

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Lerma G. de Leon (Respondent) applied for Service Pending Industrial Disability Retirement (IDR) based on an orthopedic (lower back) condition on July 8, 2020. By virtue of her employment as a Psychiatric Technician Assistant for Respondent Department of State Hospitals - Napa (Respondent DSH), Respondent was a state safety member of CalPERS. Respondent retired for service effective July 25, 2020, and has been receiving a service retirement allowance since then.

As part of CalPERS' review of Respondent's medical conditions, Robert K. Henrichsen, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME) on October 6, 2020. Dr. Henrichsen interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Henrichsen opined that Respondent was not permanently disabled or substantially incapacitated from the performance of her duties as a Psychiatric Technician Assistant based on her low back claim.

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 medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position due to an orthopedic (lower back) condition.

On October 22, 2020, Respondent was notified of CalPERS' decision to deny her IDR application based on the low back claim, and she was advised of her appeal rights.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). In her appeal, Respondent also asserted a psychological claim. On July 7, 2021, Respondent emailed CalPERS formally requesting to add the psychological (anxiety, depression) conditions to her claim.

As part of CalPERS' review of Respondent's psychological condition, Alberto G. Lopez, M.D., a board-certified Psychiatrist, performed an IME on September 24, 2021. Dr. Lopez opined that Respondent was not substantially incapacitated to perform her usual job duties based on psychological (anxiety, depression) conditions.

On October 26, 2021, CalPERS informed Respondent that both claimed conditions had been denied.

A hearing was held on January 25, 2022. Respondent represented herself at hearing. Respondent DSH did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent DSH, pursuant to Government Code section 11520(a).

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, both Dr. Henrichsen and Dr. Lopez testified in a manner consistent with their examinations of Respondent and their IME reports. Dr. Henrichsen and Dr. Lopez's medical opinions are that Respondent does not have either an orthopedic or psychological impairment that arises to the level of substantial incapacity to perform her usual job duties. Therefore, Respondent is not substantially incapacitated.

Respondent testified on her own behalf regarding her orthopedic and psychological conditions, describing the pain she experiences in her lower back, and the anxiety she faces about the possibility of getting injured again. Respondent also called her husband to testify regarding her changed physical and mental condition. Respondent did not call any physicians or other medical professionals to testify, nor did she offer any documentary evidence to support her appeal.

After considering all of the evidence introduced, as well as arguments made by the parties, the ALJ denied Respondent's appeal. The ALJ found that the testimony and IME reports of Dr. Henrichsen and Dr. Lopez were persuasive; both doctors finding that Respondent is not substantially incapacitated from performing the duties of a Psychiatric Technician Assistant due to an orthopedic or psychological condition.

The ALJ found that the burden was on Respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of her position. Respondent did not meet her burden.

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 correcting "disability of permanent or extended and uncertain duration" to "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death" in paragraph 1. under the Legal Conclusions section, on page 7 of the Proposed Decision.

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

March 16, 2022

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Nhung Dao  
Attorney