

ATTACHMENT B

STAFF'S ARGUMENT

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

Jack F. Howard (Respondent) applied for industrial disability retirement based on orthopedic (right foot, right knee, lumbar and thoracic spine) conditions. By virtue of his employment as a Licensed Vocational Nurse for Respondent Pleasant Valley State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

Respondent filed an application for service pending industrial disability retirement on June 25, 2018, with a requested retirement date of May 1, 2018, and has been receiving benefits since that time.

As part of CalPERS' review of Respondent's medical condition, Don T. Williams, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Williams interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed his medical records, and performed a physical examination. Dr. Williams opined that Respondent had some chondromalacia of the right knee, slight lumbar disc bulges and an old healed mid foot fracture but noted those conditions did not substantially incapacitate him. Dr. Williams opined that there were no job duties that Respondent was unable to perform, and he found evidence of exaggeration during the IME.

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 his position.

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 February 3, 2020. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

At the hearing, the ALJ received documentary evidence demonstrating that CalPERS had provided Respondent CDCR 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 CDCR, pursuant to Government Code section 11520.

At the hearing, Respondent testified regarding his usual and customary job duties and his inability to perform his job duties due to his orthopedic conditions. Respondent also testified about his orthopedic conditions and the limitations imposed by those conditions. Respondent submitted medical records from his physicians to support his appeal.

In addition, Respondent offered the testimony of Joseph T. Capell, M.D., who had evaluated Respondent on July 10, 2018 and later on December 16, 2019. Dr. Capell testified that he disagreed with Dr. Williams' assessment that Respondent was able to walk without a cane and Dr. Williams' opinion that Respondent was exaggerating. Dr. Capell's opinion was that Respondent "is not able to participate in most, if not all, of the physical requirements of this job, including lifting, carrying, squatting, manipulating, bending, stooping and crawling."

Dr. Williams testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Williams found inconsistencies between Respondent's subjective complaints and the objective medical findings in Respondent's medical reports. Dr. Williams opined Respondent's right knee demonstrated palpable arthritis and discomfort in the patella but no meniscus tear. He found that Respondent had good motion and "brisk" reflexes. According to Dr. Williams, Respondent's MRIs showed slight changes – the MRI of his low back showed minor changes, the MRIs of his ankles showed only sprains, and the MRIs of his feet showed right foot congenital arthrosis and an old healed left foot fracture. Dr. Williams found Respondent did not put forth his best effort in flexing at the waist and walking on his heels and tiptoes. Dr. Williams' opined that the objective medical evidence demonstrated Respondent was capable of performing his job duties. Therefore, Respondent is not substantially incapacitated.

Copies of written job descriptions for the position of Licensed Vocational Nurse for Respondent CDCR were received into evidence and considered by the ALJ.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent failed to offer sufficient competent medical evidence to support his claim for disability retirement. The ALJ found that "[Dr. Williams'] opinion that [R]espondent's orthopedic condition was not adequately supported by objective medical evidence was more persuasive and consistent with the available medical records than was Dr. Capell's opinion."

The ALJ concluded that Respondent is not eligible for industrial disability retirement.

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 correcting the definition for Government Code section 20026 from ". . . mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion" to ". . . mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion" on page 19, paragraph 2 of the Proposed Decision.

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

June 17, 2020

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Attorney