

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Mark Gallegos (Respondent) applied for Disability Retirement (DR) on May 28, 2010, based on an orthopedic condition (lower back). CalPERS determined that Respondent was not disabled from the performance of his duties as an Administrative Officer I with Respondent Department of Water Resources (DWR). Respondent appealed. A hearing was conducted on November 4, 2014.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions, and provided him with information on how to obtain further information on the process.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to Orthopedic Surgeon Dr. Joseph Serra. Dr. Serra interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his prior medical records. Dr. Serra also performed a comprehensive IME examination. Dr. Serra's medical opinion is that Respondent is not substantially incapacitated to perform his duties as an Administrative Officer I with Respondent DWR.

The Administrative Law Judge (ALJ) found that Dr. Serra "compellingly" expressed that during his physical examination of Respondent, he could move about "very freely" and that he was "able to get out of a chair, and get on and off the examining table with ease." Dr. Serra found no objective evidence of Respondent's orthopedic condition. Specifically Dr. Serra found no pelvic tilt, no scoliosis, no muscle spasm, no pain to palpation and no tenderness. In Dr. Serra's medical opinion, Respondent's motor function appears to be intact. Dr. Serra concluded that Respondent "is capable of performing all duties of his usual and customary work activity as an Administrative Officer I." He found that Respondent is not substantially incapacitated for the performance of his duties.

On the question of nature and extent of the actual disability impacting Respondent Gallegos at the time his DR application was submitted, both Dr. Serra and the ALJ noted that the application asks "What are your limitations/preclusions due to your injury or illness?" Respondent wrote, "None at this time, but could change at any moment." The ALJ found that Respondent's position is contrary to the doctrine underpinning eligibility for DR; namely, that an agency's employee must be substantially incapacitated from performing his usual duties in order to be eligible for DR. The employee's disability must be currently existing and not prospective in nature, and the employee must be presently incapable of performing the duties of the position.

The ALJ found that at the time he last performed duties as an Administrative Officer I, Respondent Gallegos' orthopedic condition did not warrant DR when he filed his application for DR in May 2010. Nor did Respondent's condition render him disabled

from the performance of his usual job duties when he retired on July 1, 2010. The ALJ found the Precedential Decision *In Re Ruth Keck* instructive. The *Keck* decision states that "it is clear from case law that [a civil service member's] difficulty in performing certain tasks is not enough to support a finding of disability. An [government agency's employee] must be substantially incapacitated from performing his or her usual duties" in order to be eligible for disability retirement. Further *Keck* states that, "the disability must be presently existing and not prospective in nature. The [civil service employee] must be presently incapable of performing the duties of the position. Prophylactic restrictions that are imposed only because the risk of future injury are insufficient."

The ALJ found that Dr. Serra provided an objective, reasonably stated report of his medical examination and that CalPERS reasonably determined that at the time Respondent applied for DR, he was not substantially disabled or incapacitated for the performance of his job 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 motion with the Board under Government Code section 11520(c), requesting that, for good cause shown, the Decision be vacated and a new hearing be granted.

February 19, 2015

  
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