

**ATTACHMENT B**

**Staff Argument**

## **STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION**

Joy Jordan (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated October 19, 2023. For reasons discussed below, staff argues the Board should deny the Petition for Reconsideration and uphold its decision.

Respondent was employed as a Pharmacy Technician by Department of State Hospitals, Napa, (Respondent DSH). By virtue of her employment, Respondent was a state miscellaneous member of CalPERS.

On February 18, 2020, Respondent submitted an application for disability retirement on the basis of orthopedic conditions (left and right upper extremity problems caused by dystonia). Respondent retired for disability effective December 4, 2019.

On September 27, 2021, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that she would be reevaluated for purposes of determining whether she remains substantially incapacitated and is entitled to continue to receive disability retirement.

To remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of his or her former 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.

As part of CalPERS' review of Respondent's medical conditions, Respondent was sent to Harry A. Khasigian, M.D. for an Independent Medical Examination (IME). Dr. Khasigian interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Khasigian also performed a comprehensive physical examination. Dr. Khasigian opined that the condition of Respondent's extremities no longer met the CalPERS disability standard.

After reviewing all of the medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated and should therefore be reinstated to her former position as a Pharmacy Technician.

Respondent appealed this determination and exercised her right to a hearing before an ALJ with the Office of Administrative Hearings (OAH). A hearing was held on October 4, 2023. Respondent represented herself at the hearing. Respondent DSH did not appear at the hearing, so the matter proceeded as a default against Respondent DSH.

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, answered Respondent's questions, and clarified how to obtain further information on the process.

At the hearing, Dr. Khasigian testified in a manner consistent with his examination of Respondent. Dr. Khasigian's medical opinion is that Respondent can perform the duties of her position and is therefore no longer substantially incapacitated. He found that Respondent did not display the muscle spasms, twitches, or jerking which are the hallmarks of dystonia. Dr. Khasigian also found that Respondent's subjective complaints could not be reconciled with the objective test results. Dr. Khasigian reviewed surveillance which showed Respondent using her left arm and hand to perform numerous tasks, including picking up heavy objects. Dr. Khasigian found the surveillance "important," and testified that he could not reconcile Respondent's activities on surveillance with her claimed degree of incapacity.

Respondent testified on her own behalf that she continued to have poor use of her upper extremities. She was emphatic that she was unable to perform certain job-related tasks. Respondent further testified that she disagreed with the results of Dr. Khasigian's examination and report. Respondent did not call any physicians or other medical professionals to testify, but she did submit some medical records to support her appeal, which were admitted as administrative hearsay. Administrative hearsay may be used to supplement or explain other evidence but cannot be used in itself to support a finding.

The ALJ found that CalPERS met its burden of proving by competent medical evidence that Respondent was no longer substantially incapacitated. The ALJ found that the only competent medical evidence was presented by Dr. Khasigian, and his testimony was comprehensive and persuasive. Respondent did not present any competent medical evidence to the contrary. As a result, the ALJ held that Respondent is not substantially incapacitated from performing her usual duties. After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision adopted by the Board at the January 16, 2024, meeting was well reasoned and based on the credible evidence presented at hearing.

For all the foregoing reasons, staff argues that the Board should deny the Petition for Reconsideration.

March 20, 2024

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MEHRON ASSADI  
Staff Attorney