

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

## **STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION**

Respondent Nicole Collins (Respondent) petitions the Board to reconsider its adoption of the Proposed Decision (PD) of the Administrative Law Judge (ALJ) dated July 22, 2016. Staff argues that the Petition for Reconsideration should be denied.

Respondent was employed by Sacramento Metropolitan Fire District as an Accounting Technician and applied for Industrial Disability Retirement. In her application, Respondent claimed disability on the basis of "prolonged hand and shoulder pain, back pain, upper lower arm pains." Pursuant to her application, Respondent's conditions limit her ability to concentrate and perform her job.

To be eligible for Industrial Disability Retirement, an individual must demonstrate, through competent medical evidence, that (s)he is substantially incapacitated from performing the usual and customary duties of her 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 (her) 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 (s)he would be restored to normal functioning if (s)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, she claims CalPERS omitted medical evidence. Respondent requests a Petition for Reconsideration "due to facts [CalPERS Independent Medical Evaluator (IME)] stated in his testimony. . ." regarding her medical condition. Respondent, however, fails to provide a valid reason for her Petition for Reconsideration.

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 answered Respondent's questions and clarified how to obtain further information on the process.

This matter was initially set for hearing, with Office of Administrative Hearings (OAH), for September 15, 2015. Respondent filed a request for continuance with OAH. CalPERS did not object to Respondent's request and OAH found good cause for a continuance. The hearing was continued to April 4, 2016.

On March 30, 2016, CalPERS filed a request for a continuance because CalPERS' IME, Dr. Harry Khasigian, M.D., was no longer available on the day of the hearing.

Respondent did not oppose the continuance, but expressed that she had “purchased a non-refundable ticket [and] won’t be able to reschedule until after June.” OAH granted the continuance based on good cause. OAH noted a continuance will also allow the member to retain counsel, as her attorney had recently withdrawn from representation. The hearing was continued to July 5, 2016.

On April 1, 2016, Respondent notified CalPERS that she was unavailable for a hearing on July 5, 2016. Respondent was informed by CalPERS to file her request with OAH. Respondent was also informed that CalPERS will not oppose the continuance and provided three dates on which CalPERS’ counsel is available.

On May 12, 2016, Respondent filed her request to continue the July 5, 2016, hearing, stating she had prior arrangements and will be unable to attend the hearing. OAH denied Respondent’s request for continuance, finding the request was untimely and was not supported by good cause.

On June 5, 2016, Respondent filed another request with OAH, asking the July 5, 2016, hearing be continued because she is still attending Worker’s Compensation appointments and her Agreed Medical Evaluation would likely not be completed prior to the July 5, 2016, hearing. On June 14, 2016, OAH issued an order denying the continuance. The Order Denying Continuance explained that when the July 5, 2016, hearing date was set, “respondent stated that she was available for hearing after June 2016.” Furthermore, OAH held that Respondent failed to “establish that her worker’s compensation case is directly relevant to a determination in her disability retirement case.”

The hearing was held on July 5, 2016, as scheduled and Respondent failed to appear at the hearing. CalPERS presented the testimony of Dr. Khasigian who testified regarding the IME report he issued following Respondent’s examination and his review of the medical records. Dr. Khasigian also testified regarding the three additional supplemental reports he subsequently issued and the additional medical records he reviewed. All of these reports had been provided to Respondent prior to the hearing. If Respondent disagreed with Dr. Khasigian’s findings, she should have appeared at the hearing to present her case. Respondent could have also submitted any new or potentially omitted medical evidence directly to OAH prior to the hearing. Instead, Respondent took no action and simply chose not to show up at the hearing. As a result, she forfeited her opportunity to cross examine Dr. Khasigian and present her case. Respondent is now asking the Board to overturn OAH’s determination, denying her request for a continuance, by granting her another day of hearing.

Staff argues the Board deny the Petition for Reconsideration and uphold its Decision because Respondent was already provided her day in court to present her case, but failed to appear.

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.

November 16, 2016

A handwritten signature in blue ink, appearing to read 'Preet', with a long horizontal flourish extending to the right.

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PREET KAUR  
Senior Staff Attorney