

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Connie L. Domingos (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated March 12, 2020. For reasons discussed below, staff argues the Board deny the Petition and uphold its Decision.

Respondent applied for disability retirement based on orthopedic (back and neck), psychiatric (depression and anxiety) and rheumatic (fibromyalgia and chronic pain) conditions. By virtue of her employment as a Cook for Respondent Tulare City School District (Respondent District), Respondent was a local miscellaneous member of CalPERS.

Respondent District filed an employer-originated application for disability retirement on Respondent's behalf on April 11, 2014. Respondent signed an application for service pending disability retirement on February 28, 2014, which was received by CalPERS on May 9, 2014, and has been receiving service retirement benefits since May 1, 2014.

As part of CalPERS' review of Respondent's medical conditions, Ghol B. Ha'Eri, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Ha'Eri interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records and performed a physical examination. Dr. Ha'Eri opined that there are no specific job duties Respondent is unable to perform because of an orthopedic condition.

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 and uncertain duration.

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

Respondent appealed this determination and exercised her right to a hearing before an ALJ with the Office of Administrative Hearings (OAH). Following her appeal, Respondent submitted additional medical reports pertaining to her orthopedic, psychiatric and rheumatic conditions to CalPERS.

As part of CalPERS' additional review of Respondent's medical conditions, Robindra Paul, M.D., a board-certified Psychiatrist, performed an IME. Dr. Paul interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her

past and present complaints, reviewed her medical records and administered a mental status examination and psychological testing. In his original report, Dr. Paul opined that if Respondent's fibromyalgia were aggravated, then it is likely her depression and anxiety were aggravated and that she would be unable to perform her duties as a Cook due to the aggravation of her depression and anxiety.

Dan La, M.D., a board-certified Rheumatologist, also performed an IME. Dr. La interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records and performed a physical examination. In his original IME report, Dr. La opined Respondent was substantially incapacitated due to her degenerative arthritis and her reports of chronic pain symptoms and diffuse myofascial pain from fibromyalgia. CalPERS requested clarification from Dr. La. In his supplemental IME report, Dr. La opined that Respondent had subjective reports of pain from fibromyalgia but no objective findings. He further opined her fibromyalgia symptoms should not affect her ability to perform her specific job duties as a Cook.

Thereafter, Dr. Paul reviewed Dr. La's reports and opined that because his opinions in his original IME report were contingent on Respondent's fibromyalgia being aggravated, he could not opine Respondent was substantially incapacitated from a psychiatric perspective at the time of his original IME report.

Because Dr. Ha'Eri was no longer providing IME services to CalPERS, Donald C. Pompan, M.D., a board-certified Orthopedic Surgeon, reviewed Respondent's medical records including the IME reports of Dr. Ha'Eri. Dr. Pompan opined that there are no objective findings to support incapacity due to an orthopedic condition.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position based on orthopedic (back and neck), psychiatric (depression and anxiety) and rheumatic (fibromyalgia and chronic pain) conditions.

The Hearing and the Evidence at Hearing

A hearing was held on February 11, 2020. Respondent and Respondent District did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent and Respondent District, 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.

Respondent failed to appear at the hearing and, as a result, did not present any documentary or testimonial evidence.

Copies of written job descriptions for the position of Cook for Respondent District were received into evidence and considered by the ALJ.

At the hearing, Dr. Pompan testified in a manner consistent with his review of Respondent's records and his IME report. Dr. Pompan testified that Respondent's medical reports and history contained no objective findings to support her claim of substantial incapacity and that her alleged incapacity appeared to be based on subjective complaints only. Dr. Pompan testified that there was no evidence that Respondent would be unable to perform her job duties as a result of an orthopedic condition. Therefore, Respondent is not substantially incapacitated from an orthopedic perspective.

Dr. Paul also testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Paul opined that Respondent had a history of psychiatric conditions that preceded her work injury. Although he originally had opined that if Respondent's fall at work aggravated her fibromyalgia, then it likely aggravated her depression and anxiety which would make her unable to perform her job duties as a Cook, he later revised his opinion. After review of Dr. La's IME report that Respondent had not aggravated her fibromyalgia when she sustained her work-related fall in February 2013, Dr. Paul opined that Respondent was not psychiatrically incapacitated when he examined her. Therefore, Respondent is not substantially incapacitated from a psychiatric perspective.

Finally, Dr. La testified in a manner consistent with his examination of Respondent and the IME reports. Dr. La testified that he deferred opinion on Respondent's orthopedic conditions to the orthopedic IME. Dr. La's medical opinion is Respondent's fibromyalgia symptoms are typical for fibromyalgia patients and he found "nothing much else" than normal results. Dr. La opined that Respondent's complaints of fibromyalgia were subjective only and not supported by objective findings, and that her fall at work would not have led to a worsening of her fibromyalgia condition. Therefore, Respondent is not substantially incapacitated due to a rheumatic condition.

After considering all of the evidence introduced, the ALJ denied Respondent's appeal. The ALJ found that Respondent failed to participate in the hearing and provided no evidence to support that her disability retirement application should be granted. The ALJ found that CalPERS' evidence established that "there was insufficient objective evidence based upon competent medical opinion" that Respondent is substantially incapacitated as a result of her orthopedic, psychiatric and rheumatic conditions. The ALJ concluded that Respondent is not eligible for disability retirement.

Petition for Reconsideration

In her petition for reconsideration, Respondent contends that she is disabled because she qualifies for, and receives, Supplemental Security Income (SSI) and she is unable to perform her work duties. However, SSI and CalPERS are different systems with different disability laws and regulations, standards and procedures. In *Reynolds v. City*

of San Carlos (1981) 126 Cal.App.3d 208, the court held that a disability finding reached in workers' compensation does not bind CalPERS. For the same reasons, findings of disability made by SSI are not binding on CalPERS.

Respondent was afforded an opportunity to present her case at the hearing on February 11, 2020, but she failed to appear and participate at the hearing. The ALJ called Respondent on the record at the hearing and Respondent stated "she chose not to attend the hearing because she needed more time to prepare." Respondent did not provide "any specific reasons for her lack of preparation or need for additional time." CalPERS presented evidence that it noticed Respondent on August 21, 2019, approximately six months prior to the hearing date, and the ALJ found that CalPERS provided sufficient notice of hearing to Respondent and that the matter could proceed as a default against Respondent pursuant to Government Code section 11520.

Respondent has not provided any medical evidence to substantiate her medical complaints and contention that she is unable to perform her job duties. No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the April 22, 2020, meeting was well reasoned and based on the credible evidence presented at hearing. For all the above reasons, staff argues that the Petition for Reconsideration be denied.

June 17, 2020

HELEN L. LOUIE
Attorney