ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Respondent Tammy J. Warner (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision dated June 30, 2017. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Applications for disability retirement were filed by Respondent and her employer, California Department of Motor Vehicles (DMV). CalPERS referred Respondent for an Independent Medical Examination (IME) with Dr. Robert Henrichsen, a board-certified Orthopedic Surgeon. Dr. Henrichsen found Respondent was not substantially incapacitated. CalPERS denied her application, and Respondent appealed. After the hearing, the ALJ issued a Proposed Decision denying the appeal and upholding CalPERS’ determination.

In her Petition, Respondent argues that Dr. Henrichsen’s IME report was not thorough, suffered from numerous errors, and that the doctor should have ordered additional diagnostic studies but did not. Respondent bears the burden of proof in this case, and must meet her burden through the presentation of competent medical evidence. Respondent failed to present direct medical testimony to controvert Dr. Henrichsen at the hearing, and her Petition does not cure this evidentiary defect. Further attacks on Dr. Henrichsen’s report or competency do not assist Respondent. Additionally, CalPERS advised Dr. Henrichsen in its retention letter (Exhibit 9) that diagnostic studies should only be ordered if the doctor felt he needed further studies to reach an opinion on substantial incapacity. By itself, not ordering further studies is at most circumstantial evidence that Dr. Henrichsen did not believe he needed more information to reach a conclusion in this case. It is not evidence of an insufficient examination, and it certainly does not assist Respondent in meeting her burden of proof on appeal.

Respondent argues that she was never instructed by CalPERS or Office of Administrative Hearings on how to serve subpoenas on potential witnesses. Specifically, Respondent claims that CalPERS provided her with blank subpoena forms, and that the ALJ told her at the hearing that CalPERS should have asked for Respondent’s witness list, completed the subpoenas, and served the subpoenas on Respondent’s witnesses. When CalPERS sent Respondent the Statement of Issues in this case, it advised her in writing that she had a duty to prosecute her own appeal and present evidence in support of her claim. There is no evidence that CalPERS offered to prepare subpoenas or serve them on potential witnesses. The ALJ did not make the representations alleged by Respondent in her Petition, and the standard appeal acknowledgement in this case from CalPERS states the exact opposite. Additionally, the Notice of Hearing (Exhibit 2) advises Respondent that any subpoenas should be directed to OAH not CalPERS. Significantly, the law makes no distinction between persons who represent themselves, and persons who are represented by counsel. The same procedural rules apply to each, with equal force and consequences. (Nwosu v. Uba (2004) 122 Cal.App.4th 1229, 1246–47.)
No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the August 16, 2017, meeting was well reasoned and based on the credible evidence presented at hearing. Thus, Respondent's Petition for Reconsideration should be denied.

September 20, 2017

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Senior Attorney