

**ATTACHMENT B**

**Staff Argument**

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

John Deis (Respondent) applied for industrial disability retirement on November 16, 2020, based on an orthopedic (neck) condition. By virtue of employment as a Correctional Officer for R J Donovan Correctional Facility, 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, Darren D. Thomas, M.D., a board-certified orthopedic surgeon, performed an Independent Medical Examination (IME). Dr. Darren D. Thomas interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Thomas opined that Respondent is not substantially incapacitated from performing the job duties of a correctional officer.

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 June 7, 2022, and July 18, 2022. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

At the hearing, Dr. Thomas testified in a manner consistent with his examination of Respondent and the IME report. Dr. Thomas' medical opinion is that although Respondent had spinal surgery in the past, he did not have an actual and present orthopedic cervical spine impairment that rose to the level of incapacity. Dr. Thomas further opined that Respondent's complaints of pain were outside the proportion of the organic findings. Therefore, Respondent is not substantially incapacitated.

Respondent testified on his own behalf regarding his working conditions, injury and worsening medical condition. He testified that his treatment started with conservative measures including physical therapy and exercises but concluded with spinal surgery. The surgery lessened Respondent's pain and numbness, but did not cure the symptoms. Respondent also testified that he could not perform his job duties due to his medical condition.

Respondent called two of his former supervisors to testify on his behalf. Both supervisors testified that Respondent was a good officer, who could be relied on to perform his daily duties and support other staff.

Respondent also called Dr. Larry Dodge, a board-certified orthopedic surgeon to testify at hearing. Dr. Dodge has treated Respondent since May 2019. Dr. Dodge confirmed that Respondent's treatment began with physical therapy, acupuncture and epidural injections, none of which worked well. Dr. Dodge then performed Respondent's spinal surgery (anterior cervical discectomy and fusion) which helped, but unfortunately did not eradicate Respondent's symptoms. Dr. Dodge testified that Respondent cannot return to work because of neck pain, radiculopathy in the right arm, spurs and stenosis ranging from moderate to severe. Dr. Dodge believes if Respondent attempted his job duties, he could suffer paralysis causing harm to himself and others.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found Dr. Dodge's medical opinion to be more reliable than that of Dr. Thomas because Dr. Dodge has treated Respondent for three years, performed his spinal surgery and has performed thousands of spinal surgeries over the years. The ALJ found Dr. Thomas' opinion less reliable because he saw Respondent once for the IME, and has performed only one spinal surgery in the last four years of his practice. Moreover, the ALJ opined that Respondent's two supervisors had first-hand knowledge of Respondent's work ethic, job duties which frequently involved violent altercations, and work conditions which involved wearing heavy tactical equipment. The ALJ concluded that Respondent is eligible for industrial disability retirement, and granted his appeal.

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