

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO THE PROPOSED DECISION

Richard Brazil (Respondent) was employed by Respondent California Substance Abuse Treatment Facility & State Prison - Corcoran, 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 or about May 31, 2017, Respondent submitted an application for industrial disability retirement on the basis of orthopedic (left thumb, hand, and wrist) conditions. Respondent's application was approved by CalPERS and he retired effective October 3, 2017.

In March 2020 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, thus entitled to continue to receive an 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 CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to board-certified Orthopedic Surgeon Don T. Williams, M.D. Dr. Williams interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Williams also performed a comprehensive IME. Dr. Williams opined that Respondent's condition has improved and he is fit to return to work.

After reviewing all medical documentation and the IME reports, 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 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 May 27, 2021. Respondent represented himself at hearing. Respondent CDCR did not appear at the hearing.

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. Williams testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Williams' medical opinion is that Respondent can perform the duties of his position and he is therefore no longer substantially incapacitated.

Respondent testified on his own behalf. Respondent testified that he is still unable to hold a firearm or restrain an inmate because he is unable to grasp objects. Respondent did not call any physicians or other medical professionals to testify. Respondent submitted medical records from his treating physicians to support his appeal, which were admitted as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

Respondent also testified that he disagreed with the results of Dr. Williams' examination and report. He disputed the amount of face-to-face time Dr. Williams spent with him during the examination.

The ALJ found that the only competent medical evidence was presented by Dr. Williams, which established that Respondent is no longer substantially incapacitated from performing his duties as Correctional Officer for Respondent CDCR.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal. The ALJ found Respondent's claims were not persuasive. The ALJ also noted that Respondent's assertions, that he cannot drive or grasp objects, were contrary to the sub-rosa evidence showing that Respondent "repeatedly perform[ed] both tasks." The ALJ agreed that Respondent has recovered and is no longer substantially incapacitated from performing his job duties.

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

September 15, 2021

Preet Kaur
Senior Attorney