

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Rory Smith (Respondent) was employed by the State Center Community College District as a Computer Operation/Information Technical Support Employee. As a result of his employment, he was a state miscellaneous member of CalPERS, subject to Government Code section 21150. Respondent submitted an application for disability retirement, wherein he stated that he was unable to work due to orthopedic (neck, bilateral extremities and low back) conditions. CalPERS retained Martha Singer, M.D., an Orthopedist, as its Independent Medical Examiner (IME) in this case. Dr. Singer reviewed his medical records, and prepared a report documenting her findings and conclusions. Dr. Singer concluded that Respondent was not substantially incapacitated from performing his usual and customary duties.

Accordingly, CalPERS denied Respondent's application for disability retirement. In his appeal letter, Respondent contested the denial of his orthopedic disability, and referred to his severe depression and emotional difficulties. Also, in her December 7, 2010 report, Dr. Singer discussed a possible psychological condition impacting Respondent's ability to work. Resultantly, CalPERS retained Dr. Andrea Bates, M.D., a Psychiatrist, as its psychological IME.

Dr. Bates, however, was unable to reach an agreement with Respondent regarding the purpose and parameters of the evaluation when Respondent arrived for his interview. Dr. Bates was uncomfortable with the interview being tape recorded at the behest of Respondent's wife. Dr. Bates did not feel that Respondent was open and cooperative, and she felt that Respondent was unable to be receptive to the examination process. Dr. Bates began to feel increasingly uncomfortable and intimidated, and concluded the process. Dr. Bates was unable to draw any conclusions concerning Respondent's psychological condition or his ability to work. After reviewing Dr. Bates' report, CalPERS again denied Respondent's disability application. Respondent appealed and a hearing was conducted on September 25, 2014, by an Administrative Law Judge (ALJ) from the Office of Administrative Hearings.

In order to be eligible for disability retirement, an individual must demonstrate, through competent medical evidence, that he or she 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 uncertain and extended duration.

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.

Respondent testified at the hearing. He described his orthopedic injuries as cumulative trauma and repetitive stress injuries to the low back, cervical and upper extremities. Respondent described his job duties as very physically demanding, including doing extensive typing and using his hands, sitting and standing. He used hand trucks and pallet jacks. His primary job was as the help desk supervisor, where he was the primary support center for the district mainframe computer services.

Several of Respondent's medical reports concerning his orthopedic conditions were received into evidence. Respondent did not submit medical evidence from a psychiatrist or psychologist supporting his claim for disability retirement based upon a psychological condition. On behalf of CalPERS, Dr. Singer and Dr. Bates testified at the hearing.

Following the conclusion of the hearing, CalPERS offered to have Respondent evaluated by a different psychiatrist. Respondent agreed, and thus, the record was left open.

Subsequent to the hearing, CalPERS retained Michael Goldfield, M.D., a Psychiatrist, as its new IME in this case. Dr. Goldfield reviewed Respondent's medical records, and prepared a report documenting his findings and conclusions. Dr. Goldfield concluded that Respondent was not substantially incapacitated from performing his usual and customary duties. The report of Dr. Goldfield was received into evidence.

In her decision, the ALJ noted that the standard applied in disability retirement cases is different from the standard applied in evaluating a workers' compensation claim. The ALJ also noted that none of the physicians that evaluated Respondent's orthopedic conditions was able to document objective findings to support Respondent's pain complaints, and that surgery was not recommended because no mechanical problems could be identified. Several physicians commented that Respondent's pain complaints were out of proportion to their objective findings. Dr. Singer's testimony and findings were persuasive in that she found Respondent able to work from an orthopedic perspective, and that he was not incapacitated for the performance of his duties. Based on his examination and record review, Dr. Goldfield diagnosed Respondent with mild depressive disorder, but opined that he was not incapacitated for performance of his usual and customary duties as a result of his psychological condition.

The Proposed Decision notes that the person seeking a disability retirement bears the burden of establishing a right to that benefit. The ALJ concluded that Respondent did not carry his burden of proof. The ALJ noted that Respondent did not establish by competent, objective medical opinion that, at the time of his disability application, he was permanently disabled or incapacitated from performing the usual duties of a Computer Operation/Information Technical Support Employee due to a physical or psychological injury.

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.

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