

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

On October 15, 2022, Joel Ocampo (Respondent) applied for industrial disability retirement based on an orthopedic condition (right elbow). By virtue of his employment as a Psychiatric Technician for Department of State Hospitals - Patton (Respondent DSH), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Leisure Yu, M.D., Ph.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Yu interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Yu opined that Respondent was not substantially incapacitated from the performance of his usual job duties as a Psychiatric Technician for Respondent DSH.

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 March 25, 2024. Respondent represented himself at the hearing. Respondent DSH did not appear at the hearing and a default was taken as to Respondent DSH only.

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. Yu testified in a manner consistent with his examination of Respondent and his IME report. Dr. Yu testified that Respondent had previously suffered a minor tear to his elbow, but that it had since nearly fully healed. Dr. Yu found minimal muscle tenderness with no signs of secondary muscle problems or swelling. Based on the physical examination, Dr. Yu concluded that Respondent was not substantially incapacitated for the performance of his usual job duties due to any orthopedic condition.

A CalPERS Investigator testified that she had completed surveillance of Respondent for several days during January and February 2023. Surveillance showed Respondent completing yard work, using a leaf blower, carrying a trash can and digging with a shovel. The surveillance DVD and summary of investigation report were admitted into evidence at the hearing. Dr. Yu testified that the sub rosa video supported his opinion and contradicted statements made by Respondent of his claimed limitations.

Respondent testified on his own behalf that he cannot perform his former job duties without pain or some difficulty. Respondent did not call any physicians or other medical professionals to testify. Respondent submitted a Qualified Medical Evaluation (QME) report from his workers' compensation matter which was admitted as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but cannot be used to support a finding.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that the only admissible medical evidence came from Dr. Yu, who opined that Respondent is not substantially incapacitated. Although the QME report was admitted as hearsay, it could not support a finding in Respondent's favor because the paragraph regarding disability was excluded from evidence and the standard from the workers' compensation matter is much lower than the CalPERS disability standard. Moreover, the ALJ found that any work restrictions discussed in the QME report were not established at the hearing. Even if they were established, at most, they showed that Respondent might experience some discomfort or difficulty with some of his job duties, but those conditions do not rise to the level of substantial incapacity. The ALJ also found that Respondent had surgery to his elbow and thereby that his condition was not permanent or of extended duration as required. In sum, the ALJ found that Respondent failed to meet his burden of proof to show by competent medical evidence that he was substantially incapacitated for the performance of his usual duties as a Psychiatric Technician for Respondent DSH due to an orthopedic condition (right elbow) when he applied for disability retirement.

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

June 12, 2024

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Attorney