

ATTACHMENT B

STAFF'S ARGUMENT

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

Respondent Cecilia L. Macayaon (Respondent) applied for a disability retirement based on pulmonary (COPD, asthmatic bronchitis, shortness of breath, severe cough) conditions. By virtue of employment as a Registered Nurse for Respondent California Institution for Men, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

Respondent filed an application for service pending disability retirement on August 7, 2020 and has been receiving benefits since that time.

As part of CalPERS' review of Respondent's medical condition, Omar Tirmizi, M.D., a board-certified Internist, performed an Independent Medical Examination (IME). Dr. Tirmizi interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Tirmizi opined that Respondent was not substantially incapacitated from performing her duties as a Registered Nurse.

In order 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 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 hearing was held on September 9, 2021. Respondent represented herself at hearing. Respondent CDCR did not appear at the hearing, and default was taken against it.

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. Tirmizi testified in a manner consistent with his examination of Respondent and the IME report. Dr. Tirmizi's review of medical records showed that Respondent did not have a history of asthma or respiratory illness while she was working, but was diagnosed with asthmatic bronchitis and asthma after she was sent home due to COVID-19 restrictions. Although diagnosis of a respiratory condition like asthma or COPD must include pulmonary function tests (PFTs), none were performed

in Respondent's case. In fact, there was no documentation in Respondent's medical records showing wheezing during any of her physical examinations.

Dr. Tirmizi physically examined Respondent and did not find evidence of a permanent respiratory disorder. The wheezing Respondent exhibited on examination was voluntary, and not due to any respiratory condition. Dr. Tirmizi found Respondent's wheezing came from intentional closure of her vocal cords. When Dr. Tirmizi asked Respondent to stop closing her vocal cords, her breathing normalized for the remainder of the exam.

Dr. Tirmizi explained Respondent did not have an actual and present pulmonary impairment that precluded her from performing her usual and customary duties. Accordingly, Dr. Tirmizi concluded that Respondent was not substantially incapacitated from working as a Registered Nurse.

Respondent testified on her own behalf that she believes she is substantially incapacitated. Respondent stated that she cannot perform her duties and responsibilities due to her asthma.

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 bears the burden to prove she is substantially incapacitated. The ALJ found Dr. Tirmizi to be well qualified to testify regarding pulmonary conditions, and his testimony was credible and persuasive. Respondent did not provide any competent medical opinion to meet her burden.

The ALJ determined that Respondent was not substantially incapacitated, and concluded that Respondent is not eligible for disability retirement.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." To avoid confusion, staff recommends that the spelling of member's name be corrected on pages 2 and 12 of the proposed decision to reflect the correct spelling of "Cecilia" not "Cecelia."

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

November 17, 2021

Charles H. Glaberman
Senior Attorney