

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Desiree L. Meux (Respondent) applied for industrial disability retirement based on an orthopedic (low back) condition. By virtue of her employment as a Correctional Sergeant for Respondent California Correctional Institution, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Juan Antonio Realyvasquez, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Realyvasquez interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records, and reviewed CalPERS' surveillance investigation of Respondent. Dr. Realyvasquez opined that Respondent was not substantially incapacitated from performing her usual and customary duties as a Correctional Sergeant.

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 reports, 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 March 9, 2020. Respondent showed up to the OAH prior to the start of the hearing, but she left before the hearing began. Despite attempts to reach Respondent by telephone prior to the start of the hearing, Respondent never returned to the hearing room. Respondent CDCR did not appear at the hearing. Because neither Respondent nor Respondent CDCR appeared at the hearing, the matter proceeded as a default 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. Realyvasquez testified in a manner consistent with his examination of Respondent and the IME report. During the examination, Respondent reported constant pain in her lumbar spine. Respondent also told Dr. Realyvasquez that she had difficulty bending, reaching, crouching, stooping, and getting out of a chair.

The medical records reviewed by Dr. Realyvasquez were inconsistent as to the extent of Respondent's purported injuries and limitations. Reports by Bruce E. Fishman, M.D., and Alan Sanders, M.D., indicated that Respondent was doing well without any requirements for any therapy care or treatments. Whereas Gil Tepper, M.D., diagnosed Respondent with a herniated disc at L5-S1 in 2017, and Dr. Tepper restricted Respondent's activities.

Dr. Realyvasquez resolved the inconsistent medical information by reviewing MRI's of Respondent's spine. The MRI's were normal and did not show any disc herniation. Dr. Realyvasquez then found that Respondent did not have any back spasm. Dr. Realyvasquez also concluded that Respondent's range of motion restrictions and physical limitations were largely exaggerated and voluntary.

Dr. Realyvasquez reviewed surveillance video recording of Respondent, which confirmed his suspicions that Respondent exaggerated her complaints. The video footage, taken by a CalPERS Investigator, showed Respondent in church. During the scenes recorded, Respondent was seen leading the congregation, while standing for extended periods in high heels. The recording also showed Respondent energetically, and without difficulty or pain, dancing, jumping, marching, bending forward and backward, and twisting at her waist in a full range of motion.

Based on all of the materials he reviewed, Dr. Realyvasquez's medical opinion is that Respondent exaggerated her complaints and is able to perform her usual and customary job duties. Therefore, Respondent is not substantially incapacitated.

CalPERS' Investigator also testified at the hearing. The Investigator took surveillance video of Respondent between December 19, 2018, and January 27, 2019. The Investigator testified in support of her Report of Investigation, and the surveillance recording.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that:

The evidence established Respondent's ability to freely, quickly, and energetically, twist and bend at her waist, stoop, sit, reach, jump, kick and walk, and had full range of motion in her upper extremities, head, and neck. (See Proposed Decision, page 11, paragraph 11.)

Because Respondent was able to perform her usual and customary duties as a Correctional Sergeant, the ALJ concluded that Respondent is not eligible for industrial disability retirement.

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

June 17, 2020

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