

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Sabrina R. Carter (Respondent) was employed by Respondent Department of Developmental Services, Porterville State Hospital (Respondent DDS) as a Psychiatric Technician Assistant. By virtue of her employment, Respondent was a state safety member of CalPERS. On or about September 19, 2001, Respondent submitted an application for industrial disability retirement. Respondent's application was approved by CalPERS on the basis of orthopedic (upper extremities and back) conditions, and she retired effective September 6, 2002.

In 2008, 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.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to Ernest B. Miller, M.D., a board-certified Orthopedic Surgeon. Dr. Miller interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records, performed a physical examination, and found that she was no longer substantially incapacitated from performance of her job duties as a Psychiatric Technician Assistant.

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 Psychiatric Technician Assistant.

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 August 14, 2012.

Following the hearing, the ALJ issued a Proposed Decision on September 20, 2012. The ALJ found that Respondent was no longer permanently disabled or incapacitated from performing her duties as a Psychiatric Technician Assistant and denied her appeal. The ALJ found that Respondent's industrial disability retirement allowance was cancelled, and that Respondent shall be reinstated, at her option, to her position as a Psychiatric Technician Assistant.

On November 15, 2012, the CalPERS Board of Administration adopted the September 20, 2012 Proposed Decision as its own Decision. No appeals or petitions for reconsideration were submitted to CalPERS. The Decision became final on January 15, 2013.

The Decision was transmitted to Respondent and Respondent DDS on November 16, 2012. However, because CalPERS never received a return-to-work date, Respondent was never removed from CalPERS disability retirement roll. Due to this error, Respondent has received industrial disability retirement payments since January 15, 2013, to which she was not entitled.

In 2018, CalPERS discovered the error and notified Respondent and Respondent DDS that CalPERS will reevaluate Respondent's orthopedic (upper extremities and back) conditions again 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.

Respondent was sent for an IME to Donald Pompan, M.D., a board-certified Orthopedic Surgeon. Dr. Pompan interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Pompan also performed a physical examination. Dr. Pompan opined that Respondent is not incapacitated from an orthopedic standpoint.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was again no longer substantially incapacitated and was no longer eligible for industrial disability retirement, and should therefore be reinstated to her former position as a Psychiatric Technician Assistant.

Respondent appealed this determination and exercised her right to a hearing before an ALJ with OAH. A hearing was held on January 14, 2020. Respondent represented herself at the hearing. Respondent DDS did not appear at the hearing.

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

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.

At the hearing, Dr. Pompan testified in a manner consistent with his examination of Respondent and the reports prepared after the IME. Dr. Pompan found that Respondent had good range of motion of the spine and there was no evidence of radiculopathy. Furthermore, Respondent's MRI reports of her lumbar and cervical spine were negative

and her most recent lumbar spine MRI from January 2020 showed that Respondent's back is structurally intact. Dr. Pompan's medical opinion is that Respondent can perform the duties of her position and is therefore no longer substantially incapacitated.

Respondent testified on her own behalf and stated that her condition has worsened and she cannot return to work. At the hearing, Respondent also testified that she disagreed with the results of Dr. Pompan's examination and reports.

Respondent submitted medical records from her treating physicians to support her appeal. Respondent also called Dr. Charles Carter, her younger brother, to testify on her behalf. Dr. Carter received a medical degree and specializes in psychiatry, but has not become a licensed medical doctor in California. Dr. Carter has no orthopedic medical background and did not know the CalPERS standard for disability retirement. Dr. Carter testified about his work experience as a Social Worker Associate for Respondent DDS and Respondent's duties as a Psychiatric Technician Assistant. Dr. Carter further testified about Respondent's limitations and her conditions.

The ALJ found that the only competent medical evidence presented was by CalPERS through Dr. Pompan, who established that Respondent is no longer substantially incapacitated from performing her duties as a Psychiatric Technician Assistant for Respondent DDS.

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 not substantially incapacitated for performance of her duties as a Psychiatric Technician Assistant for Respondent DDS and that Respondent shall be given an opportunity to be reinstated to her former position as a Psychiatric Technician Assistant with Respondent DDS.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." In order to avoid ambiguity, staff recommends inserting the word "industrial" before "disability retirement" on page 17, paragraph 2, line 5 of the Proposed Decision.

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

April 22, 2020

Helen L. Louie
Attorney