

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Darren Wadkins (Respondent Wadkins) worked as a Correctional Officer (CO) for Respondent California Department of Corrections, California Substance Abuse Treatment Facility and State Prison, Corcoran (Respondent CDCR). By virtue of his employment, Respondent Wadkins was a state safety member of CalPERS.

In 2012, Respondent Wadkins applied for and received industrial disability retirement from CalPERS on the basis of an orthopedic (right foot) condition. In 2015, CalPERS referred Respondent Wadkins for a re-evaluation with Doctor Ghol Ha'Eri, a board-certified Orthopedic Surgeon. Dr. Ha'Eri issued a written report finding Respondent Wadkins was no longer substantially incapacitated from performing the duties of a CO for Respondent CDCR. On the basis of the Independent Medical Examiner's (IME) report, and a review of Respondent Wadkins' medical and employment records, CalPERS determined that Respondent Wadkins was no longer substantially incapacitated, and moved to reinstate him to the CO position with Respondent CDCR.

Respondent Wadkins appealed CalPERS' determination. A one-day hearing was held in Fresno, California on May 31, 2016. Counsel appeared on behalf of CalPERS. Respondent Wadkins represented himself. Respondent CDCR did not appear.

Prior to the hearing, CalPERS explained the hearing process to Respondent Wadkins and the need to support his case with witnesses and documents. CalPERS provided Respondent Wadkins with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Wadkins' questions and clarified how to obtain further information on the process.

Pursuant to the California Public Employees' Retirement Law (PERL), a CalPERS member who is incapacitated from the performance of his or her duties shall be retired for disability. (Cal. Gov. Code §21150(a).) The statute has been interpreted and applied to require a showing of substantial inability to perform the usual duties of the job. (See, e.g., *Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.) On-the-job discomfort does not qualify a member for disability retirement; risk of further or future injury is similarly insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862-64.) Where CalPERS seeks to have a member removed from the disability retirement roll and reinstated to employment, it is CalPERS' burden to prove substantial incapacity no longer exists. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

At hearing, CalPERS presented the oral testimony and written IME report of Dr. Ha'Eri. Dr. Ha'Eri testified that he interviewed Respondent Wadkins, obtained a personal and medical history, physically examined Respondent Wadkins and reviewed his medical and work records.

CalPERS originally approved Respondent Wadkins for disability retirement after he suffered two work-related injuries. The first occurred in 2008 when Respondent Wadkins rolled his right foot while responding to an alarm at the prison. He was

diagnosed with a right ankle and foot sprain. Respondent Wadkins injured his right foot again in 2009 while descending stairs at the prison. Respondent Wadkins underwent surgery and did not return to work.

Respondent Wadkins told Dr. Ha'Eri that he still had right foot pain after prolonged walking, running and jumping. On physical examination, Dr. Ha'Eri found Respondent Wadkins' gait was normal, his right foot revealed no tenderness or swelling, and range of motion was within normal limits for the foot and ankle. Dr. Ha'Eri also found that Respondent Wadkins' right ankle was stable to manipulation, with no crepitus or noise produced by manipulation. There was also no atrophy of the calf or thigh muscles. Dr. Ha'Eri also conducted a neurological examination that showed decreased sensation in the second through fourth toes of the right foot. This was due to a prior physician's cutting of Respondent Wadkins' plantar nerve during surgery, according to Dr. Ha'Eri.

As a CO, Respondent Wadkins was required to frequently stand, walk, engage in simple grasping, repetitively use his hands, and walk on uneven ground. A CO would occasionally run, crawl, kneel, climb, squat, push and pull, carry between 10 pounds and 75 pounds, drive, and work at heights.

On the basis of his examination, and taking into account the physical requirements of the job, Dr. Ha'Eri opined that Respondent Wadkins was not substantially incapacitated. The only objective finding was diminished sensation of the right middle toes, which Dr. Ha'Eri testified was not disabling for a CO.

At hearing, Respondent Wadkins provided additional hearsay medical records and testified to chronic foot pain, but did not call a doctor to testify on his behalf. Since September 2014, and while receiving disability retirement benefits, Respondent Wadkins has worked as a project manager for Solar City.

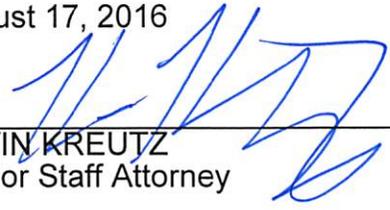
The Administrative Law Judge (ALJ) considered all the evidence, and credited the report and testimony of Dr. Ha'Eri. The ALJ found Dr. Ha'Eri to be persuasive in his opinion that Respondent Wadkins could satisfy the physical requirements of his job as a CO, notwithstanding subjective complaints of pain and an objective finding of toe numbness in the right foot.

Pursuant to Government Code section 11517(c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." In order to avoid ambiguity, staff recommends that the words "Willie Starnes (Precedential Decision 00-01)" be replaced by "Willie Starnes (Precedential Decision 99-03)" on page eleven of the Proposed Decision.

The ALJ concluded that Respondent Wadkins' appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board should adopt the Proposed Decision, as modified.

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.

August 17, 2016

  
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KEVIN KREUTZ  
Senior Staff Attorney