

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

The hearing on this case was completed December 10, 2013. Respondent was represented by counsel at the hearing. Following the hearing, a Proposed Decision was issued on January 6, 2014. The Proposed Decision was in favor of CalPERS (denial of Respondent's application for disability retirement). The Board voted to adopt the Proposed Decision on February 20, 2014. Michele DeGuzman (Respondent) submitted this Petition for Reconsideration on March 14, 2014.

Respondent was employed by the Department of Health Care Services (Respondent DHCS) as an Associate Governmental Program Analyst (AGPA). Respondent was involved in a motor vehicle accident on June 25, 2010, when the car she was traveling in was hit from the rear. She filed for disability retirement, and CalPERS denied her application.

At the hearing, CalPERS presented testimony from the Independent Medical Examination (IME) conducted by Orthopedic Surgeon Dr. Joseph Serra. Dr. Serra examined the areas of Respondent's alleged disability, and the only thing Dr. Serra found was some tenderness to palpation over Respondent's lumbar spine. Dr. Serra does not believe that Respondent is substantially unable to perform her duties as an AGPA, which is a sedentary, desk work and computer office job. Dr. Serra believes that Respondent can perform all her job duties, and that she is not disabled.

Dr. Serra noted that Respondent did not comply with her recommended home exercise program. Dr. Serra testified that home exercise can be quite effective in dealing with spinal tenderness and pain, and that failure to comply with the exercise program can result in longer recovery times or less than full recovery.

Respondent testified on her own behalf, and also called her husband to the stand as a witness. She did not call any physicians or other medical professionals to testify.

The Administrative Law Judge (ALJ) found that Respondent bears the burden of proof to show by a preponderance of evidence (based on competent medical evidence) that her symptomology renders her unable to perform her usual job duties. The ALJ found that Respondent failed to carry her burden of proof. The ALJ found that Respondent did not establish by competent, objective medical opinion, that, at the time of application, Respondent was permanently disabled or incapacitated from performing her usual duties of an AGPA for Respondent DHCS. The ALJ found that Respondent provided no objective, competent medical evidence to support her claim of disability.

The ALJ concluded that Respondent failed to establish that she was substantially unable to perform her usual job duties, and therefore, was not entitled to disability retirement. The ALJ concluded that Respondent's appeal should be denied.

Respondent's grounds for reconsideration in her petition are based on disagreement with the ALJ's findings, and disagreement with the ALJ's legal analysis of competent medical

witnesses and presented documentary evidence at hearing. Respondent's attorney also cross-examined Dr. Serra at hearing.

CalPERS staff addresses the arguments below:

With respect to Respondent's disagreement with the ALJ's findings of fact and legal analysis, it is clear from the Proposed Decision that evidence was taken, and numerous exhibits were submitted. Evidence was taken on the underlying facts, medical evidence, and Respondent's claimed disability. The ALJ simply found against Respondent. Respondent has not raised any new evidence or change in circumstances which would warrant reconsideration.

As to Respondent's disagreement with the ALJ on the necessity of basing disability on competent medical evidence, Government Code Section 20026 provides that "disability" and "incapacity for performance of duty" as a basis of retirement, mean "disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion." The only doctor to testify at hearing was Dr. Serra. He verified the results, interviews, testing and conclusions found in his IME report. Dr. Serra's testimony was that Respondent was not disabled. No other medical professional provided testimony and no other competent medical evidence was provided for the ALJ to consider. Since Respondent did not present the medical professionals who authored various medical records she brought to hearing, they were admitted as administrative hearsay. As such, they cannot be used to prove the truth of the matters asserted. The ALJ found that they cannot be considered sufficient "competent medical opinion" to support a finding of disability under Government Code Section 20026.

For all of the reasons stated above, staff argues the Board deny the Petition for Reconsideration and uphold its decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. Respondent may file a writ petition in superior court seeking to overturn the decision of the Board.

April 16, 2014


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