

**ATTACHMENT B**

**Staff Argument**

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

Seth D. Horst (Respondent) was employed by California Highway Patrol (Respondent CHP) as a California Highway Patrol Officer. By virtue of his employment, Respondent was a state patrol member of CalPERS.

On December 15, 2020, CalPERS received an application for industrial disability retirement (IDR), claiming an internal condition (left inguinal hernia (repaired) and ilioinguinal nerve pain). On February 10, 2021, Respondent's IDR application was approved, and he retired effective April 2, 2021.

On May 26, 2022, CalPERS informed Respondent that CalPERS periodically conducts reexaminations of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he remained substantially incapacitated and entitled to continue to receive IDR benefits.

To remain eligible for disability retirement, competent medical evidence must demonstrate that an individual remains substantially incapacitated from performing the usual and customary duties of his former 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, Respondent was sent for an Independent Medical Examination (IME) to Amardip Bhuller, M.D., who is board-certified in both General and Plastic Surgery with extensive experience working on hernias, including the specific type of hernia experienced by Respondent. Dr. Bhuller has performed similar corrective hernia-repair surgeries as that which Respondent underwent in December 2017. Dr. Bhuller has also performed many peripheral nerve repairs, which is the likely cause of Respondent's claimed ilioinguinal nerve problem.

Dr. Bhuller interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Bhuller also performed a comprehensive IME. Dr. Bhuller opined that Respondent's hernia-repair surgery was very successful, there were no signs of ongoing hernia, and Respondent's conduct post-surgery strongly indicated he had no ongoing chronic pain associated with the hernia or the corrective surgery.

After reviewing all of the medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated. Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). Two days of hearing were held on December 14, 2023, and January 25, 2024.

Respondent was represented by counsel at the hearing. Respondent CHP did not appear at the hearing.

At the hearing, Dr. Bhuller testified in a manner consistent with his examinations of Respondent and the reports he prepared. Dr. Bhuller found no evidence of any hernia recurrence, no evidence of any abdominal masses, and no evidence of any recurrent varicocele (a swelling of the testes and epididymis in the scrotal sac). Dr. Bhuller found no objective evidence of any condition which would cause Respondent to have left ilioinguinal pain. Dr. Bhuller found no objective evidence of any health condition that was caused by Respondent's 2017 hernia or its surgical repair. Dr. Bhuller watched Respondent walk and saw no gait disturbance or other indications of exertion causing pain. Dr. Bhuller found a "substantial lack of medical records" from after the hernia repair surgery in 2017 to support Respondent's claim of ongoing pain.

Dr. Bhuller reviewed and opined on numerous investigation videos. These videos were all posted online by either Respondent or by a martial arts training academy. Several videos depicted Respondent engaging in strenuous physical activity, including demonstrating Brazilian jiu-jitsu moves. CalPERS' investigators gathered evidence showing that Respondent had participated in jiu-jitsu tournaments, including winning matches after he was approved for IDR. Dr. Bhuller testified that ilioinguinal pain can be exacerbated by putting pressure on the groin or hip area. However, in multiple video clips of Respondent performing Brazilian jiu-jitsu movements, opponents placed pressure on Respondent's hip and groin area without visible pain to Respondent. Further, many of the movements show Respondent engaging in exertional activities that would normally exacerbate ilioinguinal pain, but Respondent did not appear to be in pain. Due to the findings on IME, review of medical records and investigation materials, Dr. Bhuller's competent medical opinion is that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated.

Respondent testified that "he was taken off work multiple times" from 2017 to 2020, until he retired in April 2021, due to groin pain (burning sensation in his inner left thigh and left testicle) from sitting in a patrol car while wearing a duty belt and ballistic vest. He stated that working multiple days in a row caused swelling in his left testicle, making it painful to wear underwear. Respondent claimed that he applied for IDR based on David McKinney, M.D.'s Physician's Report dated October 20, 2020, which did not clear him to go back to normal patrol duty because of his pain. Respondent testified that his hernia repair surgeon, Dr. Skau, told him that he would continue to have pain for the rest of his life, so he modified his lifestyle to keep the pain at a "low grade." He "always has 'low grade pain' in his left testicle" yet did not seek treatment for his groin pain until July 12, 2021. During that visit, Respondent's complaints concerned "heart burn" and "anxiety", and he denied experiencing abdominal pain, nerve pain, nerve weakness or numbness.

Respondent disagreed with the results of Dr. Bhuller's examination and report. Respondent asserted that he could not sit in a car for hours at a time, especially when he had the added pressure on his hip from wearing a duty belt.

Dr. McKinney testified on Respondent's behalf. Dr. McKinney is currently retired, but he was formerly an occupational medicine physician and examined Respondent in connection with his workers' compensation claim. Dr. McKinney testified that Respondent had ongoing pain issues associated with the hernia which made him unfit for "extraordinary duty like police officers must do, like combat duty." Dr. McKinney conceded that he had not examined Respondent in person since at least August of 2020, with all subsequent evaluations being remote. Dr. McKinney also admitted that his understanding of Respondent's condition was based entirely on Respondent's own reports of the pain he was experiencing. Prior to the August 2020 remote appointment, Respondent underwent a second ultrasound to determine if he had a recurrence of the hernia. Ultrasound results showed no such recurrence. Dr. McKinney also admitted that his prohibition of lifting over 30 pounds was "prophylactic", and that Respondent can in fact lift over 30 pounds. Dr. McKinney admits that he is not familiar with the CalPERS standard for disability.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal. The ALJ found that CalPERS had the burden of proving by a preponderance of the evidence that Respondent was no longer substantially incapacitated from performing the usual and customary duties of a California Highway Patrol Officer. The ALJ found Dr. Bhuller's testimony persuasive and credible. Dr. Bhuller has many years of experience with hernia repair surgery identical to that received by Respondent. Dr. Bhuller persuasively testified that his physical examination and review of medical records show that Respondent's hernia repair surgery in December 2017 was successful. During his IME, Dr. Bhuller found no signs of any hernia, observed that Respondent's walking and movements were normal, observed Respondent getting out of a low-seated car easily, and watched videos showing Respondent's jiu-jitsu activities. Dr. Bhuller did not find any abdominal wall discomfort during exertion. Dr. Bhuller credibly explained that a person with a chronic problem with ilioinguinal pain typically would complain of pain on exertion, during bending and flexion of the leg, and during exertional activities causing pressure on the abdomen. Respondent did not exhibit pain during any of those activities. Notably, Respondent never complained to any medical provider of any pain in his abdomen or ilioinguinal area after his retirement.

The ALJ also noted that Respondent admitted that he began pursuing medical treatment for his pain only after Dr. Bhuller's evaluation because he wanted to prove to CalPERS that he had such pain in order to keep his disability retirement benefits. The ALJ found Dr. McKinney's testimony to be less persuasive because Dr. McKinney did not understand the CalPERS standard for disability, relied exclusively on Respondent's subjective complaints of pain, and last examined him in August 2020 (which visit was by remote access). Overall, the ALJ found no objective medical evidence to support Respondent's claim of substantial incapacitation from performing his usual and customary job duties as a CHP officer.

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

April 16, 2024

MEHRON ASSADI  
Staff Attorney