

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Benjie M. Cortez (Respondent) applied for industrial disability retirement based on orthopedic (neck and bilateral upper extremities) and psychological conditions. By virtue of her employment as a Case Record Technician for Respondent San Quentin State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state industrial member of CalPERS.

Respondent filed an application for service pending industrial disability retirement on December 18, 2019, and has been receiving service retirement benefits effective August 31, 2019.

As part of CalPERS' review of Respondent's medical condition, Robert K. Henrichsen, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Henrichsen interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records, and performed a physical examination. Dr. Henrichsen opined that Respondent was not substantially incapacitated from performing her job duties.

Alberto Lopez, M.D, a board-certified Psychiatrist, performed a psychiatric Independent Medical Examination (IME). Dr. Lopez interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records, performed a Mental Status Examination, and administered psychological tests. Dr. Lopez opined that Respondent was not substantially incapacitated from performing her job duties.

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. CalPERS also determined that Respondent's alleged disability does not meet the criteria for "industrial" as defined by Government Code section 20048.

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 October 3, 2022. Neither Respondent nor Respondent CDCR appeared at the hearing. The ALJ found that the matter could proceed as a default against both Respondents, pursuant to Government Code section 11520, subdivision (a).

At the hearing, Dr. Henrichsen testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Henrichsen's medical opinion is that Respondent likely suffers from minor arthritis in the neck and tendonitis in the elbow. He opined that she put forth minimal effort during the examination. His review of Respondent's medical records revealed a history of complaints of vague and generalized symptoms with very little competent medical evidence of a cause, and conflicting prior medical diagnoses. Dr. Henrichsen opined that Respondent's subjective symptoms were far greater than any objective findings. Therefore, Dr. Henrichsen's medical opinion is Respondent is not substantially incapacitated from performing her Case Record Technician job duties.

Dr. Lopez testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Lopez's medical opinion is Respondent has depression, but her depression does not arise to the level of being incapacitating. Therefore, Dr. Lopez's medical opinion is Respondent is not substantially incapacitated from performing her Case Record Technician job duties.

After considering all of the evidence introduced, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden of proof and failed to provide competent medical evidence sufficient to demonstrate that she is substantially incapacitated from performing her usual duties as a Case Record Technician. The ALJ found the persuasive medical evidence presented at hearing established that Respondent was not substantially incapacitated from the performance of her usual duties. Consequently, the ALJ found the second issue of whether Respondent's conditions were industrial is moot. The ALJ concluded that Respondent is not eligible for industrial disability retirement.

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." To avoid ambiguity, staff recommends correcting "May 21, 2021" to "May 25, 2021" in paragraph 4, under the Factual Findings section, on page 3 of the Proposed Decision; correcting "§ 22156, subd. (a)(1)" to "§ 21156, subd. (a)(1)" in paragraph 1, under the Legal Conclusions section, on page 9 of the Proposed Decision; and correcting "section 21150, subdivision (a)" to "section 21156, subdivision (a)" in paragraph 4, under the Legal Conclusions section, on page 10 of the Proposed Decision.

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

January 17, 2023

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Attorney