

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Matthew M. Scott (Respondent) was employed by Respondent San Quentin State Prison, California Department of Corrections & Rehabilitation (Respondent CDCR) as a correctional officer. By virtue of his employment, Respondent is a state safety member of CalPERS.

On October 16, 2006, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (low back and lower extremities) condition. Respondent's application was approved by CalPERS and he retired effective February 28, 2007.

In 2020, CalPERS staff notified Respondent that CalPERS conducts reexaminations of persons on disability retirement, and that he would be reevaluated to determine whether he remains substantially incapacitated and is entitled to continue to receive industrial disability retirement.

In order to remain eligible for industrial 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 Robert K. Henrichsen, M.D. Dr. Henrichsen interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Henrichsen also performed a comprehensive IME. Dr. Henrichsen opined that Respondent was no longer incapacitated from performing his 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 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 April 11-12, 2022. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

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 did not have observable difficulties walking or standing on his toes and heels, had good functional motion in his low back and good mobility in his trunk. Dr. Henrichsen noted that Respondent displayed symptoms when bending to the right, which were consistent with wear and tear in his lower back. Although Respondent rated

his pain on the day of examination as six out of ten, Dr. Henrichsen placed Respondent's pain as a two or two and a half. Dr. Henrichsen found Respondent to be credible, and noted that he did not believe Respondent was exaggerating his symptoms.

Dr. Henrichsen reviewed MRI scans of Respondent's lumbar spine from June 2010 and November 2015. Dr. Henrichsen observed that the June 2010 MRI showed degenerative disc disease at the L4-5 and L5-S1 levels, with some mild loss of height at L5-S1. Dr. Henrichsen further noted that there was mild broad-based disc protrusion and mild central stenosis at the L4-5 and L5-S1 levels. Dr. Henrichsen found both MRI scans to be similar, in that both reflected degenerative disease at L4-5 and L5-S1, and a high intensity zone in L4-5 and L5-S1. Dr. Henrichsen observed that the November 2015 MRI appeared to indicate broad-based disc bulge at the L3-4 level, which was not previously present.

Dr. Henrichsen also reviewed the sub rosa video of Respondent. Dr. Henrichsen opined that it did not appear that Respondent had physical difficulties with his activities in the video. Dr. Henrichsen believes there are inconsistencies in Respondent's statements that he can perform the duties of a general contractor but not those of a correctional officer.

Dr. Henrichsen also reviewed a medical report prepared by Steven S. Isono, M.D., Respondent's treating physician. Dr. Henrichsen acknowledged Dr. Isono's conclusion that Respondent is substantially incapacitated for the performance of his duties as a correctional officer but asserted that Dr. Isono made that determination as a prophylactic measure. Dr. Henrichsen further posited that the reason Respondent was initially found to be substantially incapacitated for the performance of his duties had to do with nerve pain, and that there is no current evidence of nerve impingement.

Dr. Henrichsen opined that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated.

Respondent testified on his own behalf. Respondent testified about his duties as a correctional officer and the restrictions he faces due to his medical condition. Respondent testified that he believed he would be placing his colleagues in danger if he were allowed to return to work because he could not engage in combat with a prisoner. Respondent enjoyed serving as a correctional officer and thought of it as the "family business." Several of his family members also worked at San Quentin. Respondent took joy in the rehabilitation aspect of his work. Respondent did not want to retire and did so only because no permanent correctional officer assignment was available to him that would accommodate the restriction on restraining inmates that his treating physician recommended.

Respondent called Dr. Isono to testify at the hearing. Dr. Isono conducted medical evaluations of Respondent on January 8, 2016, and April 15, 2021, and wrote initial and supplemental reports in 2016 and 2021 following his examination. Dr. Isono reviewed Respondent's medical records including the MRI scans and x-ray images, the sub rosa video, the correctional officer job analysis and essential functions, and information from

CalPERS regarding the physical requirements of a correctional officer in San Quentin. Dr. Isono's testimony at hearing was consistent with his written reports.

Dr. Isono explained the differences between the controlled activities depicted in the sub rosa video and the duties of a correctional officer. Dr. Isono noted that Respondent's activities reflected in the sub rosa video are not inconsistent with Respondent's diagnoses. Dr. Isono stated that, as a general contractor, Respondent can determine the extent of his physical activities, and not engage in activity that would be too difficult. Dr. Isono explained that Respondent could carry up to 60 pounds in a controlled fashion, if he had the opportunity to prepare by stabilizing his core and spine.

Dr. Isono indicated that Respondent could likely walk a mile in a controlled environment, so long as Respondent could take breaks. Dr. Isono stated that Respondent could bend forward, walk up and down stairs, and sit and stand in a controlled environment. Dr. Isono noted that he does not believe Respondent could run without hurting his back or lift any weight over 75 pounds. Dr. Isono contrasted Respondent's activities as a general contractor with the duties required of a correctional officer. Dr. Isono indicated that correctional officers are often required to run at full sprints to respond to alarms, and that they are required to make this run while wearing a duty belt. Dr. Isono noted that correctional officers frequently engage in physical altercations with inmates, and occasionally with inmates who weigh over 400 pounds. Dr. Isono also referenced the job analysis of a correctional officer and indicated that Respondent is unable to engage in spontaneous rotating, twisting, wrestling or forcibly restraining an inmate. Dr. Isono opined that it would be incomprehensible and unethical from a medical standpoint to allow Respondent to continue to work as a correctional officer.

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 Respondent's medical expert, Dr. Isono, provided thorough and credible testimony that Respondent remained substantially incapacitated from performing his job duties as a Correctional Officer. The ALJ further found that Dr. Henrichsen did not identify any material improvement in Respondent's condition between his retirement in February 2007 and either Dr. Henrichsen's examination in July 2020, or the follow-up x-rays and MRI in October 2020 and June 2021.

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

June 15, 2022

Austa Wakily
Senior Attorney