

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Amy Edelen (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated April 3, 2023. For reasons discussed below, staff argues the Board should deny the Petition for Reconsideration and uphold its decision.

Respondent was employed as an Associate Governmental Program Analyst (AGPA) by the Department of Consumer Affairs (Respondent DCA). By virtue of her employment, Respondent was a state miscellaneous member of CalPERS.

On September 21, 2010, Respondent submitted an application for disability retirement on the basis of a rheumatological (fibromyalgia) condition. On December 10, 2010, CalPERS approved Respondent's application and her retirement began immediately.

On December 28, 2020, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement and that she would be reevaluated to determine whether she remains substantially incapacitated and is entitled to continue to receive a disability retirement. 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 her 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 Scott T. Anderson, M.D., and Pramila Gupta M.D. Both doctors interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records and sub-rosa videos. Both doctors performed a comprehensive IME in their respective specialties.

Dr. Anderson is board-certified in Internal Medicine and Rheumatology. Dr. Anderson concluded that Respondent "does not have an actual and present rheumatological fibromyalgia impairment that arises to the level of substantial incapacity." His findings were that Respondent "appears to be healthy, well-nourished with normal muscular development and no evidence of rheumatological disease." He added, "there is no evidence of muscle wasting, joint instability, rheumatoid nodules, joint effusions, loss of pulses, or other pathology." Dr. Anderson determined that Respondent is "able to perform all essential job duties" and opined that her job "appears to be an office job with little in the way of extensive physical requirements." Dr. Anderson believes that Respondent exaggerated her complaints because they "are myriad both in number and severity and yet the physical examination findings do not suggest any pathology, degenerative process, deconditioning, or inflammatory rheumatological condition." Dr. Anderson's opinion did not change after review of additional medical reports.

Dr Gupta is board-certified in Psychiatry and Neurology. Dr. Gupta concluded that Respondent has some headaches, but they “do not arise to the level of substantial incapacity to perform her usual job duties.” Dr. Gupta opines that Respondent can perform all her job duties. Dr. Gupta also noted that Respondent exaggerated her limitations in her activities due to her headaches. Dr. Gupta’s opinion did not change after review of additional medical reports.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for disability retirement, and should therefore be reinstated to her former position as an AGPA. On July 21, 2021, CalPERS notified Respondent of its determination.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). Two days of hearing were held on February 1 and March 13, 2023. Respondent was represented by counsel at the hearing. Respondent DCA did not appear at the hearing, and a default was taken as to Respondent DCA only.

At the hearing, both Dr. Anderson and Dr. Gupta testified in a manner consistent with their examinations of Respondent and their IME reports. Both IMEs testified that Respondent is no longer substantially incapacitated to perform her usual job duties.

At the hearing, Respondent asserted that CalPERS lacks jurisdiction to mandatorily reinstate her. She argued that she had not applied for reinstatement, her employer had not offered to reinstate her and there is no proof she can perform her usual job duties. Thus, CalPERS has no jurisdiction to reinstate her to her former job.

Respondent also testified on her own behalf that she has not worked since 2009 because she cannot commit to any schedule, is unable to work on a computer, cannot talk on the phone, and cannot do math. If she is reinstated, she will suffer from “electrical overload” causing her symptoms to flare up and she will feel as if she is having a panic attack. Respondent submitted various medical records from her treating physicians to support her appeal, which were admitted as administrative hearsay. Hearsay may be used to supplement or explain other evidence but is not sufficient in itself to support a finding.

Respondent also called Anne Priest, D.O., to testify on her behalf. Dr. Priest is board-certified in Family Medicine. Dr. Priest testified that she has been treating Respondent since 2016 for fibromyalgia, low thyroid, migraines, anxiety, chronic fatigue, hypertension, and somatic dysfunction, using osteopathic manipulative therapy. Dr. Priest disagreed with the results of Dr. Anderson’s and Dr. Gupta’s examinations and reports, however she admitted that she does not know CalPERS’ standards in determining disability retirement.

The ALJ found that the competent medical evidence presented by Dr. Anderson and Dr. Gupta established that Respondent is no longer substantially incapacitated from performing her duties as an AGPA for Respondent DCA. The ALJ found Dr. Priest’s testimony less persuasive because she did not know the CalPERS standard for

disability and did not testify whether she reviewed all of Respondent's prior medical records, nor whether she reviewed the sub-rosa video. Both Drs. Anderson and Gupta reviewed Respondent's copious medical documentation and examined her. Further, Drs. Anderson and Gupta are board-certified in Respondent's claimed conditions, whereas Dr. Priest is board-certified in Family Medicine. The ALJ found Dr. Priest less qualified to render opinions on rheumatological and neurological issues. When all the evidence was considered, the ALJ found the opinions of Drs. Anderson and Gupta that Respondent is not substantially incapacitated more persuasive, credible, and reliable. Accordingly, the ALJ granted CalPERS' request to reinstate Respondent from disability retirement.

In addition, the ALJ dismissed Respondent's argument that CalPERS lacks jurisdiction to reinstate her to her former job. Citing statutory authority and case law, the ALJ found that "CalPERS has jurisdiction to determine whether Respondent is still substantially incapacitated for the condition under which she was disability retired."

At its June 20, 2023, meeting, the Board voted to adopt the Proposed Decision, as modified, as its own Decision. In her Petition for Reconsideration, Respondent resurrects the same arguments she made at hearing. Respondent also raises four assertions she claims were errors made at hearing. First, any alleged "factual errors" should have been corrected by Respondent's counsel at the time they were made at the hearing, which they were not. Second, none of these assertions change the facts and law relied on by the ALJ in making the Final Decision.

No new evidence has been presented by Respondent that would alter the ALJ's analysis. The Proposed Decision that was adopted by the Board at the June 20, 2023, meeting was well reasoned and based on the credible evidence presented at hearing.

For all the foregoing reasons, staff recommends that the Board should deny Respondent's Petition for Reconsideration.

July 19, 2023

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