

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

On December 13, 2021, Christopher Chung (Respondent) applied for Disability Retirement based on orthopedic (right hip and low back) conditions. By virtue of his employment as a Dentist for California Department of Veterans Affairs Veterans Home (Respondent VA), Respondent was a state miscellaneous member of CalPERS.

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 their 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, Don T. Williams, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME) to evaluate Respondent for his claimed orthopedic condition. 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 thorough physical examination of his cervical spine, lumbar spine, and upper and lower extremities. Dr. Williams opined that Respondent is not substantially incapacitated from the performance of his usual duties as a Dentist.

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 remote hearing was held on January 18, 2023. Respondent was represented by counsel at the hearing. Respondent VA did not appear at the hearing. Consequently, this matter proceeded as a default against Respondent VA under Government Code section 11520, subdivision (a).

At the hearing, Dr. Williams testified in a manner consistent with his examination of Respondent and the IME report. Based on review of an MRI and x-rays of Respondent's right hip, Dr. Williams found that the major ligaments in his hip joint were normal, and that other major tendons and muscles were intact. During the physical examination, Dr. Williams found Respondent to have good range of motion in his cervical spine with no complaints of pain, normal motion in his upper and lower extremities, and good motion in his hips overall. Furthermore, arthroscopic hip surgery had been recommended to Respondent on numerous occasions by various physicians, but Respondent had consistently declined to undergo the surgery.

Respondent testified on his own behalf that he is unsure what caused his injury, and that he first experienced pain in 2020. He noted that the pain emerged gradually "since reaching adulthood," and that it was likely caused by "a combination of sports, life, and

dentistry.” Respondent stated the pain had gradually increased since its initial onset, particularly while performing dental procedures.

Respondent has worked for Respondent VA part-time since 2015. He indicated the hour and a half commute time driving to work 2-3 times per week tends to worsen the pain in his hip and lower back. Respondent testified that since most of his patients are over 80 years old and have limited mobility, he has to lean “aggressively” to the right in a non-ergonomic position to treat his elderly patients. He stated he experiences increased pain in his back while sitting on a stool, and increased pain in his right hip while standing. Respondent admitted he does not wish to undergo arthroscopic or hip replacement surgery.

Respondent also called two dental assistants to testify on his behalf. Both testified they observed Respondent experiencing pain during dental procedures, but neither could provide a competent medical opinion concerning substantial incapacity. Respondent did not call any physicians or any other medical professionals to testify.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found Dr. Williams’ opinion that Respondent is not substantially incapacitated due to his orthopedic conditions to be persuasive, because it was supported by a thorough review of Respondent’s medical records and a detailed physical examination. Overall, the ALJ found that Dr. Williams persuasively explained the factual basis for his conclusions and opinion. Although the ALJ concluded that Respondent may experience discomfort while performing longer dental procedures, discomfort alone is insufficient to establish substantial incapacity. Further, the ALJ noted that all the medical professionals who submitted reports in this case agree that Respondent would substantially benefit from arthroscopic and/or hip replacement surgery but Respondent is unwilling to undergo either procedure.

For these reasons, the ALJ found Respondent did not meet his burden of demonstrating that he is substantially incapacitated, and therefore denied his application for disability retirement.

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

March 15, 2023

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Nhung Dao  
Attorney