

ATTACHMENT B

STAFF'S ARGUMENT

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

Harold S. Jennings (Respondent) applied for disability retirement based on orthopedic (back and knees) conditions. By virtue of his employment as a Program Representative I for Respondent Department of Consumer Affairs (DCA), Respondent was a state safety member of CalPERS.

Respondent filed an application for service pending disability retirement on March 8, 2019, with a requested retirement date of April 1, 2019, and has been receiving benefits since that time.

As part of CalPERS' review of Respondent's medical condition, Howard Sturtz, M.D., a board-certified Orthopedic Surgeon performed an Independent Medical Examination (IME). Dr. Sturtz interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, performed a physical examination, and reviewed his medical records. Dr. Sturtz opined that there are no job duties or physical requirements that Respondent is unable to perform despite his underlying 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 duration which is expected to last at least 12 consecutive months or will result in death.

In order to receive a disability retirement, Respondent must be presently incapable of performing the duties of a position. Many injuries or medical conditions create an increased risk that the person will suffer a further injury or aggravation at a later time. For example, a person with a back injury or a heart problem is sometimes advised by doctors to avoid heavy work in order to prevent further injury. Although the person is presently capable of performing a certain task, the task should be avoided on a prophylactic basis. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, the disability applicant argued that his back injuries created an increased risk of further injury. The *Hosford* court rejected his contention that this increased risk constituted a present disability and stated that Hosford's assertion did "little more than demonstrate his claimed disability is only prospective (and speculative), not presently in existence." Therefore, the disability must exist presently and not be merely prospective or speculative. Restrictions which are imposed only because of a risk of future injury are insufficient to establish current disability.

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 July 1, 2020. Respondent was represented by counsel at the hearing. DCA 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.

Copies of written job descriptions for the position of Program Representative I for DCA were received into evidence and considered by the ALJ.

At the hearing, Dr. Sturtz testified in a manner consistent with his examination of Respondent and the IME report. Dr. Sturtz testified that he found no objective findings during his examination and review of Respondent's medical reports that supported Respondent's claim that- he was substantially incapacitated as a result of his scoliosis condition. Dr. Sturtz also testified that Respondent's back examination was largely normal with the exception of range of motion (had slight aching) and Respondent's neurological examination was normal and did not demonstrate nerve root impingement. Dr. Sturtz further testified that Respondent's medical reports showed he has scoliosis and that he may have had nerve root impingement in the past. However, he benefited from epidural injections and did not find that Respondent currently suffered from nerve root impingement caused by scoliosis.. Furthermore, Dr. Sturtz explained that Respondent worked through the years at DCA as a Program Representative I without any time loss due to his scoliosis condition and he would have continued working if he did not retire. Dr. Sturtz's medical opinion was that Respondent has a scoliosis condition, but his condition does not arise to the level of substantial incapacity. Therefore, Respondent is not substantially incapacitated.

Respondent testified on his own behalf about his pain and limitations due to his orthopedic condition, his work history, and the physical requirements of his job as a Program Representative I. He testified that he worked and performed his usual job duties until he retired and decided to retire because he believed he would be disabled from his regular duties and that it was not worth putting himself through more pain before retirement. Respondent did not call any physicians or other medical professionals to testify. Respondent submitted medical records from his treating physicians to support his appeal, including a CalPERS' Physician's Report on Disability form completed by Michael Park, M.D., a Physiatrist, who opined that Respondent will be unable to perform his job duties because his "condition will only worsen." Dr. Park's opinion concerning Respondent's disability is prophylactic, prospective and speculative.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found Dr. Sturtz's opinion to be credible, reliable, and persuasive as competent medical opinion. The ALJ found as follows:

Respondent presented no competent direct medical evidence to contradict the opinion of Dr. Sturtz. The testimony under oath of Dr. Sturtz, subject to cross-examination, is given greater weight in this case than the medical reports of Dr. Park and of Dr. Park's written statement on January 23, 2019, that [R]espondent was substantially incapacitated from the performance of his usual job duties, when [R]espondent was still performing his usual duties.

By reason of Finding 16, [R]espondent will be unable to perform his usual work duties at some point after filing his application for disability. However, [R]espondent has not met his burden of proof to show that he is substantially incapacitated for the usual duties of his investigator position as of the time of filing his application for disability retirement.

The ALJ concluded that Respondent is not eligible for 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 removing the word "industrial" before the word "disability" on page 6, paragraph 1, line 2 under the "Legal Conclusions" section of the Proposed Decision and correcting the definition of "incapacitated for the performance of duty" from "disability of permanent or extended and uncertain duration ... on the basis of competent medical opinion" to "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, ... on the basis of competent medical opinion" on page 7, paragraph 4, line 5 under the "Legal Conclusions" section of the Proposed Decision.

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

September 16, 2020

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Attorney