

ATTACHMENT B

Staff Argument

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Eric M. Johnson (Respondent) was employed by California Health Care Facility, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS. On June 15, 2021, CalPERS received an application for industrial disability retirement (IDR) from Respondent on the basis of orthopedic (lumbar, thoracic, and cervical) conditions. Respondent's application was approved by CalPERS and Respondent retired for disability effective November 30, 2021.

On February 21, 2023, CalPERS' staff notified Respondent that CalPERS conducts reexaminations of persons on disability retirement. Respondent was further notified that he would be reevaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive disability retirement.

To remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of his or her former 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 conditions, Respondent was sent to Robert K. Henrichsen, M.D. for an Independent Medical Examination (IME). Dr. Henrichsen interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Henrichsen also performed a comprehensive physical examination. Dr. Henrichsen opined that Respondent's condition had greatly improved and that Respondent no longer met the CalPERS' disability standard.

After reviewing all the medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated. Therefore, Respondent should be reinstated to his former position as a Correctional Officer. 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 September 16, 2024. Neither Respondent nor Respondent CDCR were present at the hearing, despite being properly served with the Notice of Hearing. Consequently, the matter proceeded as a default against both Respondents pursuant to 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. Henrichsen testified in a manner consistent with his examination of Respondent. Dr. Henrichsen's medical opinion is that Respondent is able to perform the duties of his position and is therefore no longer substantially incapacitated. Dr. Henrichsen found no evidence of spine instability, nerve impingement, or muscle spasms. Dr. Henrichsen further found that Respondent had normal strength, normal sensation, normal bulk and tone, no atrophy, normal functional motion of the spine, no evidence of joint swelling, and a normal gait. Dr. Henrichsen noted that these findings were consistent with magnetic resonance imaging and electromyography studies of Respondent.

Dr. Henrichsen believes that Respondent can perform the duties of a Correctional Officer for Respondent CDCR.

Dr. Henrichsen testified that he found four indicators that Respondent amplified his symptoms: (1) Respondent's supine straight leg raising was markedly limited due to reported back pain, whereas his sitting straight leg raising was normal, which defies medical explanation; (2) Respondent claimed that testing for elbow tendinitis caused him neck pain, which also defies medical explanation; (3) Respondent claimed he was unable to stand up straight without slightly flexing his lumbar spine. However, on surveillance Respondent was observed standing up straight without any flexion; and (4) Respondent's lumbar spine flexion on 3 attempts were 50, 45 and 80 degrees. Such disparate results suggest inconsistent and/or poor efforts on examination.

The ALJ found that CalPERS met its burden of proving by competent medical evidence that Respondent was no longer substantially incapacitated. The ALJ found that the only competent medical evidence was presented by Dr. Henrichsen, who testified regarding Respondent's normal physical examination, symptom amplification, unremarkable imaging and electrodiagnostic studies, and review of surveillance video footage. The ALJ found that Dr. Henrichsen's testimony was comprehensive and persuasive. As a result, the ALJ held that Respondent is no longer substantially incapacitated from performing his usual duties as a Correctional Officer with Respondent CDCR. After considering all the evidence introduced, the ALJ denied Respondent's appeal.

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

November 20, 2024

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Staff Attorney