ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Robert Mahon (Respondent) worked for the California Department of Corrections and Rehabilitation, (CDCR) as a Baker II. Due to his employment, Respondent is a state safety member of CalPERS. He filed an application for industrial disability retirement claiming disability on the basis of an orthopedic condition related to his left knee. On his application, Respondent indicated that his left knee condition limited him from prolonged walking or standing, and that he could only perform sedentary work.

CalPERS staff reviewed medical reports regarding Respondent's orthopedic left knee condition, and a written description of his usual and customary job duties. CalPERS retained Joseph B. Serra, M.D., an Orthopedic Surgeon, to conduct an Independent Medical Examination. Dr. Serra examined Respondent and reviewed medical records and a written job description. Based on his examination and record review, Dr. Serra issued a report indicating that Respondent was not substantially incapacitated for performing the usual and customary duties of a Baker II. Dr. Serra found that, while Respondent's left knee condition may have made performing certain tasks difficult by causing some pain or discomfort, there were not sufficient abnormal physical findings to support Respondent's subjective complaints, or to suggest Respondent would be unable to perform his normal work activities. Thus, CalPERS denied Respondent's application for industrial disability retirement. In response, Respondent submitted a timely appeal of staff's determination and a hearing was held to determine whether Respondent was substantially incapacitated from performance of his duties as a Baker II.

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

The medical evidence presented by Respondent in support of his industrial disability retirement application came from several workers' compensation physicians. Dr. Alan Sanders performed an agreed medical evaluation for Respondent's workers' compensation injury. Respondent was working as a Baker II when Dr. Sanders examined him and noted that he had significant problems with his knee, including chronic pain. Dr. Sanders reported that Respondent's treating physician had recommended knee replacement surgery, but that Respondent declined the surgery at that time and wanted to continue working. In a subsequent report, Dr. Sanders opined that Respondent should be limited to sedentary work. Due to this limitation, CDCR informed Respondent that he could no longer continue working as a Baker II; therefore Respondent submitted his application for industrial disability retirement.

At the hearing, Respondent was present and represented by counsel. He testified about his employment with the CDCR, the job duties performed by a Baker II, and how his left knee injury occurred. During his testimony, Respondent also discussed the treatment he received, including the recommended treatment of knee replacement

surgery, which he declined to pursue, as well as the doctors that examined and treated him for his knee injury.

One of the doctors who treated Respondent, Dr. Cyril Rebel, testified at the hearing on Respondent's behalf. Dr. Rebel testified that Respondent has Grade IV osteoarthritic changes, representing advanced arthritic changes where most of the cartilage is eliminated, and contributes to pain and a decreased range of motion in the knee. Based on the Grade IV arthritis, Dr. Rebel felt that Respondent was incapacitated from performing the duties of a Baker II. Upon cross-examination however, Dr. Rebel admitted that he was unfamiliar with the requirements of substantial incapacity, as that term is used in disability retirement. In addition, Dr. Rebel indicated that he had discussed knee replacement surgery with Respondent on several occasions, since Respondent had undergone extensive conservative care, but stated that Respondent had been trying to avoid it. Dr. Rebel further testified that knee replacement surgery would address Respondent's arthritis, decrease his pain and increase his mobility in his left knee, and is 90% effective.

Also at the hearing, Dr. Serra testified for CalPERS regarding his examination of Respondent. According to Dr. Serra, there were not sufficient findings on physical exam to indicate Respondent was unable to perform his usual duties. Thus, Dr. Serra confirmed his opinion that Respondent is not substantially incapacitated from performing his duties as a Baker II. Beyond Dr. Serra's opinion that Respondent is able to perform the usual duties of a Baker II, he testified that knee replacement surgeries are a significant part of his practice and that the success rate of the surgeries is 95%. Further, Dr. Serra stated that it is not uncommon for patients in their 70s to have good results with knee replacement surgery, and he recommended Respondent have the surgery because there is a very good possibility that it could result in an essentially pain-free knee, and allow him to regain a normal range of motion. Consequently, Dr. Serra observed that Respondent's knee condition could not be considered permanent, given that knee replacement surgery would enable him to resume his usual and customary work activities with very little limitation.

Based on the testimony presented at the hearing, the evidence submitted by the parties, as well as trial briefs filed, the Administrative Law Judge (ALJ) found that Respondent has not demonstrated through competent medical evidence that he is permanently incapacitated from performance of his duties as a Baker II for the CDCR. As the ALJ explained, while Respondent's left knee condition may be disabling, it was not established that his condition is permanent or of extended and uncertain duration, as required by *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, because it is very likely that he would be restored to normal functioning if he has knee surgery. Accordingly, the ALJ found, pursuant to *Reynolds* and the avoidable consequences doctrine, that Respondent has an affirmative duty to take reasonable and appropriate steps to lessen or minimize the debilitating effects of his knee condition. Since the examining physicians have recommended knee replacement surgery and confirmed that this surgery is appropriate treatment to improve Respondent's symptoms with a high success rate, Respondent cannot continue to avoid surgery while his knee

condition remains the same, or worsens, and claim his disability is permanent. Further, as the ALJ's decision makes clear, Respondent has the burden of establishing that his disability is permanent. Respondent also has the right to refuse surgery, but as the ALJ concluded, CalPERS retains the power to determine whether he has undergone medical treatment that reasonably could be expected to effect a cure. Because the probabilities are great that knee replacement surgery will improve Respondent's knee condition and he would be restored to normal functioning, his condition cannot be considered permanent. Therefore, the ALJ denied Respondent's application for industrial disability retirement.

The Proposed Decision is consistent with the law and the facts. For the reasons stated above, staff argues that the Board should 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.

June 17, 2015

RENEE SALAZAR
Senior Staff Attorney