

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

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

James Roberson (Respondent) is a retired member previously employed by the Department of General Services (DGS) as a custodian, and is a miscellaneous member of CalPERS.

Respondent submitted an application for disability retirement on the basis of claimed orthopedic (lower back and shoulder) and psychological conditions. CalPERS staff reviewed relevant medical reports and a written description of Respondent's usual and customary job duties. Robert Henrichsen, M.D., a board-certified Orthopedic Surgeon, examined Respondent and reviewed applicable medical records. Benjamin Kaufman, M.D., a board-certified Psychiatrist, examined Respondent and reviewed applicable records.

In written reports, Dr. Henrichsen and Dr. Kaufman expressed the opinion that Respondent was not substantially incapacitated from performing the usual and customary duties of a Custodian for DGS. CalPERS denied Respondent's application for disability retirement. Respondent appealed CalPERS' determination and a hearing was held on July 25, 2013 and August 29, 2013.

In order to be eligible for disability retirement, competent medical evidence must demonstrate that the individual is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition that is the basis for the claimed disability must be permanent or of an extended and uncertain duration.

At the hearing, the Administrative Law Judge (ALJ) heard evidence from three medical doctors about this matter.

Respondent's witness Carl H. Shin, M.D., board-certified in Physical Medicine and Rehabilitation, whose practice is focused on chronic pain management, testified that Respondent has chronic low back pain. Dr. Shin testified that he "did not disbelieve" Respondent's complaints and that Respondent could "possibly" do his work, but that pain would make it "difficult." Dr. Shin testified that his practice is to "minimize human suffering." He found Respondent incapacitated from his employment. Dr. Shin did not find specific physical reasons for the orthopedic pain, but did see "subtle" medical concerns. He opined that it is not possible to tell if a patient's claims are accurate.

The medical examination report submitted by Respondent of Dr. Ethan Harris, Psychiatrist, found that Respondent's "credibility is marginal."

Dr. Henrichsen, the Orthopedic Independent Medical Examiner, testified that after recovery from a successful laminectomy, during which he was temporarily disabled, Respondent was not substantially incapacitated from performing the usual and customary duties of a Custodian for DGS. As with almost all other examinations by various doctors, Dr. Henrichsen concluded that there was a "large disconnect between

symptoms and findings” and that there was no reason Respondent could not perform his work duties, and more.

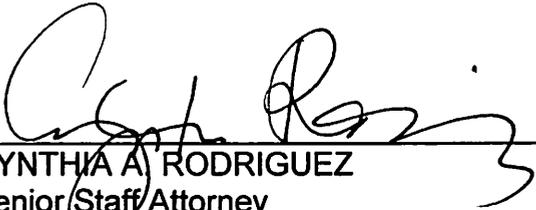
Dr. Benjamin Kaufman, the Psychiatric Independent Medical Examiner, testified that although he initially accepted Respondent’s description of his physical discomfort, he did not assess any psychological substantial incapacity for Respondent to perform his usual and customary duties of a Custodian for DGS.

The ALJ found that the orthopedic condition was not sufficiently substantiated by medical opinion as permanently disabling, and that Respondent’s request for disability retirement on that basis should be denied. The ALJ also found that the Respondent failed to present evidence to establish a disability retirement based solely on a psychological condition. Accordingly, the ALJ concluded that good cause exists to sustain CalPERS’ denial of Respondent’s application for disability retirement and that the 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.

October 16, 2013

  
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CYNTHIA A. RODRIGUEZ  
Senior Staff Attorney