

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

In this case, Rory M. Mayberry (Respondent) applied for Industrial Disability Retirement, based on orthopedic conditions (left shoulder, neck and bilateral wrist). By virtue of his employment as a Senior Medical Assistant for respondent Department of Mental Health, Vacaville Psychiatric Program, he was a safety member of CalPERS. A hearing was completed on April 10, 2013, and Respondent was represented by counsel.

As part of CalPERS' review of his medical condition, Respondent was sent for an IME examination to Orthopedic Surgeon Dr. Joseph McCoy. Dr. McCoy interviewed Respondent, and obtained Respondent's summary of his medical history, treatment, work history, recreational activities, and present complaints. Dr. McCoy reviewed all of Respondent's prior medical records.

Dr. McCoy testified that when he thoroughly reviewed Respondent's medical record, he was struck by the very mild findings on Respondent's diagnostic studies. Dr. McCoy believes that Respondent might experience some discomfort in performing his most strenuous tasks, although if he does, this does not create a substantial incapacity to perform his job duties. Dr. McCoy did find that Respondent's mild findings rose to the level of some impairment.

Of note, Dr. McCoy questioned whether Respondent put forth his best effort during testing. Examination revealed mild diminished range of movement, however, Respondent demonstrates giveaway weakness in all muscle groups of the left arm, including grip strength, suggesting some lack of complete effort. Dr. McCoy was unable to identify a specific focal neurologic defect.

Dr. McCoy believes that there are no specific job duties that Respondent is unable to perform because of his physical condition. Dr. McCoy believes he may experience some discomfort, but Respondent is not substantially incapacitated for the performance of his duties. Dr. McCoy noted that Respondent has been performing his job tasks all along, and on a continuing basis up until his carpal tunnel surgery. Dr. McCoy believes that Respondent's carpal tunnel surgery has certainly not altered his capacity to any significant degree. In fact, Dr. McCoy found that Respondent's own doctors felt that Respondent was capable of performing his usual and customary work – right up until the time Respondent applied for disability.

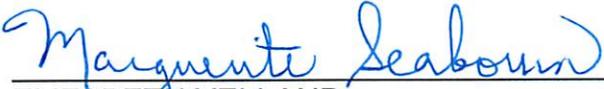
The Administrative Law Judge (ALJ) held that it was not established through competent medical evidence that Respondent's orthopedic conditions substantially incapacitated him from the performance of his usual and regular duties as a Senior Medical Assistant. Dr. McCoy's reports and testimony comprised the only competent and direct medical evidence in this case. The ALJ found that Dr. McCoy recognized that Respondent experienced discomfort and difficulty performing certain activities, but Dr. McCoy nevertheless opined that there are no job duties that Respondent could not perform because of his physical condition. Dr. McCoy further opined that Respondent is not substantially incapacitated for the performance of his duties. Respondent presented no

competent medical evidence to the contrary. Thus, under the Government Code and case law, the ALJ found that Respondent is not substantially incapacitated from performance of his usual duties.

The ALJ concluded that Respondent's appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

August 21, 2013

*for*   
ELIZABETH YELLAND  
Senior Staff Attorney