

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Marc Berginc (Respondent) applied for Service Pending Industrial Disability Retirement based on internal (reactive airway disease) and cardiovascular (hypertension) conditions on April 5, 2021. By virtue of employment as a Correctional Officer (CO) for Respondent California Correctional Institution, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS. Respondent retired for service effective April 17, 2021, and has been receiving a service retirement allowance since then.

As part of CalPERS' review of Respondent's medical condition, Robert B. Weber, M.D., a board-certified internal medicine and cardiovascular disease specialist, examined respondent in an Independent Medical Examination (IME) on July 26, 2021. Dr. Weber interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. On March 29, 2022, Dr. Weber reviewed additional records regarding Respondent's claimed medical conditions. Dr. Weber opined that Respondent was not permanently disabled or incapacitated from the performance of his duties as a CO based on either internal or cardiovascular conditions.

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 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.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position as a CO. On September 8, 2021, Respondent was notified of CalPERS' decision to deny his disability retirement application based on the internal (reactive airway disease) and cardiovascular (hypertension) claims.

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, 2022. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent CDCR, pursuant to Government Code section 11520(a).

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. CalPERS

answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, Dr. Weber testified in a manner consistent with his examination of Respondent and the IME report. Dr. Weber's medical opinion is that Respondent, while probably having Reactive Airway Dysfunction Syndrome, does not have impairment that arises to the level of substantial incapacity to perform his usual job duties. Dr. Weber did not find exertional dyspnea that would represent a substantial incapacity to perform his usual and customary duties. At hearing, Dr. Weber explained dyspnea means difficulty breathing. However, during Respondent's physical exam, Dr. Weber found that his lungs were clear, and that he had no wheezing or dyspnea.

After reviewing additional medical records provided to him in March of 2022 regarding Respondent's cardiovascular (hypertension and mid left ventricular hypertrophy) condition, Dr. Weber opined that Respondent does not have an impairment that arises to the level of substantial incapacity to perform his usual job duties. Therefore, Respondent is not substantially incapacitated due to internal (reactive airway disease) or cardiovascular (hypertension) conditions.

Respondent testified on his own behalf that his work for CDCR exposed him to several environmental irritants, including pepper spray, riot-control weapons, pesticides, and pollen, which caused him to have difficulty breathing. Furthermore, Respondent testified that his breathing difficulties worsened in 2020 and 2021, when COVID-19 protocols required him to wear a facemask while at work. Respondent testified that over time, he began to fear that his difficulty breathing would jeopardize his safety and his ability to do his job adequately.

Respondent did not call any physicians or other medical professionals to testify on his behalf. Respondent submitted some medical records from his treating physicians to support his appeal. The medical records were admitted as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

After considering all of the evidence introduced, as well as arguments made by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent failed to meet his burden to establish that at the time of his application, he was substantially incapacitated from performing his usual job duties based on his internal (reactive airway disease) and cardiovascular (hypertension) conditions. Furthermore, the ALJ found Dr. Weber's conclusions regarding Respondent's condition were credible and supported by his experience and training, especially in the field of cardiology. The ALJ also found that the evidence introduced by the Respondent was insufficient to rebut Dr. Weber's findings.

The ALJ concluded that Respondent is not eligible for industrial disability retirement, and that his IDR application must be denied.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the Proposed Decision.” In order to avoid ambiguity, staff recommends deleting “and uncertain” between the words extended and duration in paragraph 1 under the Legal Conclusions section, on page 13 of the Proposed Decision.

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

June 15, 2022

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Nhung Dao  
Attorney