

ATTACHMENT B

STAFF'S ARGUMENT

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

Mary D. Coleman (Respondent) applied for disability retirement based on orthopedic conditions (left shoulder, left elbow, bilateral hands, neck, and lower back). By virtue of her employment as a Licensed Vocational Nurse (LVN) for Respondent California Department of Veteran Affairs (CalVET), Respondent was a state miscellaneous member of CalPERS.

On May 11, 2022, Respondent submitted a Service Pending Industrial Disability Retirement Election Application,¹ requesting an earlier effective retirement date retroactive to January 1, 2020. She retired for service effective May 1, 2022, and has been receiving her service retirement allowance since then.

The issues on appeal are: (1) Whether Respondent is substantially incapacitated for the performance of her usual and customary duties as an LVN at the time of application, and (2) Whether Respondent made an error as a result of inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160 that entitles her to an earlier effective retirement date.

Disability Retirement Application

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.

As part of CalPERS' review of Respondent's medical condition, John D. Kaufman, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME) of Respondent. Dr. Kaufman 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. Kaufman opined that Respondent is not substantially incapacitated to perform her usual job duties as an LVN.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position as an LVN. 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 May 23, 2024. Respondent represented

¹ Respondent inadvertently checked the Service Pending Industrial Disability Retirement box on her retirement application. However; since she is a state miscellaneous member, the correct box option should be "Service Pending Disability Retirement."

herself at the hearing. CalVET did not appear at the hearing, and the matter proceeded as a default against CalVET under 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, answered Respondent's questions, and clarified how to obtain further information on the process.

At the hearing, Dr. Kaufman testified in a manner consistent with his examination of Respondent and the IME report. Dr. Kaufman opined Respondent does not have an actual and present orthopedic impairment in her neck, left shoulder or elbow, lower back, or hands that substantially incapacitates her for performance of the usual job duties of an LVN for CalVET. After reviewing Respondent's medical records and combined with the findings of his examination, Dr. Kaufman reached the following conclusions: Respondent probably has degenerative disc disease (arthritis) in her neck and lower back, which is normal for someone of her age. Respondent had a partial tear of her left rotator cuff, but no objective evidence of impairment or limitation in Respondent's left shoulder or left elbow. While Respondent had carpal tunnel syndrome in both hands, her right hand was doing well after the surgical release. Although Respondent indicated her left-hand experienced discomfort and loss of some feeling, Dr. Kaufman characterized this as "annoying" but not impairing. Dr. Kaufman concluded there were no specific job duties or physical requirements Respondent was unable to perform due to any of her physical complaints.

Although Respondent testified that her left shoulder and arm are still spasming, Dr. Kaufman testified that he did not notice the spasms when he examined Respondent, nor did she mention it during the examination. Furthermore, Dr. Kaufman did not detect any atrophy in either area. The lack of atrophy demonstrated to Dr. Kaufman that Respondent's left shoulder and arm are not impaired. Respondent also testified that her right hand is still bothersome, including a trigger finger and the inability to fully open her hand. However, Dr. Kaufman testified that he did not notice either condition when he examined Respondent, nor did she mention it during the examination. He concluded that such a condition would be annoying but would not impair her ability to perform her usual job duties.

Respondent testified that after retiring from the state, she has worked full-time for Kaiser as a hospice nurse. In that job, she visits patients in hospice, goes over their medications, and provides supportive care. She testified her current Kaiser job does not require strenuous activity, and she is provided with accommodations. She testified that her primary reason for filing a disability retirement application was to note for the record that she incurred injuries while working for the state, and that she was not able to return to work because CalVET refused to provide her with appropriate accommodations. Respondent does not contend that she is unable to work.

Earlier Effective Retirement Date

CalPERS determined that there was no correctable mistake that would permit Respondent's request for an earlier effective retirement date more than two years before she submitted her retirement application. Respondent's appeal of this determination was also addressed at the hearing.

The Public Employees' Retirement Law (PERL) does not allow for an effective retirement date that is more than nine months before a retirement application is received, unless a member can demonstrate they made an error or omission correctable by PERL section 20160. The effective date of a written application for retirement submitted to CalPERS more than nine months after the member's discontinuance of state service shall be the first day of the month in which the member's application is received⁷ pursuant to PERL section 21252.

Respondent testified that she delayed filing her disability retirement application because she hoped CalVET would give her appropriate accommodations, or that she would heal enough to do her job. Respondent requested an earlier effective retirement date of January 1, 2020, because that is when CalVET refused to allow her to return to her job without modified duties. Respondent requests reimbursement of wages not paid by CalVET after they "put her out" of her job until she filed her disability retirement application.

CalPERS staff testified regarding Respondent's request for an earlier effective retirement date. The testimony showed that Respondent stopped working in October 2019, and by no later than January 2021, Respondent informed CalVET she could no longer work for them. Respondent became aware of the process for filing a disability retirement application in January 2021. In May 2021, CalPERS sent Respondent Publication 35 (PUB 35), which informed her to file an application for disability retirement as soon as she was aware she could no longer work for CalVET. Based on this chronology, Respondent purposefully decided to wait until May 2022 to file her application.

Proposed Decision

After considering all the evidence introduced, as well as arguments made by the parties, the ALJ denied Respondent's appeal in its entirety. The ALJ found that Respondent failed to meet her burden of establishing by a preponderance of the evidence that she is substantially incapacitated from performing her usual and customary duties as an LVN for CalVET and is thus ineligible for a disability retirement.

The ALJ also concluded that because Respondent filed her application more than nine months after she discontinued state service, she is not eligible for the retroactive retirement date she requests. The ALJ found that Respondent made a miscalculation in her decision when to file her retirement application, as opposed to an error or omission, so she is not entitled to the relief available under PERL section 20160. She was advised

by both CalVET and CalPERS of the process and timeframe for filing a disability retirement application. Instead of filing her application when she knew she could not return to work, Respondent decided to delay submitting 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 the term “industrial” be removed from the following sections: before the term “disability” under the Summary section on page 2; paragraphs 3 and 5 on page 3; paragraph 6 on page 4; paragraph 42 on page 11; paragraph 46 on page 13; paragraph 1, and after paragraph 3 on page 14; before paragraph 12 on page 18; paragraph 15 on page 19; paragraph 17 on page 20; paragraph 19, and under the Order section on page 21.

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

September 18, 2024

Nhung Dao
Attorney