ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Daniel Soto (Respondent) was employed by the Department of Consumer Affairs (Respondent DCA) as a Program Technician I. By virtue of his employment, Respondent is a miscellaneous member of CalPERS. Respondent submitted an application for disability retirement on the basis of orthopedic (bilateral shoulder and bilateral thumb) conditions. Respondent was initially approved for disability retirement and he retired for disability effective March 11, 2009.

On September 27, 2012, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that his file was currently under review. As part of the reexamination, staff reviewed medical reports regarding Respondent's condition and a written description of his usual and customary job duties. Staff reviewed all medical records in the file, including Respondent's treating physician records and his workers' compensation file. Gerald Barnes, M.D., a board certified Orthopedic Surgeon, examined Respondent, reviewed medical reports and two written job descriptions. In his report, Dr. Barnes concluded that Respondent was not substantially incapacitated from performing the usual and customary job duties of a Program Technician I. Respondent timely appealed.

The hearing on this matter was held on June 1 and June 3, 2015. Respondent was present and represented himself. Respondent DCA was represented by Barrett McInerney, Labor Relations Counsel, Department of Human Resources.

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 clarified how to obtain further information on the process.

Respondent testified that he was injured when he fell from his chair at work in 2003. He testified regarding his ten surgeries.

The job duties of a Program Technician I are generally understood to be sedentary, to include answering phone calls and completing consumer publication requests.

Respondent received treatment from Dr. James Winters, his primary care physician, since approximately 2002. Dr. Winters testified at the hearing regarding Respondent's medical conditions and the diagnosis. Dr. Winters testified that Respondent's complaints about pain were consistent with the objective medical findings. As a result of these medical conditions, Dr. Winters concluded Respondent is incapacitated from performance of his job duties.

Respondent testified that he has been in constant pain since the date of injury and cannot perform the essential functions of his job. CalPERS' Independent Medical

Examiner, Gerald Barnes M.D. conducted a physical examination of Respondent and reviewed Respondent's medical records. Dr. Barnes diagnosed Respondent with cervical myofascial pain syndrome, cervical spondylosis, lumbar spondylosis, and chronic low back pain syndrome.

Dr. Barnes testified at the hearing that he found Respondent could perform the essential functions of his job; although, Respondent would have considerable difficulty performing them.

After reviewing the evidence, the Administrative Law Judge (ALJ) determined the preponderance of evidence established that Respondent was substantially unable to perform the usual and customary duties of a Program Technician I. According to the ALJ, the testimony of Dr. Winters, the treating physician, was more persuasive than the testimony of Dr. Barnes. The ALJ granted Respondent's appeal of CalPERS' determination that he be reinstated to his former position as a Program Technician I.

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 is unlikely to file a writ petition in superior court seeking to overturn the decision of the Board, which is in his favor.

August 19, 2015

PREET KAUR
Staff Attorney