

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

## STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent Robert Mahon (Respondent) petitions the Board to reconsider its adoption of the Proposed Decision (PD) of the Administrative Law Judge (ALJ) dated April 27, 2015. Staff argues that the Petition for Reconsideration should be denied. Respondent, a Baker II, employed by the California Department of Corrections and Rehabilitation, (CDCR), applied for industrial disability retirement. On his application, Respondent claimed disability on the basis of an orthopedic condition related to his left knee. Pursuant to his application, Respondent's orthopedic condition limits his ability to walk or stand for prolonged periods of time, and he can only perform sedentary work.

To be eligible for industrial disability retirement, an individual must demonstrate, through competent medical evidence, that he is substantially incapacitated from performing the usual and customary duties of his position at the time the industrial disability retirement application is submitted. The injury or condition that is the basis for the claimed disability must be permanent or of an uncertain and extended duration. An individual has an affirmative duty to seek medical care and treatment and/or take reasonable steps to correct his medical problem. (*Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208.) A disability cannot be considered permanent if the probabilities are great that he would be restored to normal functioning if he submits to surgery. (*Id.* at 216.) As the applicant, Respondent has the burden of proving entitlement to industrial disability retirement. In *Harmon v. Board of Retirement of San Mateo County*, (1976) 62 Cal.App.3d 689, 691, and *Rau v. Sacramento County Retirement Board*, (1966) 247 Cal.App.2d 234, 238, the Courts held that the applicant has the burden of proof.

In Respondent's Petition for Reconsideration, he indicates that no evidence was presented at the hearing regarding whether knee replacement surgery, which was first recommended by his doctor in 2008, would be authorized through his workers' compensation claim if requested. The ALJ already addressed this argument in the PD, when he wrote "there is no evidence that [surgery] would not have been approved." (PD p. 9, ¶ 24.)

Respondent additionally contends in his Petition for Reconsideration that he intends to have his primary treating physician, Dr. Rebel, request his workers' compensation carrier authorize knee replacement surgery. Respondent describes how the utilization review process in workers' compensation, under Labor Code section 4610, will determine if the authorization for knee surgery will be granted, and requests reconsideration by the Board, if surgery is not authorized. However, the ALJ already dismissed this argument in the PD, specifically indicating "Respondent cannot fairly raise this issue where he has expressly refused to undergo the recommended treatment." (*Ibid.*) Moreover, the surgery was recommended seven years ago, yet, in his Petition for Reconsideration, Respondent indicates that he still has not requested the surgery, but rather "intends" to have his doctor request authorization for surgery.

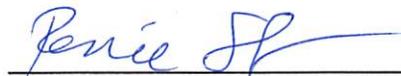
The ALJ reviewed all of the medical reports submitted by the parties at the hearing and found that in 2008 Respondent had essentially maximized non-surgical treatment at that

time. Based on the testimony presented at hearing, the ALJ found there was uniform agreement that knee replacement surgery, even now, will be 90 to 95 percent effective. Accordingly, Respondent's industrial disability retirement application cannot be approved because it was not established through competent medical evidence that his condition is permanent or of an extended and uncertain duration, which is consistent with *Reynolds, supra*. Therefore, the ALJ issued a PD denying Respondent's appeal. The Board adopted the PD at its June 17, 2015 meeting.

Respondent has presented no new evidence to support granting his Petition for Reconsideration. In fact, the arguments presented in Respondent's Petition for Reconsideration were already addressed by the ALJ in the PD. The PD is consistent with the law and the facts presented at hearing, particularly in the absence of competent medical evidence to establish that Respondent is permanently and substantially incapacitated from performing his duties as a Baker II for CDCR. Accordingly, staff argues that the Board deny the Petition for Reconsideration.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. Respondent may file a writ petition in superior court seeking to overturn the Decision of the Board.

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