

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Kimberly A. O'Donnell (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated May 22, 2020. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent worked as a Public Safety Dispatcher for Respondent City of Ventura (Respondent City). By virtue of her employment, Respondent was a local miscellaneous member of CalPERS.

On May 8, 2019, Respondent applied for service pending disability retirement based on a psychological (PTSD) condition.

As part of CalPERS' review of Respondent's medical condition, Lawrence H. Warick, M.D., Ph.D., a board-certified Psychiatrist and Neurologist, performed an Independent Medical Examination (IME.) Dr. Warick interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints and reviewed her medical records. Dr. Warick opined that Respondent was not substantially incapacitated from performing her job duties.

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. (Government Code section 20026.)

After reviewing all of the 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 6, 2020. Respondent was represented by counsel at the hearing. Respondent City did not appear at the hearing.

CalPERS presented the testimony of Dr. Warick in support of its determination. Dr. Warick is certified by the American Board of Psychiatry and Neurology. He operates a private practice in psychiatry, and he is an Associate Professor of Clinical Psychiatry at the UCLA School of Medicine. Dr. Warick has seen hundreds of PTSD patients in his practice.

At the hearing, Dr. Warick testified in a manner consistent with his examination of Respondent and the IME Report. Dr. Warick testified that during the mental status examination, Respondent was friendly, cooperative, articulate, coherent, alert and showed no signs of clinical depression and no evidence of overt anxiety such as shaking or fidgeting. She was not distracted or preoccupied, and she did not display psychotic symptoms.

Dr. Warick did not observe any physical or mental traits of PTSD during Respondent's mental status exam, and he confirmed his clinical observations with the objective MCMI-IV testing which showed no evidence of PTSD.

Dr. Warick also noted that PTSD patients "require about three or four different drugs to handle the PTSD" and that Respondent was taking "a low dose of Zoloft, which is good for anxiety and mild depression."

Dr. Warick further testified that Respondent had some symptomatology of a mild adjustment disorder with mixed features that has responded to low doses of Zoloft. Dr. Warick testified that there is no evidence at the present time of any symptoms of PTSD that would rise to a level of substantial incapacity.

Respondent testified at the hearing about the events of July 28, 2017, when a Police Officer/co-worker, with whom she was acquainted, attempted to commit suicide.

Respondent was working with several other dispatchers when the co-worker "sent a suicide email to the entire department." Respondent testified that she was the first one to read the email. Thereafter, the phone rang with personnel calling from the Police Officers' Locker Room on the floor below the Dispatch Station. Respondent was told they had "an accidental discharge" of a firearm, and they requested medics be dispatched. Respondent testified that she knew the accident involved her co-worker.

Respondent testified that emergency vehicles arrived at the location, and she was later informed that the emergency call had involved her co-worker and that he was still alive after attempting to shoot himself.

On the day of the incident, Respondent and the other Dispatchers were relieved of their duties early, and the City immediately arranged a peer support group.

Respondent testified that she returned to work performing her regular duties following the incident. Respondent testified that after the incident, she suffered from anxiety, shaking, nausea, irritability, nightmares, sleeplessness, startling and panic from loud noises, fear of large crowds and anxiety when seeing a man resembling her co-worker.

Respondent eventually informed the City she could not perform her job, and the City referred her to a doctor who "took her off work." Respondent's last day of work was September 30, 2017.

Respondent testified that she cannot return to work because her work is stressful, and the City of Ventura is a trigger for her PTSD symptoms.

Respondent applied for service pending disability retirement on May 8, 2019, and moved to Boise, Idaho in June 2019. Respondent has been working as a Driver's License Clerk at a county office in Idaho since October 2019.

Respondent presented the testimony of her treating physician, Lucille C. Thomas, M.D. Dr. Thomas operates a practice specializing in family and addiction medicine. She is certified by the American Board of Family Medicine and has a subspecialty certification in Addiction Medicine. Her Addiction Medicine certification includes the ability to provide mental health treatment, and she has provided psychiatric treatment to patients who have suffered from adjustment disorders and PTSD.

Respondent began treatment with Dr. Thomas on January 31, 2018. At the first appointment, Respondent reported that she suffered from escalating stress and anxiety stemming from the attempted suicide incident. Dr. Thomas diagnosed Respondent as having adjustment disorder with anxiety. Dr. Thomas later added PTSD to her diagnosis after being informed by Respondent about a Qualified Medical Examination in Respondent's employment litigation.

Dr. Thomas opined that Respondent still suffers from PTSD because it is "highly unlikely for PTSD to go away." Dr. Thomas predicted that, if Respondent was exposed to triggering events, her symptoms would return. Dr. Thomas opined that Respondent cannot substantially perform her job duties as a Public Safety Dispatcher. Dr. Thomas asserted that Respondent's inability to work for the City is "an actual restriction" and "not a prophylactic restriction" because Respondent "cannot work [at the City] with her current condition."

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ concluded that the evidence did not establish that at the time of her application for disability retirement, Respondent was substantially incapacitated from the performance of her usual and customary duties as a public safety dispatcher.

The ALJ explained that "incapacitated for the performance of duty" means the "substantial inability of the applicant to perform his usual duties" as opposed to mere discomfort or difficulty. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) The ALJ also noted that the increased risk of further injury is not enough to establish substantial incapacity.

Although Respondent asserts that the July 2017 trauma renders her incapable of handling the stressful duties of a Public Safety Dispatcher, her assertion was not borne out by the evidence. The ALJ noted that all of Respondent's doctors and evaluators found that, with therapy and medication, Respondent's symptoms decreased significantly. Dr. Thomas failed to sufficiently account for this in reaching her opinion that Respondent cannot return to work.

Further, the ALJ noted that Dr. Thomas arrived at her opinion based on Respondent's trepidation about returning to work, but she did not sufficiently establish that Respondent's aversion to the discomfort of returning to the stress of her job prevented her from performing her usual duties as a Public Safety Dispatcher. The ALJ further explained that the potential for exacerbation or escalation of Respondent's psychiatric symptoms when placed in her former position is a prospective possibility and is insufficient to support a finding of Respondent's inability to perform her usual and customary duties. (*Hosford, supra* 77 Cal.App.3d 854, 862-863.)

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

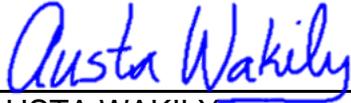
The Board adopted the Proposed Decision, as modified pursuant to Government Code section 11517 (c)(2)(C). The Board corrected the definition of "disability" in the Proposed Decision to "'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended 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." The Proposed Decision did not include "which is expected to last at least 12 consecutive months" in the definition.

The Petition raises the modification to the Proposed Decision as a basis for reconsideration. The modification was technical and does not alter the analysis or findings in this case. The ALJ concluded that Respondent failed to establish that she was incapacitated from performing her job duties as a Public Safety Dispatcher when she applied for disability retirement. Since Respondent did not establish that she was incapacitated from performing her job duty, the technical modification adding "which is expected to last at least 12 consecutive months" does not change the determination in this case. The modification does not present a new legal or factual basis that warrants reconsideration of the Proposed Decision.

The Petition also restates, verbatim, the same argument presented at the July 15, 2020 Board meeting. Respondent claims that the ALJ erroneously relied on Respondent's own treating physician, Dr. Zarrin, to conclude that she can perform her job duties. This argument has already been considered and rejected by this Board. Moreover, as stated above, the ALJ considered the opinions of multiple experts, including Dr. Zarrin, Dr. Thomas and Dr. Warick in reaching the conclusion that Respondent failed to present competent medical evidence that she is incapacitated from performing her job as a Public Safety Dispatcher.

Respondent has not presented any new evidence or legal argument that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the July 15, 2020, meeting was well reasoned and based on the credible evidence presented at hearing.

September 16, 2020



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