

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Maribeth D. Aragonés (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated February 17, 2021. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent filed an application for service pending industrial disability retirement on June 6, 2019 and has been receiving benefits since that time. As part of CalPERS' review of Respondent's medical condition, a board-certified Orthopedic Surgeon, Robert K. Henrichsen, M.D., performed an Independent Medical Examination (IME). Dr. Henrichsen interviewed Respondent, reviewed work history and job descriptions, obtained a history of Respondent's past and present complaints, and reviewed medical records. Dr. Henrichsen opined that Respondent was not substantially incapacitated from performing her usual and customary duties. Respondent appealed the determination.

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.

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. Henrichsen, testified in a manner consistent with his examination of Respondent and the IME report. Dr. Henrichsen's examination found that Respondent had normal strength in her heels and toes, and she showed no muscle weakness in her hips. Respondent showed some limitation when squatting and she reported back pain with active straight leg raises and with hip motion. Respondent complained of pain during the examination of her cervical spine. MRI's of Respondent's cervical spine showed degenerative changes at C2-3 and at C3-4 and Dr. Henrichsen noted that the foramina were clear without evidence of destructive process.

Dr. Henrichsen noted some reduced mobility in Respondent's cervical spine, which resulted from the degenerative changes in her neck. Although Respondent claimed significant pain and severe symptoms, those complaints were not supported by Dr. Henrichsen's examination findings. Although there was evidence of degenerative disc disease, there was no evidence of an existing significant pathology or traumatic injury to Respondent's lumbar or

cervical spine that supported her claimed incapacity. Dr. Henrichsen ultimately concluded that there were no specific job duties that Respondent was unable to perform. Therefore, Respondent is not substantially incapacitated from performing her usual and customary job duties as a Licensed Vocational Nurse.

Respondent testified on her own behalf and explained her injury and symptoms. Respondent was injured at work in 2018 and her symptoms have worsened over time. Respondent testified that she is unable to perform her job duties because she cannot sit for three hours, stand for three hours, run, lift over 11 pounds, or twist at the neck. She cannot do those activities because they cause so much pain and render Respondent unable to work.

In her Petition, Respondent does not raise any legal arguments but only provides medical documentation of a post-hearing medical procedure that was not, and could not have been, introduced as evidence at the hearing to support her position. Without direct evidence provided by live testimony explaining these reports and an opportunity to cross-examine such expert witnesses regarding Respondent's purported substantial incapacity, these medical records alone cannot independently support a factual finding of substantial incapacity. (Government Code section 11513, subd. (d).) In fact, this recent surgery may result in significant improvement in Respondent's condition as she recuperates.

The burden of proving an incapacitating condition is on the applicant for a disability retirement and the standard of proof is a "preponderance of the evidence." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) . The issue before the ALJ in Respondent's case, as in every disability retirement appeal, is whether, at the time of application, the member was substantially incapacitated. Pursuant to Government Code section 20026, successful prosecution of Respondent's claim requires that she provide competent medical opinion at the hearing supporting that claim. The written medical reports in the Petition are not competent medical opinion and are thus insufficient to meet Respondent's burden.

No new evidence or arguments have been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the February 18, 2021 meeting was well reasoned and based on the credible evidence presented at hearing. For all of the above reasons, staff argues that the Petition for Reconsideration be denied.

June 16, 2021

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