

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

David L. Vigil (Respondent) applied for industrial disability retirement based on an orthopedic (lumbar spine) condition. By virtue of his employment as a Material and Stores Supervisor I for Respondent R.J. Donovan Correctional Facility, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

Respondent filed an application for service pending industrial disability retirement on September 12, 2019, and requested a retirement date of July 10, 2019. He has been receiving service retirement benefits effective July 10, 2019.

As part of CalPERS' review of Respondent's medical condition, James M. Fait, M.D., a board-certified Orthopedic Surgeon performed an Independent Medical Examination (IME). Dr. Fait interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed his medical records, and performed a physical examination. Dr. Fait opined that Respondent is not substantially incapacitated to perform his usual duties as a Material and Stores Supervisor I.

In order 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 his or her 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 report, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position.

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 June 16, 2021. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing. The ALJ found that the matter could proceed 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. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, Dr. Fait testified in a manner consistent with his examination of Respondent and the IME reports. Dr. Fait's medical opinion is that Respondent's

subjective complaints of pain are not supported by objective findings during his medical examination and in Respondent's medical reports. Respondent had mild degenerative disc disease and facet arthrosis, but Dr. Fait opined that Respondent's lumbar spine and hip range of motion were adequate to perform his Material and Stores Supervisor I job duties. There was no evidence of radiculopathy or neurologic abnormality. Therefore, Dr. Fait's competent medical opinion is that Respondent is not substantially incapacitated.

In conjunction with his review, Dr. Fait was provided and reviewed a report of investigation prepared in conjunction with Respondent's Workers' Compensation case. CalPERS did not provide Dr. Fait with a surveillance DVD because none was provided for review. Dr. Fait testified that, in arriving at his opinion, he relied on his examination of Respondent, his review of the medical records, and the report of the Investigator. He testified further that his opinion would have been the same if he had not seen the investigation summary. Since the summary matched his findings, it allowed Dr. Fait to strengthen his conclusions. The ALJ noted that no DVD was provided nor reviewed but found review of the DVD was not necessary to decide the case.

Respondent testified on his own behalf that he is in pain all the time. Respondent did not call any physicians or other medical professionals to testify. He did submit medical records from his treating physicians which were admitted as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden of proof and failed to produce any competent medical evidence to support his contention that he is substantially incapacitated from performing his usual and customary job duties. The ALJ concluded that Respondent is not eligible for industrial disability retirement.

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

September 15, 2021

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Staff Attorney