

ATTACHMENT B

STAFF'S ARGUMENT

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

Nicholas E. Megazzi (Respondent) was employed by Respondent California Correctional Institution, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS. On or about November 17, 2014, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (right shoulder) condition. Respondent's application was approved by CalPERS and he retired effective January 1, 2015. Respondent was reexamined in 2017, and CalPERS determined that he continued to be entitled to receive an industrial disability retirement.

Later, in December 2018, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive an industrial disability retirement.

In order to remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of his former 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.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to John D. Kaufman, M.D., a board-certified Orthopedic Surgeon. Dr. Kaufman interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Kaufman also performed a comprehensive physical examination. Dr. Kaufman opined that Respondent could perform his Correctional Officer job duties and is not substantially incapacitated for the performance of his duties as a Correctional Officer.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for industrial disability retirement, and should therefore be reinstated to his former position as a Correctional Officer.

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 April 5, 2021 and May 12, 2021. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

Copies of written job descriptions for Respondent's position as a Correctional Officer for Respondent CDCR were received into evidence and considered by the ALJ.

At the hearing, a CalPERS' Investigator testified about the surveillance he conducted of Respondent and his review of Respondent's social media accounts. Surveillance videos showed Respondent exiting his car from the driver's seat, entering his workplace, carrying items such as binders and a water bottle, and Respondent gripping his cell phone between his ear and right shoulder. Social media photos showed Respondent engaged in, or suggested participation in, physical activities including golfing, softball, fishing and driving a vehicle.

Dr. Kaufman testified in a manner consistent with his examination of Respondent and the reports prepared after the IME. Dr. Kaufman opined Respondent can perform the duties of his position and is therefore no longer substantially incapacitated. Dr. Kaufman testified that he did not find any objective findings that corroborated Respondent's subjective complaints and limited right shoulder range of motion. Dr. Kaufman also testified that Respondent had a labral repair surgery in 2014, and the surgery would normally result in a complete recovery for someone of Respondent's age and health. Further, Respondent did not demonstrate atrophy in his right upper extremity compared to his left, which Dr. Kaufman testified is an objective indicator that Respondent was using his right upper extremity normally. Dr. Kaufman explained that an examination of Respondent's hands showed calluses on both hands which to Dr. Kaufman indicated that Respondent did substantial work requiring the use of his hands.

Respondent called Ricard D. Scheinberg, M.D, his treating physician, to testify on his behalf. Dr. Scheinberg is a board-certified Orthopedic Surgeon and performs shoulder surgeries. Dr. Scheinberg testified that he examined Respondent multiple times in 2019 and 2020 and noted that Respondent complained of persistent pain and a chronic limitation with his right shoulder range of motion. Dr. Scheinberg disagreed with Dr. Kaufman's opinion and testified that the circumferential tests Dr. Kaufman performed do not test range of motion. Dr. Scheinberg also testified that Respondent's decreased right shoulder range of motion and adhesive capsulitis, means he would not be able to swing a baton over his head with his right arm or subdue or disarm combative inmates safely. Dr. Schienberg opined that Respondent is unable to forcefully or repetitively perform at-or-above shoulder level activities, lift, or repetitively reach using his right shoulder. Respondent also submitted medical records from his medical providers to support his appeal. Dr. Scheinberg's medical records were admitted as direct evidence. Medical records from other providers were admitted as administrative hearsay. Hearsay evidence can be used to supplement or explain other evidence but is not sufficient by itself to support a finding.

Respondent testified on his own behalf. Respondent testified that he "can't use [his] right arm at all" and that he attends various networking events for his current job as a realtor. The photos of him on social media were from various networking events, but he

testified that he did not actually participate in the activities. Respondent also testified regarding his Correctional Officer job duties and his inability to perform his duties due to his right shoulder condition.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ granted Respondent's appeal. The ALJ found that the evidence supports Respondent's assertion that he remains disabled or substantially incapacitated from performance of his Correctional Officer job duties. The ALJ also found Dr. Schienberg's testimony more persuasive than Dr. Kaufman's because Dr. Kaufman discounted Respondent's limited range of motion and overemphasized Respondent's circumferential measurements and hand calluses. The ALJ held that Respondent's examinations showed that he consistently had right shoulder range of motion limitations, which supported Dr. Scheinberg's medical opinion. The ALJ further found that CalPERS failed to establish how Respondent's right shoulder condition has changed from when he was approved in 2015 and again in 2017. For these reasons, the ALJ concluded that CalPERS failed to meet its burden of proof.

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 replacing the date "November 5, 2020" with "November 5, 2019" on page 5, in paragraph 8 of the Proposed Decision.

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

September 15, 2021

Helen L. Louie
Staff Attorney