

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

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

Respondent Carey Kelly (Respondent) submitted a Petition to Reopen for Newly Discovered Evidence (Petition). The Petition is being regarded as and presented to the Board as a Petition for Reconsideration, pursuant to the provisions of Government Code section 11521. Staff argues that the Petition for Reconsideration (Petition) should be denied.

Respondent was employed as a State Traffic Officer by Respondent Department of California Highway Patrol (CHP). By virtue of her employment, Respondent was a state safety member of CalPERS. In 1998, Respondent submitted an application for Industrial Disability Retirement (IDR) on the basis of claimed orthopedic (neck, low back and left shoulder) conditions. CalPERS Staff (Staff) reviewed medical reports and a written job description of Respondent's usual and customary duties. Respondent was approved to receive IDR in 1999, and has been receiving a monthly benefit since that date.

Because Respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, in 2012, Staff informed Respondent that she would be reevaluated for purposes of determining whether she remained substantially incapacitated and entitled to continue to receive an IDR benefit. Brendan McAdams, M.D., a board-certified Orthopedic Surgeon, reviewed medical reports, a written description of the usual and customary duties of a CHP State Traffic Officer and conducted an Independent Medical Examination (IME) of Respondent. In a written report, dated May 21, 2012, Dr. McAdams noted his observations, findings, conclusions, and ultimate opinion that Respondent was not substantially incapacitated from performing the usual and customary duties of a CHP State Traffic Officer. Staff determined that Respondent was not substantially incapacitated, was no longer entitled to receive an IDR benefit, and should be reinstated to her former position as a State Traffic Officer with CHP. Staff informed both Respondent and CHP of their re-evaluation determination by letter dated December 12, 2012. Respondent appealed Staff's determination and a hearing was held on November 17, 2016.

Prior to the hearing and during the hearing, Respondent was represented by counsel.

In order to be eligible for IDR, competent medical evidence must demonstrate that the individual is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition which is the basis for the claimed disability must be permanent or of an extended and uncertain duration. Correspondingly, in order for an individual to be found ineligible for continued receipt of a previously approved disability retirement, competent medical evidence must demonstrate that he or she is no longer substantially incapacitated from performing the usual and customary duties of his or her former position.

A copy of the CHP's 14 Critical Tasks was offered and received into evidence. The Administrative Law Judge (ALJ) considered the 14 Critical Tasks, specifically the identified physical requirements, in the Proposed Decision. (See Factual Finding No. 2. Pages 2-4.)

The ALJ reviewed and considered Dr. McAdams' written report. Dr. McAdams testified at the hearing and the ALJ considered his testimony as well. The ALJ quoted extensive portions of Dr. McAdams' report. With respect to the cervical spine and upper extremities, Dr. McAdams found a full, unrestricted range of motion, "excellent strength" in both arms, full sensation, and no evidence of atrophy (muscle wasting). (See Factual Finding No. 6, page 6.) With respect to the lumbar spine, the ALJ quoted Dr. McAdams' findings, as noted in his report:

"[Respondent] stood erect. There was no list. She was able to forward flex to a point where her fingertips easily touched the floor. She fully reversed her lumbar lordotic curve. She extends 10 degrees and lateral bends is 30 degrees in both directions and has a full 90 degrees of rotation in both directions. She is able to squat down and come back up without any hesitation. She walks on her heels and toes without any evidence of weakness. Sitting position, deep tendon reflexes, knee jerks, and ankle jerks are equal and active. She has full extension of the knees without any evidence of lumbar lurch."

(See Factual Finding No. 6, page 5-6.)

The ALJ's summary of Dr. McAdams' testimony regarding Respondent's lumbar spine is also found as part of Factual Finding No. 6. The ALJ noted that Dr. McAdams "found good strength and flexibility", that Respondent's "reflexes were normal" and that there were "no objective signs of disability."

In July, 2016, as part of her preparation to appeal Staff's determination, Respondent retained Lee Snook, Jr., M.D., to conduct an examination of her and prepare a written report. Dr. Snook's written report was reviewed by Dr. McAdams and he prepared his own report. The ALJ again quoted from Dr. McAdams' follow-up report, as follows:

"After reviewing this report [Dr. Snook's] as well as my own report, I must again conclude that this lady, in my opinion, at the time that I saw her had reached her pre-injury status. She had no evidence at all of any restriction, weakness, reflex changes, or sensory changes in her axial spine or extremities."

(See Factual Finding No. 10, page 8.) (Emphasis added.)

The remaining area or condition claimed by Respondent to be disabling was her left shoulder. The ALJ summarized Dr. McAdams' findings, as noted in his reports, and his testimony at the hearing, as follows:

**"Dr. McAdams opined that the MRI of [Respondent's] shoulder does not show any condition that would likely cause substantial physical impairment."**

**(See Factual Finding No. 11.)**

The ALJ considered the contents of Dr. Snook's written report and his testimony at the hearing. The ALJ quoted Dr. Snook's findings, on physical examination of Respondent, in Factual Finding No. 14, on page 9 of the Proposed Decision. While Dr. Snook did make note of a complaint of tenderness, the remaining findings, such as cervical and lumbar range of motion, muscle strength, reflexes, and sensation, are consistent with the findings of Dr. McAdams.

Dr. Snook agreed, in essence, with Dr. McAdams' testimony regarding the condition of Respondent's left shoulder. As found by the ALJ:

**"...an MRI imaging report dated May 17, 2016, showed some abnormality in the [Respondent's] left shoulder. Dr. Snook testified that he cannot say whether this is clinically significant, and would refer her to an orthopedist for a determination whether work restrictions are recommended."**

**(See Factual Finding No. 16, page 10.)**

Of seeming critical significance to the ALJ, was the fact that Dr. McAdams was familiar with and applied the correct standard for determining disability for CalPERS purposes, while Dr. Snook did not.

**"Dr. Snook testified that a peace officer must be able to perform at 100 percent to return from disability. When Dr. Snook was asked on cross-examination where he obtained the standard that a peace officer must be 100 percent, Dr. Snook replied that he obtained the standard from the injured peace officers he has been seeing."**

**(See Factual Finding No. 20, page 11.)**

**"[D]r. McAdams applied the correct standard in reaching his opinion. ...Dr. McAdams opined that [Respondent] could perform each of the Critical Physical Activities of a CHP Officer, though some of the tasks may be difficult. Dr. McAdams' written report and testimony were well reasoned and persuasive."**

**(See Factual Finding No. 25, page 13.)**

**"Respondent's expert, Dr. Snook, did not apply the correct standard in reaching his opinion that [Respondent] remains disabled. Specifically, Dr. Snook's opinion is based on the premise that a peace officer must be able to function at 100 percent capacity, not 98 and not 99 percent. In Dr. Snook's own words, this is a very low threshold for determining disability. Given that**

Dr. Snook applied an incorrect standard for determining disability, his conclusion that [Respondent] would not be able to perform certain of the Critical Physical Activities of a CHP Officer is unpersuasive."

(See Factual Finding No. 26, page 13.)

After considering all of the documentary evidence and testimony, the ALJ found that Staff's determination, that Respondent is no longer substantially incapacitated from performing the usual and customary duties of a CHP State Traffic Officer, was and is supported by competent medical evidence and that Respondent did not offer sufficient competent medical evidence to rebut the evidence offered by CalPERS.

(See Legal Conclusion No. 5, page 14.)

The Board adopted the Proposed Decision at its February, 2017 meeting. There are multiple reasons why the Board should deny Respondent's Petition.

First, the proffered evidence is irrelevant to the issue of whether Respondent – as of the time of her reevaluation (May, 2012) – was or was not substantially incapacitated from performing the usual and customary duties of a CHP State Traffic Officer. Evidence of Respondent's low back condition as of December, 2016, is 4 ½ years after the determination made by the IME, upon which Staff relied to determine that Respondent was no longer substantially incapacitated and no longer entitled to receive an IDR benefit. Just as with an evaluation of whether a CalPERS member is entitled to begin receiving an IDR benefit, when the individual is evaluated for purposes of reinstatement (whether voluntary or involuntary), the critical focus is upon the individual's condition at the time of evaluation.

Second, the proffered evidence is irrelevant to the issue of whether Respondent is or is not substantially incapacitated because the reports – including the Operative Report – if accepted as accurate, are silent with respect to the question of Respondent's ability to perform the usual and customary duties of a CHP State Traffic Officer. Nowhere in the offered records does a physician offer an opinion regarding Respondent's ability to perform the duties of her former position. Quite simply, the Operative Report is evidence of just that; that Respondent elected to have a lumbar spine epidural injection for the relief of subjective complaints of pain.

Third, the proffered evidence is not "new evidence relating to continuing disability" as asserted in the Petition. An entry found in a 12/09/2016 report notes that Respondent "has had episodic lower back pain at least once per year." Respondent testified to this complaint and the ALJ considered it in his Proposed Decision. (See Factual Finding No.s 5 & 23.) The proffered evidence includes an MRI study of Respondent's lumbar spine, performed 12/13/2016. The results of such study, if compared with previous studies, (See Factual Finding No. 15) disclosed no new significant findings, as noted in the Impression:

"Disc degeneration with disc bulging and protrusions at L3-4 and L4-5 as described... there is no nerve root impingement or high grade canal or foraminal stenosis. Additionally, these findings were seen on the prior study some degree, slightly progressed on the right at L3-4 and grossly stable at L4-5."  
(Emphasis added.)

As the ALJ noted (See Factual Finding No. 11), results of an MRI study must be correlated with findings made upon a clinical examination. The IME reviewed previous MRI studies, with similar findings, and found them to not be indicative of, and certainly not evidence of, any objective substantial incapacity.

Fourth, the proffered evidence is administrative hearsay. If considered by the Board, the records cannot be regarded as competent medical evidence. A finding of substantial incapacity, or the opposite, a finding of a lack of substantial incapacity, must be made on the basis of competent medical evidence.

Staff argues that the Board deny the Petition to Reopen for Newly Discovered Evidence / Petition for Reconsideration.

Because the Board's Decision applies the law to the salient facts of this case, the risks of denying the Petition to Reopen for Newly Discovered Evidence / Petition for Reconsideration are minimal. Respondent may file a writ petition in Superior Court seeking to overturn the Decision of the Board.

March 15, 2017,

  
\_\_\_\_\_  
RORY J. COFFEY  
Senior Staff Attorney