

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Tuong-Vi Dang Dinh (Respondent) applied for industrial disability retirement (IDR) on October 27, 2020, based on orthopedic (shoulders, neck, arms, hands, elbows, and low back) conditions. By virtue of her employment as a Supervising Correctional Cook for the California State Prison - Solano, 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 K. Henrichsen, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Henrichsen 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 comprehensive physical examination. Dr. Henrichsen opined that Respondent is not substantially incapacitated from performing her job duties.

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). Two days of hearing were held on November 17, 2022, and April 13, 2023. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent CDCR, pursuant to Government Code section 11520, subdivision (a).

At the hearing, Respondent presented the testimony and reports of her treating physician for her workers' compensation claims, Carl H. Shin, M.D., who is board-certified in Physical Medicine and Rehabilitation. Dr. Shin testified that he was unfamiliar with the CalPERS standard for disability retirement, that he believes Respondent should be restricted from performing her job duties because of the risk of pain, and that he does not rely on objective findings because they are "unreliable" because some people experience "pain without pathology."

Respondent also submitted medical records from her other doctors and a physician assistant to support her appeal, which were admitted as administrative hearsay. Hearsay evidence may be used to supplement or explain other evidence but is not

sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code § 11513.)

Respondent testified regarding her job duties as a Supervising Correctional Cook and that she can no longer perform her job duties due to her pain. She also disagreed with how Respondent CDCR reported her job duties on the Physical Requirements of Position/Occupational Title form, although her description of her work duties to Dr. Henrichsen at the IME, through a Vietnamese language interpreter, align with the form.

Dr. Henrichsen testified in a manner consistent with his examination of Respondent and the IME reports. He opined that Respondent reported a variety of contusions and cuts in the workplace, but “no real serious issues have occurred from each injury.”

Dr. Henrichsen testified that Respondent’s examination findings did not support the level of pain she reported. He noted that Respondent’s medical records showed different findings on different days with different providers, which he believes shows that she put forth less than full effort in his examination. Dr. Henrichsen’s competent medical opinion is that there are no job duties Respondent is unable to perform and Respondent is not substantially incapacitated from performing her job duties as a Supervising Correctional Cook.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that Respondent failed to offer sufficient competent, objective medical evidence to establish that she is substantially incapacitated from performing her usual Supervising Correctional Cook job duties. The ALJ found Dr. Henrichsen’s opinions to be more trustworthy and reliable than Dr. Shin’s because they were based on his independent clinical evaluation and because he “established that the objective criteria assessed during the physical examination did not support Respondent’s subjective complaints.” The ALJ found Dr. Henrichsen’s opinion that Respondent exaggerated her symptoms to be consistent with Respondent’s testimony and behavior at the hearing. The ALJ also found that Dr. Henrichsen understood and relied on the CalPERS standard for disability retirement. Therefore, the ALJ concluded that Respondent is not eligible for industrial disability retirement.

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

June 20, 2023

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Attorney