ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION

Lisa K. Magee (Respondent) applied for service pending disability retirement based on orthopedic (neck, head) conditions. By virtue of her employment as a Commercial Vehicle Inspection Specialist I (CVIS) for Respondent California Highway Patrol (Respondent CHP), Respondent was a state miscellaneous member of CalPERS.

Respondent filed an application for service pending disability retirement on March 2, 2017, and has been receiving benefits since that time.

As part of CalPERS’ review of Respondent’s medical condition, Jerrold M. Sherman M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Sherman has been an Orthopedic Surgeon for over 50 years, and has performed thousands of surgeries. Dr. Sherman interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Sherman opined that Respondent is not substantially incapacitated from performing her usual and customary duties as a CVIS.

In order to be eligible for disability retirement, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition which is the basis of the claimed disability must be permanent or of an extended and uncertain duration.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on July 17, 2018. Respondent was represented by counsel. Respondent CHP did not appear at the hearing.

At the hearing, Dr. Sherman testified in a manner consistent with his examination of Respondent and the IME report. In his examination, Dr. Sherman observed Respondent’s movements, and paid attention to Respondent’s comments so as to ascertain information about her injury.

Dr. Sherman reviewed Respondent’s medical records. Dr. Sherman’s review of imaging studies (x-rays and MRI’s) showed degenerative changes in Respondent’s cervical spine at the C5, C6, and C7 levels.
On Dr. Sherman’s physical examination, Respondent exhibited pain-free range of motion in her shoulders, elbows, wrists, and hands. Dr. Sherman ultimately diagnosed Respondent with degenerative arthritis of the cervical spine, and concussion syndrome without neurologic or mechanical deficit.

In light of his diagnosis, Dr. Sherman concluded that Respondent is able to perform her usual and customary job duties. Dr. Sherman stated that Respondent could lie on a creeper, a requisite tool for Respondent’s job as a CVIS. Dr. Sherman stated that the changes in Respondent’s cervical spine were typical of a 55-year-old woman. Dr. Sherman’s medical opinion is that Respondent is not substantially incapacitated.

Respondent testified on her own behalf that a 2015 neck injury while working caused her to file for disability retirement. Respondent wants to return to work. However, Respondent stated that she is unable to do so. Respondent’s job as a CVIS requires her to use a creeper, and the creeper requires her to hyperextend her neck. Respondent claims to be unable to hyperextend her neck. On cross-examination, Respondent stated that she could hyperextend her neck, although doing so increases her pain levels. Respondent also stated that she has some difficulties with activities of daily living.

Respondent did not call any physicians or other medical professionals to testify. Respondent submitted medical records from her treating physicians, and from Respondent CHP, to support her appeal. Those documents were admitted as administrative hearsay under Government Code section 11513(d). Documents admitted as administrative hearsay, “shall not be sufficient to support a finding” of disability retirement.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that Respondent failed to prove by a preponderance of the evidence that she is entitled to a disability retirement. There was no persuasive evidence that Respondent was disabled or incapacitated from her work duties under the CalPERS standard. The ALJ also reiterated that CHP’s inability to accommodate Respondent’s worker’s compensation based work restrictions does not have any bearing on this disability retirement matter.

The ALJ concluded that Respondent is not eligible for disability retirement.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

September 26, 2018

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