ATTACHMENT B

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

Herman J. Smith, Jr. (Respondent) applied for industrial disability retirement based on orthopedic (back, neck, left knee and left shoulder) conditions. By virtue of his employment as a Psychiatric Technician (PT) for Respondent California State Prison - Sacramento, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

Respondent filed an application for service pending industrial disability retirement on January 4, 2017, and has been receiving service retirement benefits since that time.

As part of CalPERS’ review of Respondent’s medical condition, Harry A. Khasigian, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Khasigian interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Khasigian opined that Respondent was not substantially incapacitated from the performance of his usual duties as a PT.

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 report, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on July 18, 2018. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing.

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

At the hearing, Dr. Khasigian testified in a manner consistent with his examination of Respondent and the IME report. Dr. Khasigian’s medical opinion is that there was a “high level of subjective complaints that is not corroborated by physical impairment or physical abnormalities on examination.” Therefore, Respondent is not substantially incapacitated.
Respondent testified on his own behalf that his pain limits his ability to sleep and live and that he cannot sit for more than 15 or 20 minutes without experiencing pain. Respondent contended that he cannot perform the duties of a PT because 60 percent of the job requires him to sit down. Respondent did not call any physicians or other medical professionals to testify and did not submit any documentary evidence.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that Dr. Khasigian’s opinion was persuasive. Dr. Khasigian opined that Respondent did not suffer from significant impairment and Respondent’s complaints were not corroborated by physical impairment or physical abnormalities. The ALJ further found that Respondent failed to present competent medical evidence to support his position that he is substantially incapacitated from the performance of his usual and customary duties as a PT.

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

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

September 26, 2018

ELIZABETH YELLAND
Senior Attorney