

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Frederick J. Orsborn (Respondent Orsborn) applied for service pending industrial disability retirement on the basis of an orthopedic (heel bone spur with plantar fascia inflammation) condition. By virtue of his employment as a Fire Apparatus Engineer with Respondent California Department of Forestry and Fire Protection (Respondent Cal FIRE), Respondent Orsborn is a state safety member of CalPERS.

As part of CalPERS' review of his medical condition, Respondent Orsborn was sent for an independent medical examination (IME) to Orthopedic Surgeon Arthur M. Auerbach. Dr. Auerbach interviewed Respondent Orsborn, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Respondent Orsborn's medical history included a March 16, 2015 surgery to repair the injured plantar fascia in his left foot.

Based on relevant medical evidence, CalPERS determined Respondent Orsborn was not substantially incapacitated from the performance of his duties as a Fire Apparatus Engineer at the time his application for industrial disability retirement was filed. Respondent Orsborn appealed CalPERS' determination. A hearing as to whether Respondent Orsborn was substantially incapacitated from performing his usual and customary job duties was held on October 6, 2016.

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

At the hearing, CalPERS called Dr. Auerbach as a witness, and introduced documentary evidence, including medical reports. Dr. Auerbach testified to his examination and reports. Dr. Auerbach explained his IME report, which states that Respondent Orsborn was substantially incapacitated at the time of examination. Such incapacitation was likely temporary, as Respondent Orsborn was still recovering from his surgery. Dr. Auerbach stated that he expected the disability to last between six to twelve months following the examination.

Dr. Auerbach then explained why he felt the injury was only temporary. Respondent Orsborn's foot injury was acute, suddenly occurring on a two-mile run with his crew. Because the injury was acute, and not a chronic condition, Dr. Auerbach opined that Respondent Orsborn should make a full recovery from the surgery.

Respondent Orsborn testified to continuing foot pain. Respondent Orsborn also brought a medical report to hearing. Authored by Christopher Page, DPM, and dated September 16, 2016, Dr. Page's report diagnosed Respondent Orsborn with plantar fibromatosis and cavus foot. Dr. Auerbach reviewed Dr. Page's report at the hearing. Based on Dr.

Page's report, Dr. Auerbach changed his opinion on the stand, finding that Respondent Orsborn may not have recovered fully from surgery. Because Dr. Auerbach did not have the opportunity to re-examine Respondent Orsborn, he could not offer a definitive opinion on whether the substantial incapacity was permanent or of an extended and uncertain duration.

Based on the evidence, including Dr. Auerbach's changed opinion, the Administrative Law Judge concluded that Respondent Orsborn's appeal should be granted. The ALJ found that Respondent Orsborn is substantially incapacitated for an extended and uncertain duration from performing his usual duties as a Fire Apparatus Engineer.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision is in favor of Respondent Orsborn, it is unlikely he will appeal the decision. Therefore, the risks of adopting the Proposed Decision are minimal.

November 16, 2016



CHARLES H. GLAUBERMAN
Senior Staff Attorney