

ATTACHMENT B

STAFF'S ARGUMENT

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

Eric Devore (Respondent) filed an application for industrial disability retirement (IDR) based on an orthopedic (right shoulder) condition on July 1, 2022. By virtue of employment as a Correctional Officer for California State Prison, Sacramento, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Harry A. Khasigian, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Khasigian interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Khasigian opined that Respondent was not substantially incapacitated from his usual and customary duties as a Correctional Officer due to an orthopedic condition concerning his right shoulder.

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 Dr. Khasigian's IME report, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position. On October 24, 2022, CalPERS informed Respondent that his IDR application had been denied and advised him 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 July 26, 2023. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing. Consequently, this matter proceeded as a default against Respondent CDCR under Government Code section 11520, subdivision (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, 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 and his IME report. Dr. Khasigian determined that the pain in Respondent's shoulder did not preclude him from performing his usual job duties. He found that Respondent had normal strength and close to full range of motion in his right shoulder. Dr. Khasigian concluded that Respondent's subjective complaints were unsupported by the objective medical evidence. Therefore, Dr. Khasigian's medical opinion is that Respondent is not substantially incapacitated.

Respondent testified on his own behalf that he had severe pain in his shoulder, and that although he tried physical therapy and acupuncture, neither alleviated his pain. Respondent did not call any physicians or other medical professionals to testify. He submitted medical records related to his workers' compensation claims to support his appeal which were admitted as hearsay. Hearsay evidence may be used to supplement or explain other evidence but is not sufficient in itself 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 Dr. Khasigian testified credibly to his medical opinion, and Respondent failed to present any competent, non-hearsay medical evidence. The ALJ therefore held that Respondent failed to meet his burden of proof to establish he was entitled to IDR benefits.

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 that the following edits be made with respect to misquotes from the California Public Employees' Retirement Law:

1. On page nine of the Proposed Decision, in the third paragraph of the Legal Conclusions section, the quotation from California Government Code section 20026 be edited to remove the word "uncertain." This will change the quotation to read, "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death."
2. On page 10 of the Proposed Decision, in the third paragraph of the Legal Conclusions section, the quotation from California Government Code section 21156 be edited so that the period at the end of the quotation is in brackets. This will change the quotation to read, "[i]f the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability[.]"

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

November 15, 2023

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Staff Attorney