ATTACHMENT B

STAFF'S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION

Myriam L. Zech (Respondent) applied for disability retirement based on a neurological (neuritis on left side of body) condition. By virtue of her employment as a Water Resource Control Engineer for Respondent California State Water Resources Control Board (Respondent CSWRCB), Respondent was a state miscellaneous member of CalPERS.

As part of CalPERS’ review of Respondent’s medical condition, Michael M. Bronshvag, M.D., a board-certified Neurologist, performed an Independent Medical Examination (IME). Dr. Bronshvag interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Bronshvag opined that Respondent was substantially incapacitated at the time of his examination of her, but added that he could not say, with certainty, that the condition was permanent and/or that Respondent’s condition might not improve within 12 months.

In order to be eligible for disability retirement, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of his or her 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.

After reviewing all medical documentation and the IME report, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position.

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 January 27, 2020. Respondent was represented by counsel at the hearing, but she did not attend. Respondent CSWRCB appeared at the hearing and was represented by counsel.

Copies of medical records, which were received into evidence as administrative hearsay, demonstrated that, for at least the past 10 years, Respondent has experienced recurrent outbreaks of shingles (herpes zoster virus (VZV)) on her right torso and leg. These episodes were treated, resolved and Respondent continued to work at her position with Respondent CSWRCB. In April 2018, Respondent had a severe outbreak of VZV, on the left side of her chest, upper abdomen and hip. Respondent described experiencing extreme pain associated with this outbreak, due to a sensitivity to light touch (allodynia). Respondent received treatment, which resulted in the rash going away, but the allodynia persisted. Respondent was diagnosed with post herpetic neuralgia (PHN).
At the hearing, Dr. Bronshvag testified in a manner consistent with his examination of Respondent and the IME report. Dr. Bronshvag noted that Respondent’s statements regarding her condition, treatment and persistent pain appeared to be accurate, consistent with medical literature and credible. Dr. Bronshvag stated that Respondent’s allodynia made it impossible for her to work more than two hours. He also offered his opinion that Respondent could recover completely from the allodynia, but that there was no way to predict whether that would occur within a 12-month timeframe, and that Respondent could experience a recurrence of PHN.

Respondent called Michael Rowbotham, M.D., to testify on her behalf. Dr. Rowbotham is a board-certified Neurologist. He has developed a medical practice specializing in the treatment of patients with chronic pain due to nerve damage and has conducted extensive research and written several articles regarding PHN. Dr. Rowbotham has been treating Respondent since the Summer of 2019. Dr. Rowbotham testified that Respondent had a severe case of PHN, resulting in substantial nerve damage. He stated that the nerve damage is permanent and that no treatment, other than efforts to reduce the nerves’ hypersensitivity by means such as the application of lidocaine patches to the affected area, exist.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found that, “Dr. Rowbotham and Dr. Bronshvag agree that respondent suffers from PHN and allodynia caused by her most recent outbreak of VZV, which impacted her ability to work.” The ALJ also found as follows:

…Dr. Rowbotham, a preeminent expert in this area, testified that due to her neurological condition, respondent cannot perform her job duties and she will not get better without a new treatment which does not yet exist. Therefore, respondent has provided persuasive medical opinion to establish that her neurological condition substantially incapacitated her from the performance of her usual and customary duties as a water resource control engineer with CSWRCB, and her disability is expected to last at least 12 consecutive months.

The ALJ concluded that Respondent is eligible for disability retirement.
For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

April 22, 2020

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Rory J. Coffey
Senior Attorney