

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Scott A. Maynard (Respondent) was employed by Respondent Deuel Vocational Institution, California Department of Corrections & Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS. In August 2014, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (right knee) condition. Respondent's application was approved by CalPERS and he retired effective November 5, 2014.

In 2017, CalPERS staff notified Respondent that CalPERS conducts reexaminations of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he 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 his 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 Harry A. Khasigian, M.D. Dr. Khasigian interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Khasigian opined that Respondent was not substantially incapacitated from performing the usual and customary duties of a Correctional Officer.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for industrial disability retirement, and should therefore be reinstated to his former position with Respondent CDCR.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on August 6 and 7, 2019, October 22, 2019, and on January 21, 2020. Respondent represented himself at Day 1, Day 2, and Day 3 of the hearing. Respondent was represented by counsel on Day 4 of the hearing. Respondent CDCR did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his 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. Khasigian testified in a manner consistent with his examination of Respondent and the reports prepared after the IME. Dr. Khasigian found that Respondent's right knee was not tender, that all ligaments appeared intact and that the patella of the knee joint appeared normal. Dr. Khasigian's review of MRI studies, performed in 2013 and 2018, indicated that, while there was evidence of chondromalacia (thinning or fraying of the surfaces of the cartilage in the knee joint), there did not appear to be evidence of Grade 3 chondromalacia. Chondromalacia is described as being Grade 1, 2, 3 or 4, with 4 being the most severe (bone-on-bone). Dr. Khasigian testified that, in his opinion, Respondent can perform the duties of his position and is therefore no longer substantially incapacitated.

Respondent testified on his own behalf. Respondent described injuring his right knee as a result of a fall at work in 2013. Respondent stated that he never returned to work as a Correctional Officer and that he has not worked in any capacity since the date of his injury. He described experiencing pain in his right knee on a daily basis, with the pain increased by activities such as walking any distance, standing any length of time, and any movement requiring him to bend his knee. Respondent stated that he has difficulty descending stairs and avoids kneeling and squatting. Respondent testified that he cannot run.

Respondent also called Roland Winter, M.D., to testify on his behalf. Dr. Winter is a board-certified Orthopedic Surgeon and has treated Respondent since 2014. Dr. Winter testified that there is objective evidence, in the form of a 2013 arthroscopic surgery report and the 2018 MRI study of Respondent's right knee, demonstrating that there is Grade 3 chondromalacia in Respondent's right knee. Chondromalacia is a condition that, once present, does not improve. According to Dr. Winter, Respondent's complaints of pain, swelling and a feeling of instability are all consistent with a diagnosis of chondromalacia. Dr. Winter disagreed with Dr. Khasigian's assessment of Respondent and testified that Respondent remains substantially incapacitated from performing the usual and customary duties of a Correctional Officer for Respondent CDCR.

The ALJ found that competent medical evidence demonstrated that Respondent remains substantially incapacitated and, therefore, entitled to continue receiving industrial disability retirement. As summarized by the ALJ:

Respondent's condition has not improved. He walks with a limp, suffers from pain, swelling and weakness with activity. Dr. Winter, respondent's treating orthopedic physician since 2014, persuasively testified that chondromalacia is not a condition that will improve over time. His opinion is supported by the evidence. Dr. Winter identified objective findings on the

physical examinations, the November 4, 2013 operative report and most recent MRI taken on January 18, 2018, to support his opinion that respondent suffers from an orthopedic condition, which precludes him from performing the duties of a CO.

After considering all of the evidence introduced, as well as arguments by the parties at the hearing, the ALJ granted Respondent's appeal.

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

April 22, 2020

Rory J. Coffey
Senior Attorney