

ATTACHMENT B

STAFF'S ARGUMENT

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

Atziri Villagomez (Respondent) applied for industrial disability retirement based on an orthopedic (left knee) condition on January 18, 2020. By virtue of her employment as a Correctional Officer for Respondent California Institution for Women, 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, Leisure Yu, M.D., Ph.D., a board-certified orthopedic surgeon, performed an Independent Medical Examination (IME) on November 17, 2020. Dr. Yu interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Yu opined that his examination and review of the records showed nothing to substantiate the Respondent's subjective complaints of pain, finding that the Respondent was not permanently disabled or incapacitated from the performance of her job duties based on her left knee condition.

In order 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 due to an orthopedic (left knee) condition. On December 17, 2020, CalPERS notified Respondent of its determination.

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 hearing was held on April 29, 2022. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

At the hearing, Dr. Yu testified in a manner consistent with his examination of Respondent and his IME report. Dr. Yu found no swelling or effusion in Respondent's knee. He opined that the knee surgery Respondent underwent had fully resolved her prior injury. Dr. Yu testified that the video surveillance revealed that Respondent could move with ease, and she exhibited no indications of pain. Because there were no objective findings corresponding to Respondent's subjective complaints of alleged pain, Dr. Yu concluded Respondent is not substantially incapacitated.

Respondent testified about the accident and her injury, the pain she suffers, and the nature and duties of her job. Respondent also called Dr. Ghodadra to testify on her behalf. Dr. Ghodadra testified that Respondent could not perform many of her job-

related duties, but admitted that his recommendations were prophylactic in nature, and were motivated by a fear of causing additional injury. Respondent submitted medical records from her treating physicians to support her appeal. Because the medical records were admitted as administrative hearsay, they could not be used to support a finding of fact but could be used to supplement and explain other evidence.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that both experts were credible and qualified in their field but concluded that Dr. Yu's testimony and report were more persuasive. The ALJ found that this case was "essentially about a subjective complaint of pain in search of an objective pathology." Because there were no objective findings corresponding to Respondent's alleged pain, Respondent failed to meet her burden. Furthermore, the judge noted the numerous medical records mentioned physical preclusions that were prophylactic in nature, and thus failed to prove a physical incapacity to perform her job duties. The ALJ concluded that the Respondent is not eligible for industrial disability retirement.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." To avoid ambiguity, staff recommends correcting various dates: replace the employment commencement date of "July 17, 2017" with the correct employment commencement date of "March 9, 2015" on page 3 paragraph 1 of the Proposed Decision; "April 17, 2018" with the correct injury date of "April 17, 2017" on page 3 paragraph 2; "July 7, 2007" with the correct date of "October 20, 2007" on page 6 paragraph 11; "June 2017" with the correct surgery date of "August 2017" on page 7 in the final sentence of the third paragraph; "June 1, 2017" with the correct application date of "January 18, 2020" on the "ORDER" section located on page 35 of the Proposed Decision; and correcting spelling errors: replace "Christina" with "Cristina" on page 2; and correct the word "lift" with the word "left" on page 32, paragraph 10 of the Proposed Decision.

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

July 13, 2022

Cristina Andrade
Senior Attorney