

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Respondent Tiffany Hogue (Respondent) was employed by Respondent California Department of State Hospitals - Atascadero (Respondent Atascadero) as a Psychiatric Technician. By virtue of her employment, Respondent was a state safety member of CalPERS. On or about January 23, 2015, Respondent submitted an application for industrial disability retirement (IDR) on the basis of an orthopedic (back) condition. Respondent's application was approved by CalPERS and she retired effective November 8, 2013.

In 2016, 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) with Ernest B. Miller, M.D. (Dr. Miller). Dr. Miller interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Miller also performed a comprehensive IME report. Dr. Miller opined that Respondent was no longer incapacitated from the performance of her usual and customary duties.

On the basis of Dr. Miller's report and other relevant medical evidence, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for IDR benefits, and should therefore be reinstated to her former position as a Psychiatric Technician.

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 December 13, 2019. Respondent was represented by counsel at the hearing. Respondent Atascadero did not appear at the hearing.

At the hearing, Dr. Miller testified that he met with Respondent on August 1, 2017. Through that evaluation, Dr. Miller observed that Respondent injured herself while at work on March 21, 2012. On that day, Respondent was preparing medications for

patient-inmates when a patient in her room indicated to Respondent he was having a seizure. Respondent unlocked the inmate's door, directed the patient to come out, and he fell on her and caused Respondent to fall on her back. The inmate weighted more than 300 pounds. Respondent injured her back as a result and required medical treatment. She attempted to return to work after the incident but stopped due to back pain and migraine headaches. At the time of the evaluation, Dr. Miller testified that Respondent complained of continuous low back pain, with left-sided numbness that radiated into her lower extremities, and that her back pain has affected her gait and caused her to limp.

On physical examination, Dr. Miller found Respondent's range of motion was severely limited, secondary to pain, but that palpation of Respondent's spine in the lumbar and sacral regions did not present evidence of muscle spasm, weakness or tenderness. After examining Respondent, Dr. Miller found no objective evidence of any problem with Respondent's lower extremities resulting from her low back pain. Reviewing Respondent's medical records, Dr. Miller noted that Respondent's treating physicians issued varying diagnoses, and that she received treatment in the form of pain medication, physical therapy, and epidural injections. Dr. Miller also reviewed an MRI of Respondent's lumbar spine from 2012 that was normal, with no evidence of spinal stenosis, herniated discs, or root compression. Dr. Miller explained at the hearing that an MRI of Respondent's back, taken in 2017, was unchanged by comparison. For all of these reasons, Dr. Miller found that Respondent was not substantially incapacitated.

Respondent called William Mohlenbrock, M.D., to testify at the hearing. Dr. Mohlenbrock is an Orthopedic Surgeon who evaluated Respondent to confirm whether she remained substantially incapacitated. Like Dr. Miller, Dr. Mohlenbrock reviewed Respondent's medical records and conducted a physical examination. At the hearing, Dr. Mohlenbrock testified that at the time of his examination, Respondent complained of chronic and constant pain in her neck, back and shoulder. Respondent was taking Norco four times per day when she saw Dr. Mohlenbrock. On physical examination, Dr. Mohlenbrock found Respondent to have no evidence of muscle atrophy, but that she did present with an abnormal gait and guarding of her back to avoid pain when moving from seated to standing positions and vice versa. Dr. Mohlenbrock also found no evidence of muscle spasm, but did note tenderness throughout Respondent's lumbar spine, and a significant reduction in range of motion in that same area.

Dr. Mohlenbrock concluded that Respondent suffers from a chronic lumbar strain, degenerative changes in the lumbar spine, and the same conditions in her cervical spine. For all of these reasons, Dr. Mohlenbrock opined that he believed Respondent remained substantially incapacitated from the performance of her usual and customary duties. Among other duties of a Psychiatric Technician, Dr. Mohlenbrock found that Respondent would be unable to walk 2 miles per shift, lift 50 pounds, lift a 200-pound patient, push 80-pound objects, bend, crouch, kneel, or deliver care to violent inmates. Dr. Mohlenbrock clarified during cross-examination that Respondent "could probably do" the activities referenced above if forced to, but that she would be uncomfortable or have

difficulty doing them, based on her limited range of motion and the pain and discomfort she presented during physical examination. Dr. Mohlenbrock also clarified that he felt that amount of medication Respondent was taking was an additional basis to find she was unable to perform her job duties. Given the fact that Respondent's lumbar strain was diagnosed in 2012, and had been long-standing, Dr. Mohlenbrock testified that he doubts it will ever be resolved, a fact that he felt further supported his opinions in this case.

At the hearing, Respondent testified that since the 2012 incident at work, she has had difficulty getting dressed, and that she needs help with daily activities such as pushing a shopping cart at the store, loading dishes or simply walking normally. Respondent testified that she does not believe she can effectively care for patients at the hospital if she were to return to work. Respondent also submitted letters from her partner, mother and daughter attesting to her difficulty with daily living activities.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ granted Respondent's appeal. The ALJ found that while both parties presented "compelling expert witness testimony," Respondent's evidence was determined to be more persuasive. The ALJ found that a "significant factor" in reaching this determination was CalPERS' prior decision in June 2015, approving Respondent's IDR application. In so doing, CalPERS made a determination that was based on the same medical records that were relied upon by Dr. Miller in reaching his conclusion, in 2017, that Respondent was no longer substantially incapacitated.

Critically, the ALJ found that the record of Respondent's medical treatment occurring after CalPERS' 2015 determination revealed no change in the underlying condition of her low back. Rather, the subsequent records showed Respondent "having the same complaints of back pain, being treated with the same medication regiment," and having a 2017 MRI that showed no changes when compared to a 2012 MRI of Respondent's low back. The reasonable inference to be drawn from a comparison of this evidence, the ALJ held, was that Respondent's back condition had not changed. For these reasons, the ALJ ruled in favor of Respondent and granted her appeal.

Staff disagrees with ALJ's determination but recognizes that the case presented disputed questions of fact that could reasonably be interpreted differently under the CalPERS substantial incapacity standard. For these reasons, staff argues that the Proposed Decision be adopted by the Board.

March 18, 2020

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