

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent California Department of Motor Vehicles (DMV) employed Respondent Brenda Noel (Respondent) as a Motor Vehicle Field Representative at the call center.<sup>1</sup> By virtue of her employment, Respondent is a miscellaneous state member of CalPERS subject to Government Code section 21150.

Initially, the Chief of Human Resources for the DMV submitted to CalPERS a disability retirement application on Respondent's behalf. Later, Respondent signed her own disability retirement election application claiming disability due to otolaryngologic (hearing loss) and orthopedic (cervical spine) conditions.

CalPERS arranged for Respondent to be examined by Independent Medical Examiners, Dr. Joseph Serra, a board certified orthopedic surgeon; and Dr. Rodney C. Diaz, a board certified in Otolaryngology with a subspecialty in neurology.

Both physicians found that Respondent was not substantially incapacitated from the usual and customary duties of a Motor Vehicle Field Representative.

After reviewing Dr. Serra's and Dr. Diaz's reports and other medical evidence, CalPERS staff denied Respondent's application for disability retirement. Respondent appealed and a hearing was held on August 25, 2015.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law, Respondent has the burden of showing that she is substantially incapacitated from performing the usual and customary duties in her position as a Motor Vehicle Field Representative. 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.)

Respondent represented herself. Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS provided Respondent with a copy of the Administrative Hearing Process Pamphlet. CalPERS sent all exhibits to Respondent and explained the procedure for submitting exhibits at hearing. CalPERS staff worked with Respondent and she produced some medical records at the hearing, which were admitted as administrative hearsay and the record was left open after hearing for more records to be submitted.

At the hearing, Dr. Serra explained that Respondent's cervical spine range of motion upon flexion was 100 percent of normal, extension 75 percent of normal, and rotation

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<sup>1</sup> Respondent was transferred to a Motor Vehicle Field Representative working in DMV's Sacramento Business Depot Call Center as a result of work restrictions placed on her by her doctor through a reasonable accommodation process.

and lateral bending 50 percent of normal. A neurologic examination of her upper extremities showed reduced grip strength bilaterally, but she had no loss in muscle mass.

Dr. Serra also described his sensory examination of Respondent's lower extremities as "bizarre" because "it didn't follow the normal neurologic pathways that go to the lower extremity." He described her sensation to light touch and pinwheel as "patchy," and then explained "patchy is unusual because there isn't any neurologic reason for sensation to be in one area and then shift to a totally different area, instead of following the pathway of the nerve that you're testing." He further explained that the only time one can medically account for patchy sensation in the lower extremities "would perhaps be if there was severe trauma to a nerve, but only part of the nerve was damaged." There was no evidence Respondent suffered any such trauma. He was unable to correlate her subjective complaints of pain with any objective findings that she suffers from an orthopedic condition. As a result, he found that Respondent did not meet the requirements to qualify for disability retirement.

Dr. Diaz (otolaryngologist) explained at the hearing that he performed a complete examination of both of Respondent's ears, which was unremarkable. Dr. Diaz also performed the Weber and Rinne tests to determine whether Respondent's reported hearing loss in her left ear was a sensorineural or a conductive hearing loss. The results of both tests indicated Respondent suffers from a sensorineural hearing loss in her left ear.

Based on the totality of his findings during physical examination of Respondent and a review of the medical records provided, Dr. Diaz opined that, while she suffers from some sensorineural hearing loss in her left ear, such loss is not of a degree that renders her substantially incapacitated for the performance of her usual duties as a Motor Vehicle Field Representative in DMV's Sacramento Business Depot Call Center.

Respondent testified and introduced medical records into evidence. The Administrative Law Judge (ALJ) found that her records were of little value. The ALJ explained that her treating physician had returned her to work with minimal restriction and in fact Respondent continued to work in her position and was returning to work after that hearing. The ALJ found that Respondent failed to meet her burden of proof and 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.

December 16, 2015

  
JEANLAURIE AINSWORTH  
Senior Staff Attorney