

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

John Cano (Respondent) applied for industrial disability retirement (IDR) on April 2, 2020, based on an orthopedic (left and right arm) condition. By virtue of employment as a Correctional Counselor I for Pleasant Valley State Prison, 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, Don T. Williams, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Williams interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed his medical records and performed a comprehensive physical examination. Dr. Williams opined that Respondent was not substantially incapacitated from performing his usual and customary 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 his position.

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 September 7, 2022. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

At the hearing, Dr. Williams testified in a manner consistent with his examination of Respondent and his IME report. Dr. Williams concluded that Respondent was not substantially incapacitated from his job as a Correction Counselor I. Dr. Williams noted that Respondent was able to rise from a chair and walk with a normal gait. Dr. Williams found that Respondent's cervical spine was normal. He had full range of motion in his shoulders and left elbow, and nearly full range of motion in his right elbow. Respondent could extend both arms against gravity but complained of pain when doing so. Dr. Williams also reviewed Respondent's medical records, which described bilateral injuries to Respondent's triceps, surgeries on both triceps, and Respondent's recovery which proceeded well.

Dr. Williams diagnosed Respondent with "Post repair of bilateral Triceps Tendon Ruptures of olecranon." Dr. Williams concluded that Respondent had improved and

would continue to do so. Dr. Williams found that tenderness in the surgical areas, similar to the symptoms experienced by Respondent, is common and should have taken Respondent six to eight months to heal. Dr. Williams found good strength in the repair to both triceps, both of which were intact.

Dr. Williams explained that repaired injuries like Respondent's should not cause lifting limitations. This is because the biceps and shoulder muscles, rather than the triceps, are used to lift and carry. Pushing is the activity most impacted by Respondent's injuries; however, based on Respondent's age and physical examination, Dr. Williams did not believe his ability to push was limited. Given the full range of motion in Respondent's elbows, Dr. Williams determined that he was able to defend himself and engage in workplace altercations, although he might experience pain afterwards.

Respondent testified on his own behalf and explained the requirements of his job. Pursuant to his testimony, 75 percent of his job as a Correction Counselor I was a desk job. The remaining 25 percent was spent responding to incidents, circulating among inmates and going to hearings.

Regarding his injuries and recovery, Respondent stated that he still has difficulty performing basic life activities and that he is unable to perform some of his job duties. Respondent does not think he can defend himself or others, apply restraints, or carry inmates. He does not think he could push the heavy work doors shut. Respondent admitted that he never had to subdue inmates, apply restraints, engage in an altercation, apply a takedown maneuver, use his baton, or use pepper spray. None of Respondent's clerical duties were impacted by his injury and subsequent recovery.

Respondent called a former Correctional Counsel III to testify about the general job duties of a Correctional Counselor I. He also called Christopher Fleming, M.D. to testify on his behalf. Dr. Fleming is a board-certified Orthopedic Surgeon, but is not Respondent's treating physician. Dr. Fleming did not perform a physical examination of Respondent. Instead, he based his opinion solely on a review of medical records.

Dr. Fleming opined that Respondent was substantially incapacitated based on ongoing reports of weakness in his triceps. Although none of Respondent's treating physicians stated that Respondent was substantially incapacitated, and none of the treating physicians used the CalPERS standard in their reports, Dr. Fleming felt that the subjective complaints of pain were sufficient to reach this conclusion. Dr. Fleming also stated that he did not know which of Respondent's complaints of pain were true because he never examined Respondent.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent did not meet his burden to demonstrate substantial incapacity. The ALJ gave less weight to Dr. Fleming's medical opinion because Dr. Fleming never examined Respondent. In contrast, Dr. Williams applied the applicable standards for industrial disability retirement, reviewed medical records, performed a thorough physical exam, then based his

conclusions on all these different sources of information. Accordingly, the ALJ concluded that Respondent is not eligible for industrial disability retirement.

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

November 16, 2022

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Senior Attorney