

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

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Respondent Anthony Lee (Respondent Lee) applied for service pending industrial disability retirement on the basis of an orthopedic (right shoulder) condition. By virtue of his employment as a Stationary Engineer with Respondent California Department of Corrections and Rehabilitation – California Correctional Institution (Respondent CDCR), Respondent Lee is a state safety member of CalPERS.

As part of CalPERS' review of his medical condition, Respondent Lee was sent for an independent medical examination (IME) to Orthopedic Surgeon John D. Kaufman. Dr. Kaufman interviewed Respondent Lee, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Respondent Lee's medical history included a February 25, 2014 surgery to repair the Respondent Lee's shoulder. Dr. Kaufman performed a comprehensive IME examination on May 11, 2015.

To be eligible for industrial disability retirement, competent medical evidence must demonstrate the member is substantially incapacitated from performing the usual and customary duties of his position. Furthermore, the injury and condition that is the basis for the claimed disability must be permanent or of an extended and uncertain duration.

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

At the hearing, CalPERS made arguments, called Dr. Kaufman as a witness, and introduced documentary evidence, including medical reports. Dr. Kaufman testified to his examination and reports. Dr. Kaufman explained his IME report, which states that Respondent Lee was not substantially incapacitated at the time of examination.

Although Respondent Lee complained of right shoulder pain and occasional numbness at the IME examination, Dr. Kaufman's IME report noted that Respondent Lee's arthroscopic incisions on his right shoulder were well healed. The IME report then explains that there was no deformity or swelling in Respondent Lee's right shoulder. As part of the IME, Dr. Kaufman measured the circumference of Respondent Lee's right and left forearms. The measurements showed Respondent Lee's right arm to be slightly larger than his left, while both forearms measured the same size. Dr. Kaufman also tested Respondent Lee's grip strength during the IME using the Jamar Dynamometer, which showed Respondent Lee's right limb grip to be weaker.

At hearing, Dr. Kaufman explained the significance of the arm measurements as compared to Respondent Lee's grip strength. Dr. Kaufman explained that a patient can determine the outcome of a grip strength test by putting forth as little effort as he or she pleases. Conversely, arm measurements are objective findings, which indicate whether or not a patient actually uses an extremity. Because of the larger right arm measurement, Dr. Kaufman concluded that Respondent Lee used his right arm and shoulder in a normal manner.

Respondent Lee testified on his own behalf. He explained that he has not been the same person since his surgery.

The ALJ concluded that Respondent Lee's appeal should be denied because Respondent Lee is not substantially incapacitated from performing his usual duties as a Stationary Engineer. Staff argues that the Board adopt the Proposed Decision.

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 inconsistency and ambiguity, staff recommends that "industrial" be added to the first line of Paragraph 2 on Page 2 between the words "for" and "disability."

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.

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