

ATTACHMENT B

STAFF'S ARGUMENT

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

On January 30, 2019, Respondent John Lopez (Respondent) applied for industrial disability retirement based on an internal (coccidioidomycosis - Valley Fever) condition. By virtue of his employment as a Registered Nurse for Respondent Department of State Hospitals, Coalinga Secure Treatment Facility (Respondent DSH), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's application, Thomas E. Leonard, M.D., board-certified in Internal Medicine, performed an Independent Medical Examination (IME). Dr. Leonard interviewed Respondent, obtained a medical history, conducted a physical examination, and reviewed Respondent's physical requirements form, duty statement, and his available medical records. Dr. Leonard concluded that Respondent was not substantially incapacitated for the performance of his usual 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.

After reviewing all information and documents, 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 February 22, 2021 and June 7, 2021. Respondent represented himself at the hearing. Respondent DSH did not appear at the hearing. The matter proceeded as a default against Respondent DSH.

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.

At the hearing, Dr. Leonard testified in a manner consistent with his examination of Respondent and the IME report. Dr. Leonard testified that possibly fear, based on lack of understanding of Valley Fever, caused Respondent's treating physicians to believe that he can again develop Valley Fever. According to Dr. Leonard, Respondent did show positive for a lung cavity which evolved over the years after he was diagnosed with pneumonia. The lung cavity is in the left lower lobe where the pneumonia originated; but at the time of the IME was not causing symptoms. Dr. Leonard also posited that Respondent has a history of obesity which can lead to shortness of breath with activity. Dr. Leonard agreed that Respondent has scarring in his left lower lung, but he has fully recovered from Valley Fever, and he is not substantially incapacitated from performing his job duties.

Respondent testified on his own behalf. He stated that since 2009, he has been hospitalized four times with pneumonia. He stated his condition affected his ability to perform his job because he had to respond to alarm system activations and perform takedowns of combative patients, which would lead to shortness of breath. He claimed that he still has lung damage and that his nodule has now progressed to being the size of a quarter. He opined that his former employer participated in a “cover up” of the risks of Valley Fever in order to recruit nurses.

Respondent did not call any physicians or other medical professionals to testify. Respondent submitted medical records from his treating physicians to support his appeal. Their opinions were admitted only as administrative hearsay.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that neither of Respondent’s treating physicians provided a medical opinion supported by objective findings to demonstrate that Respondent has active Valley Fever or that further exposure will reactivate Valley Fever. Nor did either treating physician opine that Respondent is substantially incapacitated from the performance of his job duties.

The ALJ further found that IME “Dr. Leonard’s opinion that [R]espondent does not have active Valley Fever and it is highly unlikely that further exposure will reactivate the Valley Fever is persuasive.”

The ALJ concluded that Respondent is not eligible for industrial disability retirement:

When all the evidence is considered, Respondent failed to provide persuasive medical opinion to establish that his [Valley Fever] condition substantially incapacitated him from the performance of his usual and customary duties as a registered nurse for [Respondent DSH]. Therefore, Respondent is not entitled to retire for industrial disability retirement pursuant to Government Code section 21151, subdivision (a).

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 that the word “lob” in the last line of page 12 of the Proposed Decision be changed to “lobe.”

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

November 17, 2021

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Staff Attorney