

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Josefina A. Miramontes (Respondent Miramontes) worked as a Correctional Officer for Respondent California Department of Corrections and Rehabilitation, Valley State Prison for Women (CDCR). By virtue of her employment, Respondent Miramontes was a state safety member of CalPERS.

Respondent Miramontes applied for Industrial Disability Retirement (IDR) with CalPERS on the basis of an orthopedic (low back) condition, which she claimed made her unable to work as a Correctional Officer with Respondent CDCR.

To evaluate Respondent Miramontes' IDR application, CalPERS referred Respondent Miramontes for an Independent Medical Examination (IME) with orthopedic surgeon Joseph B. Serra, M.D. Dr. Serra interviewed Respondent Miramontes, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. In addition, Dr. Serra reviewed surveillance video of Respondent Miramontes that was obtained by a CalPERS investigator. Dr. Serra also performed a comprehensive IME. Dr. Serra issued a written report finding Respondent Miramontes was not, in his opinion, unable to perform her duties as a Correctional Officer with Respondent CDCR. On the basis of this IME report and a review of Respondent Miramontes' medical records, CalPERS denied Respondent Miramontes' IDR application.

Respondent Miramontes 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 Fresno, California on June 30, 2016. Respondent Miramontes was represented at the hearing by an attorney. Respondent CDCR did not appear at the hearing.

At the hearing, CalPERS elicited testimony from investigator Sean Espley. Mr. Espley conducted surveillance of Respondent Miramontes' activities for five days in March, 2013. During his testimony, Mr. Espley authenticated the surveillance video and provided a summary of the activities he witnessed Respondent Miramontes performing over a five day period. The surveillance video primarily captured Respondent Miramontes entering and exiting her sports utility vehicle at her residence and various business locations. The video showed Respondent Miramontes having no difficulty in entering and exiting her vehicle, or walking to and from various establishments, carrying objects, opening and closing the doors of her vehicles, and placing objects into her vehicle.

At the hearing, CalPERS also elicited testimony from Dr. Serra. Dr. Serra testified in a manner consistent with his examination of Respondent Miramontes and the report prepared after the IME. Dr. Serra testified that he believed Respondent Miramontes was significantly exaggerating her complaints. Dr. Serra reviewed the surveillance video and believed that it demonstrated Respondent Miramontes did not have any difficulty in her movement and that her gait and body movements appeared within normal limits. Dr. Serra's medical opinion is that there are no specific job duties

Respondent Miramontes is unable to perform because of a physical or mental condition; therefore, Respondent Miramontes is not substantially incapacitated.

Respondent Miramontes testified on her own behalf. Respondent Miramontes testified that she experienced a lot of pain in her back and, as a result, underwent back surgery on February 13, 2014. She testified that her daily activities are limited and that she is unable to perform any activities that require significant physical exertion. Respondent Miramontes testified that she is currently working; however, Respondent Miramontes testified that her job is sedentary and that she is able to go home if her pain is too severe.

Respondent Miramontes also called Valerie Gibson, D.O., to testify on her behalf. Dr. Gibson examined Respondent Miramontes on June 23, 2016, and prepared a report summarizing this examination and Respondent Miramontes' medical records. Dr. Gibson concluded that, based upon her examination and review of medical records, Respondent Miramontes is not currently fit for duty as a Correctional Officer. Dr. Gibson's opinion is that Respondent Miramontes is unable to perform the following usual duties: carrying more than 25 pounds, and working at heights. Dr. Gibson reviewed the surveillance video and concluded that Respondent Miramontes was not found to be doing anything unusual or out of the ordinary for someone with her injury. Dr. Gibson testified that she believed the surveillance video demonstrated Respondent Miramontes moving slowly, which is consistent with her complaints of back pain. Dr. Gibson acknowledged at the hearing that she is not familiar with the CalPERS standard when determining disability.

The ALJ denied Respondent Miramontes's appeal. The ALJ found that Respondent Miramontes bears the burden to prove by a preponderance of evidence (based on competent medical evidence) that her orthopedic condition renders her unable to perform her usual job duties as a Correctional Officer. The ALJ found that Respondent Miramontes failed to carry her burden of proof.

The ALJ found that Dr. Serra's testimony and opinion that Respondent Miramontes was significantly exaggerating her complaints was persuasive. The ALJ concluded that Respondent Miramontes did not establish through competent medical evidence that, at the time of applying for IDR, she was permanently disabled or incapacitated from performing the usual duties of her position as a Correctional Officer.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

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 confusion, staff recommends that the name of the attorney representing CalPERS at the hearing be changed from "John Mikita, Senior Staff Attorney" to "John Shipley, Senior Staff Attorney" on page one of 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

September 21, 2016



JOHN SHIPLEY
Senior Staff Attorney