

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

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Jerri Clay (Respondent Clay) worked as a Correctional Officer for Respondent California Department of Corrections and Rehabilitation, Central California Women's Facility (Respondent CDCR). By virtue of her employment, Respondent Clay was a state safety member of CalPERS.

Respondent Clay applied for Industrial Disability Retirement with CalPERS on the basis of a podiatric (left foot) condition. To evaluate Respondent Clay's application, CalPERS referred Respondent Clay for an Independent Medical Examination (IME) with Ekta Shah, a Doctor of Podiatric Medicine. Dr. Shah issued a written report finding Respondent Clay was not unable to perform the duties of a Correctional Officer for Respondent CDCR. On the basis of the IME report, and a review of Respondent Clay's medical and employment records, CalPERS denied Respondent Clay's application.

Respondent Clay appealed CalPERS' determination. A one-day hearing was held in Sacramento, California on August 30, 2016. Counsel appeared on behalf of Respondent Clay. Respondent CDCR did not appear. Upon satisfactory proof of service of the Statement of Issues and Notice of Hearing, the matter proceeded as a default against Respondent CDCR pursuant to Government Code §11520(a).

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.) On appeal, it is the member's burden to prove substantial incapacity. (*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. Shah. Dr. Shah testified that she interviewed Respondent Clay, obtained a personal and medical history, physically examined Respondent Clay and reviewed her medical and work records.

During examination, Respondent Clay complained that she began receiving treatment for bilateral foot pain in 2011. Her right foot healed, but pain persisted in her left foot. Respondent Clay was eventually diagnosed with plantar fasciitis. Her physicians prescribed custom footwear (orthotics), but the pain in her left foot remained. Respondent Clay worked in a light duty capacity for a few months, attended physical therapy and received injections. She told Dr. Shah that the pain did not go away. Respondent Clay told Dr. Shah that she experiences pain throughout the day that worsens over time, culminating in pain rated 8 of 10 by the end of the day. Respondent Clay arrived to the IME wearing flip-flop sandals with memory foam.

Dr. Shah conducted a physical examination of Respondent Clay's feet. Dr. Shah found pulse to be normal, no evidence of neuritis or any neurological abnormality, full muscle strength across the left foot, pain with palpation on the left central arch and increased pain along the left plantar medial heel. Observing Respondent Clay walk, Dr. Shah observed that Respondent Clay initially walked with a limp to avoid pressure on her left foot, but that continued walking resulted in a normal gait. On the basis of her physical findings and review of the medical records, Dr. Shah diagnosed Respondent Clay as having chronic plantar fasciitis and pain in the left foot.

As a Correctional Officer, Respondent Clay's usual and customary job duties include working overtime, wearing protective equipment, continuously walking, occasional climbing and running, and continuously wearing an equipment belt weighing approximately 15 pounds.

On the basis of her examination, and taking into account the physical requirements of the Correctional Officer position, Dr. Shah opined that Respondent Clay was not substantially incapacitated. Dr. Shah did not believe that the pain Respondent Clay experienced in her left foot would make her unable to serve as a Correctional Officer, because it would not prevent her from walking or standing. Pain resulting from a tear or rupture of the plantar fascia may prevent a person from being able to stand or walk for long periods of time, but there was no evidence of a tear or rupture, according to Dr. Shah. Additionally, Dr. Shah did not find a sufficient correlation between her objective findings and Respondent Clay's subjective complaints of pain. Dr. Shah also testified that flip-flop sandals, the kind Respondent Clay wore to the IME, would be very uncomfortable for someone with chronic plantar fasciitis.

At hearing, Respondent Clay testified that she could not stand or walk long enough to work the overtime shifts required of a Correctional Officer. Her workers' compensation physician, Dr. Roy Kroeker, testified that Respondent Clay could not perform her usual and customary duties of her position because doing so would cause her to experience pain and could risk injury to herself or others. Dr. Kroeker testified at hearing that he was not familiar with the CalPERS' substantial incapacity standard.

The Administrative Law Judge (ALJ) considered all the evidence, and credited as persuasive the report and testimony of Dr. Shah. The ALJ agreed with Dr. Shah that even though Respondent Clay may experience pain while working as a Correctional Officer, the pain did not rise to the level of substantial incapacity. The ALJ disregarded the testimony of Dr. Kroeker as being unreliable and based upon prophylactic restrictions designed to prevent future injury. Significant to the ALJ's conclusion was the fact that none of the other treating physicians contradicted Dr. Shah's opinion that the Respondent is not substantially incapacitated.

The ALJ concluded that Respondent Clay'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.

November 16, 2016



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KEVIN KREUTZ  
Senior Staff Attorney