

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Oscar E. Diaz (Respondent) applied for Industrial Disability Retirement (IDR) based on an orthopedic (back) condition. By virtue of his employment as a Correctional Officer (CO) for Respondent California Rehabilitation Center, 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, Robert J. Kolesnik, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME) of Respondent on August 19, 2020. Dr. Kolesnik interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed his medical records, and performed a comprehensive examination of Respondent's orthopedic condition. Dr. Kolesnik opined that Respondent was not substantially incapacitated from the performance of his duties as a CO due to an orthopedic condition.

After the initial IME was completed, CalPERS provided Dr. Kolesnik with additional records to review, including two workers' compensation evaluations. After review of the additional reports, Dr. Kolesnik reiterated his opinion that Respondent does not have an orthopedic impairment that rises to the level of substantial incapacity to perform his usual job duties as a CO.

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 his position due to an orthopedic (back) condition. On September 24, 2020, Respondent was notified of CalPERS' denial of his IDR application, and he was advised 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). OAH heard this matter on January 12, 2022. Respondent represented himself at hearing. Respondent CDCR did not appear at the hearing, and the matter proceeded as a default against Respondent CDCR, pursuant to Government Code section 11520(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. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, Dr. Kolesnik testified in a manner consistent with his examination of Respondent and the IME reports. During the physical examination, Dr. Kolesnik had Respondent perform each range of motion movement three times, resulting in three very different results. The variance in range of motion findings showed Dr. Kolesnik that Respondent was exaggerating his complaints, and not giving a full effort. Dr. Kolesnik also noted inconsistencies between Respondent's reports of how prior treatments helped him and how his providers described the treatments at the time. For example, Respondent told Dr. Kolesnik that his epidural steroid injections in 2016 were of no benefit, but a progress report at the time noted Respondent stated he was feeling a lot better. Based on his records review and examination, Dr. Kolesnik testified that Respondent does not have an actual and present orthopedic back impairment that rises to the level of substantial incapacity to perform his usual and customary job duties as a CO. Dr. Kolesnik found no focal neurologic deficits, and no muscle atrophy. Although there was some decreased range of motion, Dr. Kolesnik found that Respondent was not expending a full effort and was exaggerating. Therefore, Dr. Kolesnik's competent medical opinion is that Respondent is not disabled.

Respondent testified on his own behalf that he hurt his back in January 2016 at work, and that he has pain that lasts all day, every day. He believes that he would be a liability to the state and to his partners if he returned to work as a CO. Respondent did not call any physicians or other medical professionals to testify. Respondent did offer the two workers' compensation evaluations referenced above as support for his appeal. However, the ALJ found that the standard for disability in workers' compensation cases is different than the standard for disability in a CalPERS IDR case. Thus, the workers' compensation reports did not support Respondent's position. Moreover, Dr. Kolesnik had reviewed both of these evaluations, and they did not change his opinion that Respondent is not disabled.

After considering all of the evidence introduced, as well as arguments made by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent has the burden of providing competent medical opinion that he is substantially disabled from performing the usual and customary duties of a CO. The only competent medical opinion in this case was provided by Dr. Kolesnik, who testified that Respondent is not disabled. The ALJ concluded that Respondent is not eligible for IDR, and denied his appeal.

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

March 16, 2022

Nhung Dao
Attorney