

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Carly S. Hessel (Respondent) was employed by Respondent California Highway Patrol (CHP) as a Public Safety Dispatcher. By virtue of her employment, Respondent was a state safety member of CalPERS. On July 29, 2016, Respondent submitted an application for industrial disability retirement on the basis of cervical and lumbar trauma, anxiety, and somatic disorder causing muscle spasms conditions. Thereafter, on October 20, 2016, CHP signed an employer-originated application for industrial disability retirement on Respondent's behalf, which was received by CalPERS on October 25, 2016. The next day, Respondent requested CalPERS cancel her application for industrial disability retirement, so that CHP could file an application on her behalf, pay her temporary disability benefits and continue her health benefits. CalPERS cancelled her application on October 27, 2016. Respondent's employer-originated application was approved by CalPERS on the basis of neurological (cervical and lumbar) conditions, and she retired effective September 10, 2016.

In 2018, CalPERS' staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that she would be reevaluated for purposes of determining whether she remains substantially incapacitated and is entitled to continue to receive an industrial disability retirement.

In order to remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of her former position. The injury or condition which is the basis of the claimed disability must be permanent or of an extended duration which is expected to last at least 12 consecutive months or will result in death.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to Stephen Dell, M.D., a board-certified Neurosurgeon. Dr. Dell interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records, and performed a comprehensive physical examination. Dr. Dell opined that he could not verify Respondent's subjective complaints and assertions concerning her inability to perform her job duties from Respondent's physical or neurological examination or from the laboratory studies he reviewed. He further opined that he could not identify specific job duties that Respondent is unable to perform due to her neurological conditions and that she is not substantially incapacitated from the performance of her job duties.

After reviewing all medical documentation and the IME report, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for industrial disability retirement, and should therefore be reinstated to her former position as a Public Safety Dispatcher.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on October 21, 2019. Respondent represented herself at the hearing. Respondent CHP did not appear at the hearing.

At the hearing, the ALJ received documentary evidence demonstrating that CalPERS had provided both Respondent and CHP with proper notice of the date, time and place of the hearing. The ALJ found that the matter could proceed as a default against CHP, pursuant to Government Code section 11520(a).

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

Copies of written job descriptions for the position of Public Safety Dispatcher for CHP were received into evidence and considered by the ALJ.

At the hearing, Dr. Dell testified in a manner consistent with his examination of Respondent and the reports prepared after the IME. Dr. Dell testified that Respondent complained of pain and diffuse stocking-like distribution of hypesthesia, but these alleged symptoms did not correspond to any medical diagnosis. He further testified that Respondent's "degree of impairment, as reported appeared exaggerated ... by comparison with the physical and neurological examination and laboratory findings presented at this time." Dr. Dell's medical opinion is that Respondent can perform the duties of her position and is therefore no longer substantially incapacitated.

CalPERS also presented a staff witness who testified to the multiple attempts CalPERS made to request information concerning the psychiatric conditions alleged on Respondent's application for industrial disability retirement and in her appeal. Furthermore, the witness testified that Respondent did not provide CalPERS with a Physician's Report on Disability form and medical reports concerning the alleged psychiatric condition and as a result CalPERS did not make a determination regarding Respondent's alleged psychiatric condition.

Respondent testified on her own behalf. Respondent testified about the physical and mental requirements of her job with CHP and her limitations. Respondent did not call any physicians or other medical professionals to testify nor did she submit any medical records from her treating physicians to support her appeal. At the hearing, Respondent also testified that she disagreed with the results of Dr. Dell's examination and report. Respondent further testified about her anxiety condition and that her anxiety condition limits her from performing her job duties as well. She further testified that CHP may not be willing to reinstate her.

The ALJ found that the only competent medical evidence presented by Dr. Dell persuasively established that Respondent is no longer substantially incapacitated from performing her duties as a Public Safety Dispatcher for CHP. The ALJ found as follows:

[Dr. Dell's] IME report documented a thorough review of [Respondent's] medical records and a detailed physical examination, and persuasively explained the factual bases for his conclusions and opinion. He testified consistently with his report. Although Dr. Ansel found [Respondent] to be permanently and substantially incapacitated in January 2017, Dr. Dell's more recent November 2018 evaluation is more probative of [Respondent's] present capacity. Moreover, Dr. Dell's opinion was consistent with the opinion of Dr. Rutschik, [Respondent's] former treating neurologist, who opined in May 2016 that her incapacity was expected to last only approximately six months to one year.

[Respondent's] contention that CalPERS improperly failed to consider her anxiety condition is unpersuasive. CalPERS never made any determination regarding her anxiety condition when it granted her [industrial disability retirement], and to date, she has not provided CalPERS with a physician's report and medical records documenting treatment for her anxiety or any other mental health condition. Additionally, it is irrelevant that SCIF accepted her anxiety in the worker's compensation case in light of the different standards applicable to worker's compensation benefits and disability retirement benefits. Finally, although [Respondent] suggests that CHP may not be willing to reinstate her, she provided no evidence of a refusal to reinstate; nor did CHP appear in this case to appeal CalPERS' decision. If CHP ultimately refuses to reinstate [Respondent], she may well have a remedy in another forum. However, any speculation regarding such potential action by CHP does not affect the propriety of CalPERS' reinstatement determination.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal. The ALJ found that Respondent "is no longer substantially incapacitated for the performance of her usual job duties as a CHP Public Safety Dispatcher due to neurological conditions."

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

March 18, 2020

Helen L. Louie
Attorney