

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Jennifer A. Fous (Respondent) was employed by Respondent California Highway Patrol (Respondent CHP) as a Public Safety Dispatcher. By virtue of her employment, Respondent was a state safety member of CalPERS. On or about January 30, 2018, Respondent CHP submitted an application for industrial disability retirement on Respondent's behalf. The application was approved by CalPERS on the basis of an orthopedic (right shoulder) condition, and Respondent retired effective February 14, 2018.

In 2020, CalPERS staff notified Respondent that CalPERS conducts reexaminations of persons on disability retirement, and that she would be reevaluated for purposes of determining whether she remains substantially incapacitated and is 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 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 condition, Respondent was sent for an Independent Medical Examination (IME) to John D. Kaufman, M.D., a board-certified Orthopedic Surgeon. Dr. Kaufman interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed medical records, and performed a physical examination. Dr. Kaufman opined that Respondent is not substantially incapacitated from the performance of her usual Public Safety Dispatcher job duties.

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 her former position as a Public Safety Dispatcher

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 January 6, 2022. Respondent was represented by counsel at the hearing. Respondent CHP did not appear at the hearing.

At the hearing, Dr. Kaufman testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Kaufman opined that Respondent can perform the duties of her position and is not substantially incapacitated from performing her Public Safety Dispatcher job duties. Dr. Kaufman found no objective findings to support a

substantially incapacitating shoulder condition. Dr. Kaufman testified that Respondent did not have atrophy, which demonstrates that she was using her right shoulder normally. Dr. Kaufman was present during the testimonies of Respondent and Domenick J. Sisto, M.D., and his opinion did not change as a result of their testimonies.

Respondent called Dr. Sisto, a board-certified Orthopedic Surgeon who has been treating her since April 2021, to testify. Dr. Sisto opined that Respondent cannot return to work as a Public Safety Dispatcher for Respondent CHP because she has impingement syndrome in her right shoulder post arthroscopic surgery “x 3”, a progressive condition unlikely to improve. Dr. Sisto found significant diminished grip strength on the right side and weakness in the deltoid and rotator cuff muscles. Dr. Sisto opined that the pain and weakness in Respondent’s rotator cuff will impinge on her ability to reach below her shoulder, and he believes her weakened grip strength to be a function of her shoulder problems. In Dr. Sisto’s experience, three shoulder surgeries will lead to diminished grip strength, and he noted that Respondent has had three shoulder surgeries and two hand surgeries; the most recent of which was completed in November 2021. Dr. Sisto’s medical opinion is that Respondent cannot perform her usual and customary duties as a CHP Public Safety Dispatcher. Dr. Sisto’s medical reports were admitted as direct evidence.

Medical records from other providers were admitted as administrative hearsay. Hearsay evidence can be used to supplement or explain other evidence but is not sufficient by itself to support a finding.

Respondent testified on her own behalf. Respondent testified regarding her Public Safety Dispatcher job duties and her work environment and equipment. Respondent testified that she continues to experience pain and discomfort in her right shoulder. She testified about her limitations due to her condition and that she cannot perform her Public Safety Dispatcher job duties.

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 found that the evidence supports a finding that Dr. Sisto’s opinion must be given more weight than the opinion of Dr. Kaufman. As the ALJ explained, both physicians found Respondent to be credible and both found objective evidence of limitations on grip strength and the ability to use her right arm. However, that Dr. Kaufman does not perceive sufficient objective findings when some exists was problematic. The ALJ further found Respondent to be credible and her reports of pain and limited ability to use her arm were supported by Dr. Sisto’s medical opinion. Finally, the ALJ found that Dr. Kaufman did not understand the demanding nature of Respondent’s job. Dr. Kaufman testified more than once that her job amounted to desk work, of a sedentary nature. Based on documentation of the physical requirements of the job, the ALJ found that Respondent’s dispatcher job is plainly not a sedentary desk job, but involves constant reaching under the shoulder, and is more physically demanding than Dr. Kaufman understood it to be. The ALJ concluded that Respondent remains entitled to industrial disability retirement benefits because she

remains substantially unable to perform her usual and customary duties as a Public Safety Dispatcher.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the proposed decision.” In order to avoid ambiguity, staff recommends replacing “. . . permanent or of extended and uncertain duration, . . .” with “. . . permanent or of extended duration which is expected to last at least 12 consecutive months or will result in death, . . .” in paragraph 3 of the Legal Conclusions section, on page 13 of the Proposed Decision.

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

June 15, 2022

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Attorney