

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Frankie T. Veloria (Respondent) applied for Industrial Disability Retirement (IDR) based on an orthopedic (lumbar and cervical spine) condition. By virtue of his employment as a Correctional Officer for Kern Valley State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Michael Quacinella, D.O., MPH, a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME) of Respondent. Dr. Quacinella interviewed Respondent, reviewed his work history, job description and physical requirements, obtained a history of his past and present complaints, reviewed his medical records, reviewed the report of investigation, and performed a comprehensive examination of Respondent's orthopedic condition. Dr. Quacinella opined that Respondent is not substantially incapacitated from performing the duties of his position.

To be eligible for disability retirement, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of their position. The injury or condition, which is the basis of the claimed disability, must be permanent or of an extended duration which is expected to last at least 12 consecutive months or will result in death.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position. On October 31, 2022, Respondent was notified of CalPERS' denial of his IDR application, and he was advised of his appeal rights.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on December 21, 2023. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing and the matter proceeded as a default against Respondent CDCR pursuant to Government Code section 11520.

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

At the hearing, Dr. Quacinella testified in a manner consistent with his examination of Respondent and the IME report. Dr. Quacinella's medical opinion is that Respondent is not substantially incapacitated from performing the duties of his position as a Correctional Officer. Dr. Quacinella testified that during the physical examination of Respondent, he was in no acute distress, there was no evidence that he was experiencing hypertonicity or muscle spasms in his neck or back, he was able to walk with a heel to toe gait, and his vital signs were all within normal limits. Dr. Quacinella found Respondent's spine to have normal curvature. Dr. Quacinella found Respondent to have normal range of motion in his

neck, although slightly decreased range of motion when rotating his head to the left. Significantly, Dr. Quacinella found nothing to indicate that the pain Respondent reported experiencing in his neck was caused by non-organic means. The range of motion in Respondent's lower back while bending forward, backward, and side to side were all within normal limits.

Dr. Quacinella also reviewed a copy of CalPERS' investigative report which summarized a social media search for information on Respondent. The investigator found Respondent's Facebook account which promoted a business called "Daddy Frank's Tritip." The Facebook account included images of barbecue sandwiches and menus, as well as a photograph of Respondent with a young child sitting on his shoulders. The investigator also found Instagram accounts belonging to Respondent under the names "Frankie44mp" and "Daddyfrankstritips." Like the Facebook account, both Instagram accounts promoted Respondent's business and featured images of barbecue sandwiches and menus. Dr. Quacinella questioned Respondent about his participation in the barbecue business given Respondent's reported physical limitations and found his answers to be evasive. Dr. Quacinella was unable to draw a correlation between Respondent's reported symptoms of pain with the records he reviewed and his own objective findings during the IME. Dr. Quacinella opined that Respondent is not substantially incapacitated to perform his usual job duties.

Respondent testified on his own behalf at the hearing. He stated he is 34 years old and suffers from pain every day. There are days where his back spasms are so severe that he cannot function normally. He has received three epidural injections, but they have been largely ineffective. He tried to return to work in a limited capacity for approximately six months and worked in the "control room." In that assignment, he had minimal contact with inmates, and his job primarily consisted of "just pressing buttons." However, sitting or standing for extended periods of time caused him pain. Moreover, even when working in a limited capacity in the control room, he is required to wear a duty belt and bulletproof vest, the weight of which exacerbated his pain.

Respondent also testified that he and his wife only operated the Daddy Frank's Tri-tip business for approximately one year. It started as a hobby, but he eventually tried to turn it into a business which was unsuccessful. Respondent testified that he never lifted more than the weight of a tri-tip roast. He stated he was responsible for cooking and assembling sandwiches but left the more physically strenuous activities to others.

Respondent also called a former co-worker at Kern Valley State Prison, a friend and former business partner of Daddy Frank's Tri-tip business, and his wife to testify on his behalf. Respondent did not call any physicians or other medical professionals to testify.

After considering all of the evidence introduced, as well as arguments made by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent bears the burden of proving, by competent medical evidence, that he was substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer at the time of his application for IDR. The ALJ found Respondent to have failed to meet his burden.

The ALJ found that although Respondent experiences residual pain associated with his injury, Dr. Quacinella explained that pain alone does not render Respondent substantially incapacitated. Respondent testified that even being assigned to limited duty, which requires prolonged sitting and standing, is too painful for him to bear. The ALJ found that testimony “suspect” given Respondent’s admitted participation in a barbecue business for a period of approximately one year. While Respondent testified that his role in the business was limited to cooking tri-tip and assembling sandwiches, the ALJ reasonably inferred that those two tasks required him to either sit or stand for prolonged periods of time, just as his work as a Correctional Officer would require and Respondent failed to establish any meaningful physical distinction between the two.

The ALJ concluded that when all the evidence is considered, Respondent did not prove that he was substantially incapacitated for the performance of his duties as a Correctional Officer at the time he filed his application for IDR. As such, his appeal must be denied.

In accordance with Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to “make technical or other minor changes in the proposed decision.” To avoid ambiguity, staff recommends deleting the term “uncertain” between the words “extended” and “duration,” and changing the word “employees” to “employing” in sentence two, paragraph two, under the Legal Conclusions section on pages 12-13 of the Proposed Decision.

For all the above reasons, staff argues that the Proposed Decision should be adopted by the Board, as modified.

March 20, 2024

Nhung Dao
Attorney