

**ATTACHMENT B**

**Staff Argument**

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

Joshua Ryan (Respondent) applied for industrial disability retirement based on orthopedic (thoracic, cervical, lumbar spine, and left shoulder) conditions on March 8, 2022. By virtue of his employment as a Firefighter I for California Department of Forestry and Fire Protection (Respondent CalFIRE), Respondent is a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Harry A. Khasigian, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Khasigian 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. Dr. Khasigian opined that Respondent was not substantially incapacitated from performing his job duties as a Firefighter I for Respondent CalFIRE.

To be eligible for industrial 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 report, 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 May 10, 2023. Respondent represented himself at the hearing. Respondent CalFIRE did not appear at the hearing, and a default was taken as to Respondent CalFIRE only pursuant to Government Code Section 11520.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet, answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, Dr. Khasigian testified in a manner consistent with his examination of Respondent and the IME report. Dr. Khasigian believes that Respondent is not substantially incapacitated to perform the usual and customary duties of a Firefighter I. Dr. Khasigian found that there was normal range of motion of Respondent's cervical, lumbar and thoracic spine, his shoulders were normal and physical examination revealed nothing of significance. Respondent's x-rays and MRI showed no objective abnormalities which correlate with Respondent's subjective complaints.

Respondent testified on his own behalf. On June 2, 2020, Respondent was a passenger in a rollover fire engine accident while responding to a helicopter crash. He returned to full duty for a few months in 2021, but he has not worked in any capacity since that time. Over the course of the past three years, Respondent completed 24 sessions of physical therapy and visited a chiropractor three times. He underwent surgery on his left shoulder on May 8, 2023. Respondent takes nonsteroidal anti-inflammatories for pain management.

Respondent did not call any physicians or other medical professionals to testify. He submitted a Panel Qualified Medical Evaluation (PQME) report and a transcript of a consultation with another doctor, both of which were completed in conjunction with his workers' compensation claim. Both documents were admitted as administrative hearsay. Administrative hearsay may be used to supplement or explain other evidence but is not sufficient in itself to support a finding. The ALJ reviewed both reports, and found that neither one contained an opinion as to whether Respondent was substantially incapacitated from performing the usual duties of a Firefighter I.

Respondent presented the non-medical testimony of Captain Jesse Campbell who testified regarding Respondent's work performance before and after the accident.

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 had the burden of proof and failed to meet his burden. The ALJ found that Dr. Khasigian's testimony was credible, persuasive, and consistent with the medical evidence. His opinion that Respondent is not substantially incapacitated from the performance of his usual duties was well-reasoned and supported by his physical examination and review of prior medical records, including his workers' compensation records. The AJ also noted that the workers' compensation standard for disability is different than the CalPERS standard for disability retirement. The ALJ concluded that CalPERS correctly denied Respondent's application 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 that the word "industrial" be inserted before the words, "disability retirement" on page 21, in the last sentence of the "Conclusion."

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

July 19, 2023

---

Noelle Lamprecht  
Senior Attorney