

ATTACHMENT B

STAFF'S ARGUMENT

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

Elias Mendez (Respondent Mendez) applied for Industrial Disability Retirement (IDR) based on an orthopedic condition. By virtue of his employment as a Correctional Officer (CO) for California State Prison Corcoran, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, John D. Kaufman, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME) of Respondent. Dr. Kaufman interviewed Respondent, reviewed his work history, job description and physical requirements, obtained a history of his past and present complaints, reviewed his medical records, and performed a comprehensive examination of Respondent's orthopedic condition. Dr. Kaufman opined that Respondent was not substantially incapacitated from the performance of his duties as a CO due to an orthopedic condition concerning the right shoulder.

After the initial IME was completed, CalPERS provided Dr. Kaufman with additional medical records and a baton training video to review. After review of the additional evidence, Dr. Kaufman reiterated his opinion that Respondent does not have an orthopedic impairment that rises to the level of substantial incapacity to perform his usual job duties as a CO.

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 their 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 his position due to an orthopedic (right shoulder) condition. On March 4, 2021, Respondent was notified of CalPERS' denial of his IDR application, and he was advised of his appeal rights.

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 March 16, 2022. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing and the matter proceeded as a default against Respondent CDCR, pursuant to Government Code section 11520(a).

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. Kaufman testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Kaufman assessed Respondent's right and left shoulder range of motion and stability of his upper extremity ligaments during the physical examination. He found no signs of swelling, deformity, or erythema in either shoulder, and some tenderness in the right shoulder only. Dr. Kaufman's circumferential measurements of Respondent's upper extremities showed no atrophy. After the physical examination, Dr. Kaufman opined Respondent was not substantially incapacitated from performing his usual job duties, and that Respondent's subjective symptoms were not corroborated by objective findings on exam. As such, Dr. Kaufman's competent medical opinion is that Respondent is not disabled.

Respondent testified on his own behalf that his shoulder injury has worsened with time, and that he has limited range of motion in his right arm. He testified he cannot swing his right arm to swing a baton, meaning he cannot complete mandatory annual baton training. He further testified that he cannot reach above his shoulder with his right arm and has limitations of not lifting more than 40 pounds, which precludes working as a CO. Respondent believes his limitations render him substantially incapacitated.

Respondent also called his treating physician, Antonio Durazo, M.D., who specializes in family medicine, to testify on his behalf. In examining Respondent's right shoulder, Dr. Durazo noted no muscle asymmetry, no scapular winging, and no atrophy. Dr. Durazo testified at hearing that Respondent's work restrictions render him substantially disabled and qualify him for IDR. However, Dr. Durazo could not provide any explanation as to why the objective evidence did not support Respondent's claims. Respondent also submitted medical records from other treating physicians to support his appeal. These records were admitted as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found Dr. Kaufman's opinion more convincing because Dr. Kaufman's opinion was based on objective findings during an examination that included testing of Respondent's physical abilities, accurate information regarding Respondent's daily physical activities and abilities, and the proper legal standard of what constitutes disability under the CalPERS standard. Dr. Kaufman opined that Respondent is not substantially incapacitated to perform his usual job duties; he is not disabled. The ALJ found that Respondent's self-interested testimony was unconvincing. The ALJ further found that Dr. Durazo provided insufficient objective medical evidence to support a finding of substantial incapacity, and that the prophylactic restrictions imposed by Dr. Durazo were insufficient to support a finding of substantial incapacity necessary for IDR.

The ALJ therefore afforded greater weight to Dr. Kaufman’s opinion than to Dr. Durazo’s. The ALJ held that Respondent failed to meet his burden of establishing his entitlement to IDR benefits, concluded that Respondent is not eligible for IDR and denied Respondent’s appeal.

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 4 under the Applicable Law of the Legal Conclusions section, on page 11 of the Proposed Decision.

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

June 15, 2022

Nhung Dao
Staff Attorney