

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Esther Chodakiewitz (Respondent) was employed by the Department of Corrections and Rehabilitation at the California Institution for Men, Chino (CIM), as a Staff Psychiatrist. As a result of her employment, she was a state safety member of CalPERS, subject to Government Code section 21151. Respondent submitted an application for service pending industrial disability retirement, wherein she stated that she was unable to work due to orthopedic (right major upper extremity, right knee, left foot and left shoulder) conditions. CalPERS retained Neil Halbridge, M.D., an Orthopedist, as its Independent Medical Examiner (IME) in this case. Dr. Halbridge examined Respondent, reviewed her medical records, and prepared several reports documenting his findings and conclusions. Dr. Halbridge concluded that Respondent was not substantially incapacitated from performing her usual and customary duties. Accordingly, CalPERS denied Respondent's application for industrial disability retirement. Respondent appealed and a hearing was conducted on November 28, 2012, by an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH).

In order to be eligible for disability retirement, an individual must demonstrate, through competent medical evidence, that he or she is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition that is the basis for the claimed disability must be permanent or of an uncertain and extended duration.

Respondent testified at the hearing. She stated that while walking across a grassy area of the prison grounds, she stepped into a gopher hole, twisted her left ankle and fell on a concrete area. As a result of the fall, Respondent suffered immediate injury to her left ankle, right knee and right hand.

The parties had previously stipulated that all doctors' reports would be entered as direct evidence; therefore, there was no need for any doctors to appear. Thus, on behalf of Respondent, the ALJ received into evidence the reports of Respondent's primary treating physician, Soher M. Aval, M.D., Orthopedist, and those of the agreed medical examiner, Raymond K. Zarins, M.D., Orthopedist, and qualified medical examiner, Jonathan Nissanoff, M.D., Orthopedist.

Dr. Aval evaluated Respondent on several occasions, and upon further diagnosis of Respondent, he found that she also had problems associated with her left shoulder. Ultimately, Dr. Aval recommended work restrictions for Respondent such as preclusion from lifting greater than 20 pounds, work at or above the shoulder level, and forceful pushing and pulling of the left shoulder. For the right wrist, he recommended preclusion from gripping, grasping and fine manipulation greater than 50% of her work day, which includes writing and keyboard activities. For the right knee, preclusion from repetitive kneeling, squatting, and climbing was recommended. As to her ability to return to work,

Dr. Aval noted that the patient should be provided with permanent modifications consistent with the work restrictions.

After evaluating Respondent, Dr. Zarins concluded that based on Respondent's job description, she could not return to pre-injury work activities and was eligible for vocational rehabilitation.

On behalf of CalPERS, the ALJ received into evidence the reports of Dr. Halbridge, who opined that there were specific job duties that Respondent was unable to perform because of her physical condition; however, he stated that she would be capable of performing the majority of her psychiatric work, except for reaching overhead and having physical confrontation with inmates or youthful offenders. Additionally, Dr. Halbridge reviewed a letter from CalPERS that listed job accommodations on Respondent's ability to perform her job duties. As a result of reviewing the work accommodations and again reviewing a description of Respondent's job duties, Dr. Halbridge concluded that there did not appear to be any specific job duties that Respondent was unable to perform.

After evaluating Respondent, and reviewing the reports of Dr. Halbridge, Dr. Nissanoff agreed with Dr. Halbridge concerning the work restrictions that would be necessary for Respondent to be able to perform her job duties.

The ALJ noted that the return to work coordinator for CIM sent Respondent a confirmatory letter, which memorialized a telephone conversation that they had regarding Respondent's supervisor's willingness to provide the accommodations of the recommended work restrictions. Furthermore, the ALJ also noted a letter that was sent by the Return to Work Coordinator in response to a series of questions that were posed by CalPERS to CIM. One of those questions was "In responding to emergency situations that would fall within this job duty, would the performance of this duty involve physical contact with inmates, youthful offenders, or others, and would it require the member to do a take-down or to physically restrain an inmate, youthful offender, or others?" An employer's analyst replied as follows: "No. A Staff Psychiatrist's response to an emergency situation would include, but not be limited to call back on day off, physically reporting to another area of the institution to perform emergency psychiatric evaluations, face to face interviews, or interviews conducted through safety glass."

The experts all agreed that Respondent was not malingering nor exaggerating her injuries, and with adequate accommodations she can perform all of her regular job functions as a Staff Psychiatrist for CIM. The evidence established that at the time Respondent applied for industrial disability retirement, CIM was ready, willing and able to fully accommodate Respondent's limitations. An evaluation of the medical evidence in conjunction with CIM's offer of permanent accommodations established that Respondent is not permanently disabled and incapacitated from performance of her job duties.

The ALJ concluded that Respondent's appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

May 15, 2013



JOHN A. MIKITA
Senior Staff Attorney