ATTACHMENT B

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

Raymond B. Cantu (Respondent) was employed by Respondent California Department of Corrections & Rehabilitation - California Institution for Men (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS. On or about June 10, 2013, Respondent submitted an application for industrial disability retirement on the basis of orthopedic (left knee and right shoulder) conditions. Respondent’s application was approved by CalPERS and he retired effective June 11, 2013.

CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive an industrial disability retirement.

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

As part of CalPERS’ review of Respondent’s medical condition, Respondent was sent for an Independent Medical Examination (IME) to Robert J. Kolesnik, M.D., a board-certified Orthopedic Surgeon. Dr. Kolesnik interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Kolesnik also performed a comprehensive IME. Dr. Kolesnik opined that Respondent is no longer substantially incapacitated from performing his usual and customary job duties.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for industrial disability retirement, and should therefore be reinstated to his former position as a Correctional Officer.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). The first day of hearing was held on October 30, 2017, and the second day was held on April 3, 2018. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear.

At the hearing, Dr. Kolesnik testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Kolesnik examined Respondent’s right shoulder, and found the right shoulder to be relatively normal. Respondent’s upper arms, elbows, forearms, wrists, and hands showed no defects, deformity, or atrophy upon examination. Dr. Kolesnik also tested for tendonitis and inflammation of the rotator cuff and supraspinatus tendon. Both the rotator cuff and
supraspinatus tendon were absent abnormality upon testing by Dr. Kolesnik. Respondent’s right shoulder was thus normal.

Dr. Kolesnik also examined Respondent’s left knee. Respondent’s left knee exhibited well healed arthroscopy incisions, without effusion or soft tissue swelling. The left knee did show some joint line tenderness, though stress testing did not elicit pain. Lachman’s test (which stresses the anterior cruciate ligament), McMurray’s test (which tests for torn cartilage), and the drawer sign were all negative. Dr. Kolesnik found Respondent’s left knee to be essentially normal.

Dr. Kolesnik’s medical opinion is that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated. Following his initial IME Report, Dr. Kolesnik issued four supplemental reports after being provided additional medical records for review. Dr. Kolesnik’s opinion remained unchanged in his supplemental reports.

Respondent testified on his own behalf. Respondent testified that his injuries have not healed, and that they prevent him from returning to work.

Respondent also called Robert Wood, M.D., to testify on his behalf. Dr. Wood conducted an IME of Respondent, issued two IME reports, and ultimately concluded that he thought that Respondent was substantially incapacitated from performing his usual and customary job duties.

However, Dr. Wood was inconsistent throughout his testimony, and repeatedly changed his opinions. The ALJ noted the inconsistencies in the Proposed Decision:

On direct examination, Dr. Wood testified that respondent Cantu could squat, crawl and kneel but not for more than 15 minutes. On redirect, Dr. Wood changed his opinion and stated that he did not think that Dr. Wood could fully squat or kneel at all. Then, on the second redirect examination. Dr. Wood testified that he felt the definition of squat in the job description should have been interpreted as a full squat. Then, when commenting on respondent Cantu's ability to squat in his report, dated July 31, 2017, Dr. Wood made no reference to whether the ability is partial or full. Dr. Wood did not change his testimony regarding respondent Cantu's ability to crawl, contradicting previous testimony regarding respondent Cantu's inability to crawl.

The inconsistencies regarding whether respondent Cantu was able to perform certain physical requirements or whether he could do so with pain called into question whether Dr. Wood understood the criteria for determining whether respondent Cantu was substantially incapacitated from performing his usual duties.
The ALJ found Dr. Kolesnik to be more persuasive in his testimony and reports than Dr. Wood. California courts have repeatedly underscored that an expert’s opinion is only as good as the facts and reasons upon which the opinion is based. \(\textit{Kennemur v. State of California} (1982) 133\ \text{Cal.App.3d} \ 907, \ 924.\) The inconsistencies in Dr. Wood’s testimony called into question his understanding of the criteria for determining whether Respondent was substantially incapacitated from performing his usual duties. Dr. Kolesnik was thus more reliable and trustworthy.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent’s appeal. The ALJ found that Respondent was no longer substantially incapacitated from performing his usual and customary job duties.

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

September 26, 2018

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