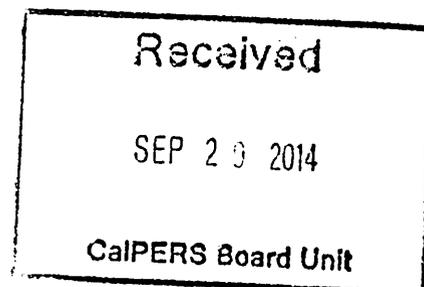


**ATTACHMENT C**  
**RESPONDENT(S) ARGUMENT(S)**

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OAH Case Name: Bannister, Marion P  
OAH Case No.: 2013100882  
Agency Case No.: 2013-0817



## **RESPONDENTS'S ARGUMENT**

My original request for retirement benefit was granted based on numerous previous medical evaluations, which included surgeon reports relating to the actual interior status of the left shoulder. The operative report from R. Danier dated 06/26/2007 states "Diagnostic arthroscopy revealed grade IV chondromalacia involving 50% of the humeral head anterosuperiorly and 20% of the glenoid anterosuperiorly". Chondromalacia has four grades, grade IV is the final stage where cartilage is completely gone and bone is exposed. These reports clearly explained the damage to the left shoulder, and the extent of cartilage loss creating a bone on bone situation, as well as additional damage within the shoulder. Dr. Serra acknowledged the cartilage loss and bone on bone situation, however, minimized this by stating that "it was only a small amount of bone on bone".

All of the medical reports speak to the status of permanent and stationary. The definition for permanent and stationary states that "your medical condition has reached maximum medical improvement". The permanent and stationary decision made by the previous doctors were a result of the cartilage loss in my shoulder. Cartilage does not grow back and Dr. Serra, when asked if cartilage could grow back, went into a lengthy dissertation regarding "scar tissue" and failed to answer the question. The previous MRI's and X-rays were not reviewed or considered by Dr. Serra. This injury is internal and cannot be evaluated from the outside. I will add that Dr. Serra did not request any x-rays or MRI's of the shoulder for current analysis or review. There is no documentation showing that the cartilage has grown back because, cartilage does not grow back or regenerate. In Dr. Serra's physical examination findings, he acknowledges the tenderness to the touch, occasional clicking sounds, substantial range of motion loss in

left shoulder and mild sensory loss in the upper left arm. All of these are present issues which limit the use of my left arm. Dr. Serra bases his conclusion on the fact that my biceps are the same size, and that I have not been seeking continual treatment. Throughout my medical treatment I was encouraged by all of the doctors to continue with the physical therapy exercises to minimize further deterioration of the shoulder. It is worth noting, that while reviewing previous medical evaluations, my biceps were always equal. With the exception of shoulder replacement, none of these doctors offered further medical ways of repairing the cartilage, nor did they suggest or encourage pain medication. The use of pain medication will not correct the problem, it will only hide the symptoms, which will cause further damage and additional pain. With the limited use of my arm, at and above shoulder height, I have been able to maintain the circumference of my biceps and limit the amount of pain incurred. However, the cartilage still has not grown back and the limitations and pain still exist with my left shoulder.

Medical reports that were introduced as evidence by myself, were all received from Cal Pers when the appeal was filed and the request made for a copy of all medical files being utilized. During the hearing, it was also discovered that Dr. Serra had in fact, not reviewed all of the medical reports. When questioned regarding the medical reports, the Cal Pers attorney objected, and stated that they were not utilized due to the nature of the request for said reports. Meaning that they were requested to determine the qualification of the workman's compensation claim not my retirement, however, these are the same reports that were used in the consideration of the medical retirement. These are valid reports showing the extent of the injury, and were completed by physicians and surgeons who had first hand knowledge of the shoulder and indicate the extent and severity of this injury, proving that it exists. When asked during the hearing, Dr. Serra stated that he had no argument with the medical findings of the previous medical reports.

While being questioned, Dr. Serra continually referred to my work position as a "Sanitation Engineer". I requested permission from the Judge to correct him and it was granted. I informed Dr. Serra that my title was "Stationary Engineer", not "Sanitation Engineer". I asked at that point if he had read, or reviewed the duty statement for this position and he answered "no". This Job Duty Statement is an in-depth six page statement that goes into great

detail on the requirements of this job. In Dr. Serra's Independent Medical Examination report dated 06/04/2014, page 8; discussion #1 asks: "Are there specific job duties that you feel the member is unable to perform because of a physical or mental condition?", #2: "In your professional opinion is the member presently substantially incapacitated for the performance of her duties?", Dr. Serra stated no, to both of these items. As a result of Dr Serra not reviewing my duty statement, neither of these questions can be answered by Dr. Serra, as he had no knowledge of the specific job duties required.

The Stationary Engineer Job Description states on page 4, under "Other Qualifications": "Maintain sufficient strength, agility, and endurance to perform during stressful (physical, mental, and emotional) situations encountered on the job without compromising their health and well-being, or that of their fellow workers or inmates.". (CalPers exhibit #11) Please note as well, that on page four of this duty statement it clarifies the physical demands required and the amount of usage each day. The "Occasionally" section requires usage every day. This injury has substantially limited my shoulder movement. Swinging of my arm forward and back (as if running), or the rotation of the shoulder (when utilizing tools) will cause further deterioration of the remaining cartilage within my shoulder and create a tremendous amount of pain. Any action that brings the shoulder bones together creates pain and furthers the damage within the shoulder. These actions include reaching above shoulder height, lifting heavy objects or use of the left arm in any repetitive motion.

Throughout the hearing, when Dr. Serra was questioned as to my ability to complete standard tasks in this job, he continually stated that I could use my arm because I could get help if needed. Although inmate labor is available, there is no guarantee that it can be utilized. Many areas of prison institutions are security areas in which inmates are not allowed. This is clearly stated in the Job Duty Statement. In the instances of "institutional lockdowns", (which is a common occurrence), there is no inmate labor available, at which point I would then be required to complete the assigned duties myself.

The basis for returning to this job is whether or not I could accomplish these duties. If Dr. Serra's conclusion is based on the premise that I could get help, then his conclusion is invalid, as I am unable to complete the daily

tasks without assistance. This injury has limited the use of my left shoulder to the extent that I am no longer capable of completing the daily tasks required

Cal Pers had the burden of proof that there is medical improvement within this shoulder. This decision was strictly based on the opinion of one man, who ceased medical practice in approximately 2006, failed to consider all medical evidence presented, and failed to review the duty statement of the job for which I would be returning.

The cartilage lost as a result of this injury has not grown back. The grinding together of the shoulder bones, and further deterioration of the remaining cartilage, is something that I can feel and continues each day. I live with this shoulder daily and the pain and limitations that I experience are real. I do not believe that taking pain medication will correct the damage and by limiting the use of my shoulder, I am able to minimize further deterioration as well as the pain I endure.

Having worked as a Stationary Engineer for thirteen years, I have first hand knowledge of the duties required for this job each day and know that I am no longer physically able to perform the daily duties required. I feel that Cal Pers has neither proved that the cartilage loss has been corrected or healed, nor have they shown any documentation indicating improvement in the medical condition of my shoulder.

*Marion P. Bannister*

Marion P. Bannister