

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION WITH MODIFICATION

Respondent Melissa Centeno (Respondent) was employed by Respondent Oakland Unified School District (District) as a Police Sergeant. The District contracts with CalPERS to provide retirement benefits for its employees. By virtue of her employment, Respondent was a state safety member of CalPERS. Respondent submitted an application for industrial disability retirement on the basis of claimed orthopedic (back) condition. CalPERS staff reviewed relevant medical reports and a written description of Respondent's usual and customary duties as a Police Sergeant for the District. An independent medical examination (IME) of Respondent was performed by Dr. Joseph Serra, an Orthopedic Surgeon. This physician prepared a written report expressing the opinion that Respondent was not substantially incapacitated from performing the usual and customary duties of her position as a Police Sergeant. Staff determined that Respondent was not incapacitated for performance of her job duties and denied her application for industrial disability retirement. Respondent appealed CalPERS staff's determination and a hearing was held on May 2, 2016.

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

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

Respondent testified at the hearing, describing her usual and customary duties as a Police Sergeant for the District. Respondent testified that she experienced low back pain after a traffic accident while on duty. Her back pain escalated to spasms, and she sought physical therapy and medication. She saw several doctors, including Dr. Pacito Yabes, who treated her for 18 months, and Dr. Steven Feinberg who was an agreed upon medical evaluator (AME) in her workers' compensation claim for the same injury.

Respondent called Dr. Yabes to testify at the hearing. Dr. Yabes is a Board Certified Physical Medicine and Rehabilitation specialist and is a diplomate of the American Board of Pain Medicine. He saw Respondent at least 15 times. He testified that she had episodes of stabbing pain that radiated to her left lower extremity. He last examined her in March 2014 when her workers' compensation case was resolved. In December 2014, without an examination subsequent to the March 2014 examination, Dr. Yabes submitted a Physician's Report on Disability to CalPERS in support of Respondent's industrial disability retirement application. In that report he noted his

opinion that she was substantially incapacitated from the performance of her usual duties. However, at Respondent's March 2014 examination, Dr. Yabes found that Respondent's condition was continuing to improve.

Dr. Feinberg's AME report was admitted as administrative hearsay. The standard applied in the case for which Dr. Feinberg's exam was prepared was the workers' compensation standard, which differs from the standard required by CalPERS for permanent disability. His report therefore did not support a finding of substantial and permanent incapacity from performing the usual duties of a Police Sergeant at the standard required by CalPERS.

Joseph Serra, M.D. is a board-certified Orthopedic Surgeon who testified at the hearing. Dr. Serra reviewed medical reports regarding Respondent, as well as a written description of her usual and customary job duties, and performed an independent medical evaluation of Respondent. A copy of Dr. Serra's written report was received by the Administrative Law Judge (ALJ) into evidence. With respect to Respondent's orthopedic condition, Dr. Serra explained that his physical examination included measuring the extremities and testing function. He noted that Respondent had mild degenerative disc disease, low back pain and functional overlay. He also noted that her subjective complaints far outweighed the objective findings and that her substantial incapacity was temporary and would last less than six months.

After considering all of the evidence and testimony, the ALJ found that "respondent failed to offer sufficient competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a Police Sergeant." The ALJ noted that Dr. Yabes' testimony included his opinion that Respondent's disability was temporary and that she was responding well to the Functional Restoration Program (FRP), in other words, improving. Dr. Feinberg's AME report did not apply the CalPERS' standards for disability; therefore his report was not given much weight. The ALJ determined, however, that Dr. Serra clearly testified that the subjective complaints were not supported by the objective findings and that in his opinion she was not substantially incapacitated from performing her duties pursuant to the CalPERS standards was persuasive.

Accordingly, the ALJ concluded that Respondent had failed to meet her burden of proving, on the basis of competent medical evidence, that she was substantially incapacitated and that, therefore, Respondent's appeal should be denied. Pursuant to Government Code section 11517(c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." In order to avoid ambiguity, staff recommends that the word "industrial" be inserted before the words "disability retirement" on pages seven, eight and ten of the Proposed Decision. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision, as modified.

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.

August 17, 2016



CYNTHIA RODRIGUEZ
Senior Attorney