

ATTACHMENT B

STAFF'S ARGUMENT

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

Respondent Samuel G. Gonzalez-Lopez (Respondent) applied for Service Pending Disability Retirement based on an orthopedic (back) condition on February 21, 2020. By virtue of his employment as a Custodian for Respondent Department of Veterans Affairs, Yountville Veterans Home (Respondent CalVet), Respondent was a local miscellaneous member of CalPERS. Respondent retired for service effective March 6, 2020, and he has been receiving a service retirement allowance since then.

As part of CalPERS' review of Respondent's medical condition, Robert K. Henrichsen, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME) on June 23, 2020. Dr. Henrichsen interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records.

On August 25, 2020, Dr. Henrichsen reviewed additional records regarding Respondent's medical condition for further consideration. After review of all of the information made available to him, Dr. Henrichsen opined that Respondent does not have an impairment that arises to the level of substantial incapacity to perform his usual duties as a Custodian based on his orthopedic (back) claim.

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 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 as a Custodian. On September 10, 2020, Respondent was notified of CalPERS' decision to deny his disability retirement application based on the orthopedic (back) claim 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 January 19, 2022. Respondent was present and represented himself. An interpreter was sworn in to provide English/Spanish translation. Respondent CalVet did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent CalVet, pursuant to Government Code section 11520(a).

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. Henrichsen testified in a manner consistent with his examination of Respondent and his IME reports. During the physical examination performed on June 23, 2020, Dr. Henrichsen took Respondent's measurements, assessed his range of motion, and tested his strength and maneuverability. All test results were within normal limits, and Dr. Henrichsen found no atrophy. Respondent walked without leaning and showed no evidence of an uneven gait. Furthermore, Dr. Henrichsen noted that Respondent moved differently when he left the treatment room than during the IME, further supporting Dr. Henrichsen's opinion that Respondent was being deceptive during the examination.

Ultimately, Dr. Henrichsen's medical opinion is that Respondent does not have an impairment that arises to the level of substantial incapacity to perform his usual duties based on his orthopedic (back) claim. After reviewing the supplemental medical records, Dr. Henrichsen did not change his opinion. He concluded that Respondent "put forth a very poor effort at the time of the examination" and exaggerated his symptoms, which did not match with the imaging and examination findings. Therefore, Dr. Henrichsen opined that Respondent is not substantially incapacitated from performing his usual duties as a Custodian at CalVet.

Respondent testified on his own behalf that he was happy at his workplace until his back injury, but since then, he has not been able to sleep through the night because of pain. Respondent reports his pain is constantly at "9/10." Respondent did not call any physicians or other medical professionals to testify. Respondent submitted some medical records from his treating physicians to support his appeal. The medical records were admitted as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

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's testimony regarding his inability to work is insufficient to make a finding. The ALJ found that Dr. Henrichsen's opinion was persuasive, based on his examination, test results, and review of prior medical records. Furthermore, Dr. Henrichsen based his opinion on objective findings, not on Respondent's subjective complaints.

The ALJ concluded that Respondent did not establish, through competent medical evidence, that he was substantially incapacitated from performing the usual job duties of a Custodian at CalVet based on his orthopedic (back) condition, and as such, Respondent is not eligible for disability retirement.

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 correcting "disability of permanent or extended and uncertain duration" to "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death" in paragraph 1 under the Legal Conclusions section, on page 9 of the Proposed Decision.

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

April 19, 2022

Nhung Dao
Attorney