

ATTACHMENT B

STAFF'S ARGUMENT

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

Olivia Ivey (Respondent) applied for Service Pending Industrial Disability Retirement (IDR) on October 21, 2020, based on an orthopedic (low back, neck, bilateral feet, bilateral wrists) condition.¹ By virtue of her employment as a Correctional Officer (CO) for Correctional Training Facility, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS. Respondent retired for service effective November 8, 2020, and she has been receiving benefits since then.

As part of CalPERS' review of Respondent's medical condition, Don T. Williams, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Williams interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records, and performed a thorough physical examination. Dr. Williams opined that Respondent is not substantially incapacitated from performing her duties as a CO.

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 her position. 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 remote hearing was held on November 29, 2022. Respondent represented herself at the hearing. Respondent CDCR did not appear at the hearing, and the matter proceeded as a default as to Respondent CDCR only pursuant to Government Code section 11520, subdivision (a).

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 the IME report. During examination, Dr. Williams observed normal

¹ Respondent also claimed psychological (PTSD) condition. However, at hearing she stipulated that her claim for PTSD should be excluded from consideration. The hearing went forward on her claim of an orthopedic condition only.

range of motion in Respondent's neck, bilateral feet, and bilateral wrists. He observed normal reflexes and good grip strength in both hands. Dr. Williams diagnosed Respondent with cervical and lumbar strain; bilateral high arches in her feet; plantar fasciitis in the right foot; resolved great toe locking; and wrist sprain.

However, Dr. Williams' medical opinion is that Respondent is not substantially incapacitated from performing her duties as a CO. He opines that her subjective complaints are greater than the objective findings. While Dr. Williams did observe some tenderness in Respondent's plantar fascia (more on the right foot), he opines that the arch supports she received for treatment were effective such that this condition does not prevent her from performing her usual job duties. He cites her normal MRI studies, EMG, and nerve conduction studies as objective evidence that Respondent can still perform her usual job duties.

Respondent testified on her own behalf that her orthopedic condition renders her substantially incapacitated from performing her usual and customary duties as a CO. She testified that she was having difficulty opening/closing prison doors because of pain in her wrists, and that she had trouble running to alarms because of pain in her legs and feet. Respondent also testified that her back condition was a secondary condition which impacted performance of her duties, and she believes she likely hurt her back when lifting mattresses during inmate cell searches.

Respondent did not call any physicians or other medical professionals to testify, but did submit medical records from her workers' compensation physicians. One of these exhibits was incomplete and illegible. The record remained open for Respondent to submit a full, legible copy of the exhibit, but she declined to do so. Respondent's medical records 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 civil actions.

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 was not substantially incapacitated from performance of her duties as a CO based on the claimed orthopedic condition. In light of the more persuasive medical evidence submitted by CalPERS, the ALJ found Respondent's evidence was insufficient to prove incapacity. The ALJ concluded that Respondent is not eligible for industrial disability retirement because she did not establish that she was substantially incapacitated for the performance of her duties as a CO at the time of her application.

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." 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 2 under the Legal Conclusions section on pages 10-11 of the Proposed Decision.

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

April 18, 2023

Nhung Dao
Attorney