

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Safia S. Ali (Respondent Ali) worked as a Tax Program Technician I (Technician) for Respondent California Franchise Tax Board (Respondent FTB). By virtue of her employment, Respondent Ali was a state miscellaneous member of CalPERS.

Respondent Ali applied for service pending disability retirement with CalPERS on the basis of rheumatologic conditions (bilateral hand, cervical spine), causing tendinitis in both hands and arthritis in her cervical spine, which she claimed made her unable to work as a Technician with Respondent FTB.

To evaluate Respondent Ali's disability retirement application, CalPERS referred Respondent Ali for an Independent Medical Examination (IME) with Doctors Scott Anderson (rheumatology, internal medicine) and Harry Khasigian (orthopedic surgeon). Both doctors issued written reports finding Respondent Ali was not, in their opinion, unable to perform her duties as a Technician with Respondent FTB. On the basis of these IME reports and a review of Respondent Ali's medical records, CalPERS denied Respondent Ali's disability retirement application.

Respondent Ali appealed CalPERS' determination, exercising her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative hearings. The ALJ presided over a one-day hearing in Sacramento, California on January 19, 2016. Counsel appeared on behalf of CalPERS. Respondent Ali represented herself. Her daughter, Saba Hashmat, was provisionally certified to serve as an Urdu interpreter for Respondent Ali as needed at the hearing. Respondent FTB did not appear.

Prior to the hearing, CalPERS explained the hearing process to Respondent Ali and the need to support her case with witnesses and documents. CalPERS provided Respondent Ali with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Ali's questions and clarified how to obtain further information on the process.

Pursuant to the California Public Employees' Retirement Law (PERL), a CalPERS member who is incapacitated from the performance of his or her duties shall be retired for disability. (Cal. Gov. Code §21150(a).) The statute has been interpreted and applied to require a showing of substantial inability to perform the usual duties of the job. (See, e.g., *Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.) On-the-job discomfort does not qualify a member for disability retirement; risk of further or future injury is similarly insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862-64.) On appeal, it is the member's burden to prove substantial incapacity. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

At hearing, CalPERS presented the oral testimony and written IME reports from Doctors Anderson and Khasigian. Dr. Anderson testified that he interviewed Respondent Ali, obtained a personal and medical history, had Respondent Ali fill out a rheumatology and internal medicine questionnaire, physically examined her and reviewed her medical and work records.

Respondent Ali had been working for Respondent FTB as a Technician since 1997. Approximately 50 percent of her job included review and validation of business income tax returns, 35 percent involved verifying returns were properly posted, and the remainder of Respondent Ali's duties included communication with supervisors and assisting with training as needed. The physical requirements of the FTB Technician position included frequent sitting and use of hands at a computer, keyboard and mouse, occasional bending and twisting of neck and wrists, but never performing the following activities: running, standing, walking, crawling, climbing, kneeling, squatting, reaching below the shoulders, pushing or pulling, lifting any weight, driving or working at heights.

Respondent Ali told Dr. Anderson she began experiencing right hand pain in 2005 and left hand pain in 2008. She also had tension-like discomfort in her upper back. Respondent FTB provided ergonomic and workstation accommodations for Respondent Ali, which she claimed were insufficient. She told Dr. Anderson she was able to drive, walk and shop but had difficulty cooking, cleaning and exercising.

On physical examination, Dr. Anderson found normal range of motion in the hands and wrists, no pain radiation, some swelling, and a post-surgery scar on Respondent Ali's right hand. Her grip strength was five out of five but immediately gave way to no strength, which Dr. Anderson found inconsistent. Dr. Anderson received and reviewed additional medical records showing Respondent Ali had a negative rheumatoid factor and was shown to have degenerative changes in the hands and pain secondary to those changes. He diagnosed Respondent Ali as having "status post stenosing tenosynovitis, right long and ring fingers, successfully treated with local debridement surgery," osteoarthritis of the hands and cervical strain. Reviewing Respondent Ali's work records, Dr. Anderson opined that Respondent Ali was not substantially incapacitated from the performance of her usual duties as a Technician as a result of her rheumatologic conditions.

CalPERS also referred Respondent Ali for an orthopedic IME with Dr. Khasigian. Like Dr. Anderson, Dr. Khasigian performed a review of relevant records, interviewed Respondent Ali, and conducted a physical examination. Her physical examination was normal. Respondent Ali grunted and moaned (indicating effort) when taking a hand strength test, but no measurement could be recorded. Dr. Khasigian diagnosed Respondent Ali with post-trigger finger release, mild osteoarthritis of the hands and subjective cervical pain. Dr. Khasigian noted significant Waddell's findings—symptoms that are not produced by any physical impairment. In his opinion, Respondent Ali's limited ability to perform only limited tasks "does not appear to be consistent with her relatively normal physical presentation on examination."

Respondent Ali testified at hearing, complaining of chronic pain in the wrist extending to the shoulders and spine. She expressed concern that future work may cause her condition to worsen. Respondent Ali presented hearsay medical records but did not call any doctors to testify, and none of the records produced indicated any physicians had found her substantially incapacitated from the performance of her usual duties as a Technician at FTB.

The ALJ considered all the evidence, and credited as persuasive the reports and testimony of Doctors Anderson and Khasigian regarding Respondent Ali's medical conditions and ability to work. The ALJ found the reports and testimony "did not reveal any objective evidence that [Respondent Ali's] rheumatologic conditions would prevent her from performing the usual and customary duties of a Technician." The ALJ further held Respondent Ali presented no competent medical evidence to support her appeal.

The ALJ concluded that Respondent Ali'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.

March 16, 2016



KEVIN M. KREUTZ
Senior Staff Attorney