

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Peter P. Hernandez (Respondent Hernandez) was employed by the California Department of Transportation (CalTrans) as a Transportation Survey Party Chief. By virtue of his employment, he is a state miscellaneous member of CalPERS, subject to Government Code section 21150.

Respondent Hernandez submitted an application for service pending disability retirement, wherein he claimed his disability was on the basis of orthopedic conditions involving his neck, shoulders, arms, hands and lower back.

CalPERS arranged for Respondent Hernandez to be examined by Jeffery Schiffman, a Board-Certified Orthopedic Surgeon. Dr. Schiffman testified as an Independent Medical Examiner (IME) in this case. He reviewed Respondent Hernandez's medical records, and prepared reports finding that Respondent Hernandez was not substantially incapacitated from the usual and customary duties of his position as a Transportation Survey Party Chief.

Accordingly, CalPERS denied Respondent Hernandez's application for disability retirement. Respondent Hernandez appealed this determination and a hearing was conducted on August 12, 2015, by an Administrative Law Judge (ALJ) from the Office of Administrative Hearings.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law, Respondent Hernandez has the burden of showing that he is substantially incapacitated from performing the usual and customary duties of his position as a Transportation Survey Party Chief. Prophylactic restrictions and risk of possible future injury cannot support a finding of disability. (*Mansperger v. Pub. Employees' Ret. System* (1970) 6 Cal.App.3d 873; *Hosford v. Bd. Of Administration* (1978) 77 Cal.App.3d 854.)

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

Dr. Schiffman testified extensively at the hearing. Dr. Schiffman explained that he believed that Respondent Hernandez, in fact, experienced some pain in his neck, shoulders, upper extremities, hands, and low back. However, his examination and the objective medical evidence did not support a conclusion that Respondent Hernandez was unable to perform his usual and customary duties as a Transportation Survey Party Chief.

Respondent Hernandez explained he was a working supervisor of a three person crew and was responsible to survey equipment. He described his duties as being more physical than stated in the job description or the forms completed by CalTrans. He testified he experiences pain in his neck, shoulder, arms and hands while caring for his orchard and gardening. Respondent Hernandez explained that he is currently being treated by Dr. Frederick Close, an Orthopedic Surgeon.

The ALJ found that Respondent Hernandez 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 Transportation Survey Party Chief. Accordingly, the ALJ denied Respondent Hernandez's appeal. 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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JEANLAURIE AINSWORTH  
Senior Staff Attorney