

ATTACHMENT B

Staff Argument

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Nicholas Abarca (Respondent) applied for industrial disability retirement (IDR) on February 14, 2022, based on an orthopedic (3 bulged discs – lower back) condition. By virtue of his employment as a Firefighter 1 at the California Department of Forestry and Fire Protection (Respondent CalFIRE), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Don T. Williams, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Williams interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed his medical records, reviewed investigative materials, and performed a thorough physical examination. Dr. Williams opined that Respondent is not substantially incapacitated from performing his duties as a Firefighter 1.

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 of the medical documentation and the IME reports, CalPERS determined that Respondent is 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 remote hearing was held on August 28, 2023. Respondent was represented by counsel at the hearing. Respondent CalFIRE did not appear at the hearing.

At the hearing, Dr. Williams testified in a manner consistent with his examination of Respondent and the IME report. Dr. Williams reported that his physical examination of Respondent produced no significant findings. Dr. Williams reported that Respondent has a "mild pathology" that 95% of the population will at some point have, a small bulge similar to what appears in Respondent's CT scan, and that he will recover. Dr. Williams noted that Respondent's social media postings show him active, moving normally and without pain. Dr. Williams believes Respondent can perform all of the duties of his Firefighter 1 position with Respondent CalFIRE, and no restrictions are warranted.

Respondent testified that he is able to perform his duties for "a day or two" but is not able to work for "days on end." He described bending over, carrying heavy items, laying/pulling hoses, and riding off-road as particularly painful aspects of his job.

Respondent produces art and music events. He travels to event locations, transports art to the events in trailers, and installs large interactive art pieces and lights. He testified that he goes to events and shows much less frequently, that he will rest for a whole week after attending an event, and that he had not gone out for four months prior to the hearing date. He insists that installing and looking at art installations at these events is not at all equivalent to the work of a firefighter.

Respondent also presented the testimony of his Workers' Compensation doctor, Alan Moelleken, M.D. Dr. Moelleken is board certified in Orthopedic Surgery, has more than 30 years of experience, and specializes in the spine. Dr. Moelleken testified that Respondent cannot return to his usual occupation as a Firefighter 1 and that his condition is permanent and stationary.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden of proof and did not sustain his burden. Thus, the ALJ found Respondent was not substantially incapacitated from the performance of his duties as a Firefighter 1 based on his claimed orthopedic condition. The ALJ found Dr. Williams to be more persuasive than Dr. Moelleken and that Dr. Williams' opinion is consistent with the evidence.

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

November 15, 2023

Elizabeth A. Yelland
Assistant Chief Counsel, Litigation