

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Juanita Nunez (Respondent) was employed by Respondent Department of Corrections Valley State Prison for Women, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of her employment, Respondent was a state safety member of CalPERS. On November 2, 2017, Respondent submitted an application for industrial disability retirement on the basis of orthopedic (back, right hip, right leg, left ankle) conditions. Respondent's application was approved by CalPERS and she retired effective May 2, 2018, on the basis of her orthopedic (right hip, back) condition.

In 2019, 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 an industrial disability retirement.

In order 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 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 condition, Respondent was sent for an Independent Medical Examination (IME) to board certified Orthopedic Surgeon Don T. Williams, M.D. Dr. Williams interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Williams also performed a comprehensive IME.

In his IME report, Dr. Williams noted Respondent's claimed lower back pain radiating to her right leg, resulting in numbness and burning. He further noted her self-perceived inability to lift over 20 pounds and sit or drive for long periods. Dr. Williams documented his physical exam findings, including Respondent's ability to rise from her chair and walk with a normal heel/toe gait without any foot dragging, and found her efforts to bend at the waist to be inconsistent. He reviewed Respondent's EMG and MRI, finding both to be completely normal. Dr. Williams concluded Respondent is not substantially incapacitated to perform her usual job duties.

After reviewing all medical documentation and the IME reports, CalPERS determined Respondent was no longer substantially incapacitated, was no longer eligible for an industrial disability retirement, and should therefore be reinstated to her former position as a Correctional Officer.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on October 28, 2021. Respondent represented herself at the hearing. Respondent CDCR did not appear at the hearing and the matter proceeded as a default hearing against Respondent CDCR.

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

At the hearing, Dr. Williams testified in a manner consistent with his examination of Respondent and his IME report. Dr. Williams testified that Respondent has no restrictions on her ability to perform her duties as a correctional officer. In fact, his competent medical opinion after reviewing all medical reports, interviewing Respondent, and performing a comprehensive exam, is that Respondent can perform all the duties required of her position. As the Respondent can perform all her job duties, Dr. Williams' medical opinion is that she is no longer substantially incapacitated.

Respondent testified on her own behalf. Respondent testified that the work injury she sustained has substantially altered her life. She remains in a reclining chair most of the day, and no longer drives because she does not trust her foot on the gas and brake pedals. She claimed that the MRIs performed by Kaiser were inaccurate because of "miscalibration," and admitted to "babying" her pain during Dr. William's IME exam. Due to subsequent injuries she sustained while on industrial disability retirement, she states that she now uses a walker.

Despite Dr. Williams' testimony that Respondent could perform her job duties without restriction, the ALJ opined that the underlying IME report itself did not adequately assess all the activities required to work as a Correctional Officer. Specifically, the ALJ held that "[t]he August 2019 IME did not assess respondent's lifting and carrying capacity, nor did it assess her ability to climb." The ALJ's opinion accepts as undisputed truth Respondent's claim that she cannot drive, and then criticizes the IME report for failing to adequately vet her driving ability. The ALJ does not offer any ideas as to how such tests could have, or should have, been performed. The ALJ accepted Respondent's claim of using a walker as evidence of further deterioration of her condition, and dismissed the IME report, claiming it "as a whole was not persuasive."

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ granted Respondent's appeal. This Proposed Decision downplays live testimony offered by Dr. Williams concerning Respondent's ability to perform all job duties on an unrestricted basis. The ALJ instead bases her conclusions on perceived deficiencies in the IME report. The Decision also gives full credence to Respondent's claims of disability, despite Respondent's failure to offer any medical support for any of her claims.

While CalPERS staff questions the rationale of this approach, we do not oppose adoption of this decision.

January 18, 2022

Dustin Ingraham
Staff Attorney