

ATTACHMENT B

STAFF'S ARGUMENT

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

Brian A. Dalhover (Respondent) was employed by Respondent Department of State Hospitals - Metropolitan (Respondent DSH) as a Psychiatric Technician. By virtue of his employment, Respondent was a state safety member of CalPERS. On July 6, 2017, Respondent submitted an application for industrial disability retirement on the basis of a urological (groin) condition. Respondent's application was approved by CalPERS and he retired effective July 1, 2017.

In 2020, 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 William G. Moseley, M.D. Dr. Moseley interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Moseley also performed a comprehensive physical examination. Dr. Moseley opined that Respondent is not substantially incapacitated for the performance of his duties as a Psychiatric Technician.

After reviewing all medical documentation and the IME report, 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 Psychiatric Technician.

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 November 4, 2021. Respondent represented himself at the hearing. Respondent DSH 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.

At the hearing, Dr. Moseley testified in a manner consistent with his examination of Respondent and his IME report. Dr. Moseley's medical opinion is that Respondent can perform the duties of his position and is therefore is not substantially incapacitated. There were no objective findings in Respondent's medical records or presented during the IME to support Respondent's subjective complaints of pain or an inability to perform his Psychiatric Technician job duties. Dr. Moseley testified that Respondent had no diagnosis of epididymitis at the time of the IME, a normal genital examination, and no urological condition that required treatment.

At the hearing, a CalPERS investigator testified about the surveillance she conducted of Respondent and her investigation report. Surveillance showed Respondent standing upright in a line of people for a number of minutes, walking in his neighborhood, walking while kicking his legs in an outward motion, bending at the waist and bending over.

Respondent testified on his own behalf. Respondent disagreed with the results of Dr. Moseley's examination and report. Respondent experiences pain and is undergoing treatment for that pain. However, he agreed that he has ridden a bicycle, walks every day, and walks his children to school.

Respondent did not call any physicians or other medical professionals to testify. He did submit two medical reports from his treating physicians which were admitted as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. At hearing, Dr. Moseley testified that he reviewed the two medical reports and the reports do not change his medical opinion that Respondent is not substantially incapacitated from performing his Psychiatric Technician job duties.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal. The ALJ found CalPERS had the burden of proof. The ALJ found Dr. Moseley's testimony to be persuasive and credible, and held that CalPERS met its burden to demonstrate that Respondent is no longer substantially incapacitated from performing his duties as a Psychiatric Technician for Respondent DSH. Respondent failed to refute CalPERS' competent medical evidence. The ALJ concluded that Respondent is not entitled to continue his industrial 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 striking the words "and uncertain" from the definition of Government Code section 20026 on page 16, paragraph 2 and page 21, paragraph 10 in 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.

January 18, 2022

Helen L. Louie
Staff Attorney