

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Nicholas J. Scarlett (Respondent) was employed by Respondent Salinas Valley State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Sergeant. By virtue of his employment, Respondent was a state safety member of CalPERS. On or about April 20, 2018, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (right arm, wrist, and hand) conditions. Respondent's application was approved by CalPERS and he retired effective July 17, 2018.

In September 2019, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive industrial disability retirement.

In order 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 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 its review of Respondent's medical condition, CalPERS sent Respondent for an Independent Medical Examination (IME) to Robert K. Henrichsen, M.D. Dr. Henrichsen interviewed Respondent, reviewed a pre-examination questionnaire, reviewed his work history, job description and Physical Requirements form, obtained a history of his past and present complaints, and reviewed medical records. Dr. Henrichsen also performed a comprehensive IME.

In his IME report, Dr. Henrichsen states that Respondent reported tenderness in his right forearm with tingling and pain extending down into his right wrist and fingers. Based upon his physical exam of Respondent, Dr. Henrichsen opined that Respondent's wrist flexion was normal and he had no swelling or effusion of the wrists. Dr. Henrichsen completed grip strength testing and found Respondent's grip strength to be within the "normal" range. Dr. Henrichsen also found normal reflexes in Respondent's biceps and observed no muscular atrophy in Respondent's upper arms or forearms. Dr. Henrichsen also stated that Respondent had an MRI with normal results. Respondent had two Electromyographs (EMGs). The first EMG was normal but the second showed some sensory reduction of the radial nerve of Respondent's right upper arm. Dr. Henrichsen opined that Respondent's objective examination did not support Respondent's claimed symptoms and found Respondent was not substantially incapacitated.

After reviewing all medical documentation and Dr. Henrichsen's IME report, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for industrial disability retirement, and should therefore be reinstated to his former position as a Correctional Sergeant.

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 April 13, 2021. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing. The ALJ found that Respondent CDCR was duly served with a Notice of Hearing and entered a default as to Respondent CDCR.

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. CalPERS counsel also had several email exchanges with Respondent's counsel exchanging exhibits, discovery, and discussing the hearing process.

At the hearing, Dr. Henrichsen testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Henrichsen testified that Respondent suffered a "right forearm contusion at work," but that Respondent's reports of pain were not substantiated by the examination findings. Dr. Henrichsen testified that based upon grip strength testing conducted during the IME, Respondent has "reasonable grip strength" with "no significant atrophy," which indicated that in Respondent's day-to-day life, he is not avoiding use of his right arm or hand. Dr. Henrichsen also found that the prior functional capacity strength testing performed three years earlier was not credible, as the weightlifting tests were prematurely ended due to Respondent's vertigo. Dr. Henrichsen did acknowledge during his testimony that Respondent would have difficulty performing job duties that involve gripping, such as "controlling an inmate, slinging a baton, or firing a weapon with his right hand." Dr. Henrichsen explained during cross-examination that the "difficulty" Respondent may experience would be pain rather than an inability to perform the tasks. Dr. Henrichsen concluded that despite the intermittent pain Respondent may experience during the performance of select job duties, Respondent was no longer substantially incapacitated for the performance of his duties.

Respondent testified on his own behalf. Respondent testified that his orthopedic conditions had not improved since his CalPERS IME with Dr. Howard at the time of his initial IDR application. Respondent also testified that he could not safely operate a firearm or pass a range qualification because he is not able to manipulate a firearm due to his orthopedic conditions. Respondent explained that as a Correctional Sergeant, he is required to lift unresponsive inmates who can weigh in excess of 100 pounds. He further stated that he does not have the strength in his right arm to lift and carry the weight that is required as part of his job duties. Respondent did not call any physicians or other medical professionals to testify. Respondent submitted medical records from

his treating physicians to support his appeal. All of the medical records submitted by Respondent were admitted as administrative hearsay only.

The ALJ found that CalPERS failed to establish that Respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Sergeant for the Department. The ALJ found persuasive the opinions of the initial IME, Dr. Howard, in his August 3, 2018 IME report.¹ The ALJ was persuaded by the lifting limitations assigned in Dr. Howard's IME report, and noted that "Dr. Henrichsen did not perform any testing to determine respondent's ability to lift." As a result, the ALJ found that "Dr. Henrichsen's opinions are not supported by testing of respondent's lifting and carrying strength" and therefore found his medical opinion unpersuasive.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ granted Respondent's appeal. The ALJ held:

To involuntarily reinstate respondent from industrial disability retirement, CalPERS has to establish that respondent is no longer substantially incapacitated from performing the usual duties of a [Correctional Sergeant] for the Department. . . . CalPERS did not offer sufficient competent medical evidence to meet its burden of proof. Consequently, when all the evidence is considered, CalPERS' request that respondent be involuntarily reinstated from disability retirement must be denied.

The medical conclusions of Dr. Howard and Dr. Henrichsen were similar. Both doctors concluded that Respondent could complete tasks such as using a firearm, defending himself, and subduing an inmate, but Respondent may suffer pain as a result. The doctors' opinions diverged with respect to opinions regarding how much weight Respondent would be able to lift and/or carry. Ultimately, the ALJ found Dr. Henrichsen's opinions unpersuasive. Staff does not oppose adoption of this decision by the Board.

July 14, 2021

Dustin Ingraham
Staff Attorney

¹ Dr. Howard did not testify at the hearing, was not subject to cross-examination, and his IME report was admitted as administrative hearsay.