ATTACHMENT B

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

Respondent David J. Manlowe (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision dated June 8, 2018. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent was employed by Respondent California Medical Facility, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Supervising Correctional Cook. By virtue of his employment, Respondent was a state safety member of CalPERS. On or about September 2, 2014, Respondent submitted an application for industrial disability retirement on the basis of claimed orthopedic (back, right knee, left knee, and right foot) conditions. Respondent’s application was approved by CalPERS and he retired effective March 11, 2015.

In July 2016, 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 remained substantially incapacitated and was entitled to continue to receive 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) with Harry A. Khasigian, M.D., a board-certified Orthopedic Surgeon. Dr. Khasigian interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Khasigian viewed surveillance images of Respondent obtained by the CalPERS Investigations Unit. Dr. Khasigian also performed a comprehensive IME. Dr. Khasigian opined that Respondent was not substantially incapacitated and could perform his usual and customary 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 Supervising Correctional Cook.

Respondent appealed this determination and exercised his right to a hearing before an ALJ with the Office of Administrative Hearings. Hearings were held on October 4, November 28 and December 7, 2017, and again on May 9 and 10, 2018. Respondent represented himself at 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.

A copy of written job descriptions for the position of Supervising Correctional Cook were received into evidence. Additionally, a CDCR Correctional Food Manager (who supervises Supervising Correctional Cooks) testified. A Supervising Correctional Cook’s responsibilities include supervising CDCR employees and up to 24 inmates in an institutional kitchen environment. A Supervising Correctional Cook will spend approximately 50 to 75 percent of an eight-hour shift engaged in supervisorial activities, as distinct from hands-on kitchen work.

At the hearing, Dr. Khasigian testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Khasigian’s medical opinion is that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated.

Initially, Dr. Khasigian asked Respondent to identify and describe his chief complaints, Respondent told Dr. Khasigian that he experienced “total body pain” on a daily basis, at an average pain level of six-eight, with the pain sometimes exceeding a “10” level. Respondent told Dr. Khasigian that, for his right foot, “every step is painful.” Respondent said that the pain in his right knee was daily and at an average level of seven, with the pain — again — sometimes exceeding a “10” level. Respondent made similar claims regarding low back pain.

In contrast to Respondent’s claims, the surveillance videos, which Dr. Khasigian reviewed, showed Respondent spending 45 minutes washing and vacuuming his Ford Mustang, walking approximately .85 miles from his residence to a grocery store, washing and drying his vehicle on another occasion for one hour and 25 minutes, and walking 2.2 miles from his home to a restaurant. Other activities performed by Respondent and captured on the surveillance videos contradicted his claimed incapacity.

As part of his examination of Respondent, Dr. Khasigian performed both a sciatic stretch test (SST) and a straight leg raising test (SLR). As the ALJ noted, “The SLR and the SST both stretch the sciatic nerves, and should result in similar pain limitations. Dr. Khasigian opined that respondent falsely reported pain during the SLR based on the fact that he reported no pain during the SST.” (See Factual Finding No. 13.)

With regard to Respondent’s spine, Dr. Khasigian noted that there was no guarding (voluntary response) or spasm (involuntary response) in the cervical, thoracic or lumbar spine. Respondent had normal gait, stance and stride.

The ALJ summarized Dr. Khasigian’s report findings and testimony regarding the lack of evidence of impairment regarding Respondent’s lumbar spine.
Dr. Khasigian reviewed an October 3, 2013 MRI of respondent’s lumbar spine. There were signs of degenerative disc disease with bulging at the L5-S1 level and mild facet hypertrophy, but no disc protrusion. During the hearing in this matter, Dr. Khasigian also reviewed a September 13, 2017 MRI imaging report of respondent’s lumbar spine, which was included in respondent’s exhibits. The results showed lumbar disc bulges of 1 to 3 mm, without spinal stenosis or nerve root compression, and the presence of L5-S1 facet osteoarthritis. Lumbar disc bulges of 1 to 3 mm are normal and expected in a person of respondent’s age. The 2017 MRI does not present any objective findings consistent with respondent’s reports of pain, and confirms Dr. Khasigian’s findings of a normal lumbar spine exam. Dr. Khasigian noted that respondent’s activities in the surveillance tapes, including walking, washing his car, getting in and out of his car, and carrying objects without any evidence of impairment is inconsistent with respondent’s statements regarding his pain levels. (See Factual Finding No. 16; Emphasis added.)

Medical records demonstrated that Respondent’s right knee was injured in 2008. A 2009 MRI showed a medial meniscus tear. Arthroscopic surgery (partial medial meniscectomy) was performed on January 8, 2010. The knee joint was found to be normal, without degenerative arthritis. Respondent had a second surgery on his knee in 2013.

A March 7, 2018 MRI of Respondent’s right knee showed a small amount of joint effusion, results of the two prior surgeries, no current meniscal tears and no other significant findings. Dr. Khasigian’s clinical examination found that Respondent had normal range of motion in both knees, full stability, normal ligaments and only a minor clicking sound on flexion and extension of the right knee. Dr. Khasigian stated that, essentially, Respondent had a fully functional, normal right and left knee.

Respondent’s feet showed no swelling. Respondent has a congenital webbing between his second and third toes on each foot. But this condition is not disabling. Likewise, on his right foot there is evidence of a long-healed fracture to the second toe, which was not and is not disabling.

Respondent testified on his own behalf and introduced into evidence copies of various medical records and reports. Respondent testified that the condition of his low back, knees and feet prevent him from performing the usual duties of a Supervising Correctional Cook. Respondent did not call any physicians or other medical professionals to testify on his behalf.

The ALJ summarized the documentary evidence offered by Respondent as follows:

Respondent has undergone numerous chiropractic, podiatric, and medical diagnoses and treatments of his lumbar spine, feet, and right knee. None of the clinical records either state or demonstrate that respondent is substantially incapacitated from performing the duties of a Supervising Correctional Cook. Also, some of the conclusions...
reached by respondent’s treating providers contradict his claim that he is substantially incapacitated. For example, one of respondent’s treating physician’s, Randall Schaefer, M.D., gave a diagnosis of “symptom magnification” in an October 27, 2016 progress report regarding his right knee. Another treating physician, David Broderick, M.D., noted in a letter dated March 20, 2018, that a recent MRI of respondent’s right knee was negative for any evidence of internal derangement of the knee.

(See Factual Finding No. 22; Emphasis added.)

The ALJ found Respondent’s evidence and claims unpersuasive. The ALJ also found that “respondent's complaints of pain are exaggerated in relation to the objective medical evidence, as stated by both Dr. Khasigian and Dr. Schaefer.”

The ALJ found that the competent medical evidence presented by Dr. Khasigian established that Respondent is no longer substantially incapacitated from performing his duties as a Supervising Correctional Cook for Respondent CDCR.

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 CalPERS had presented competent medical evidence to satisfy its burden of proving that Respondent is no longer substantially incapacitated from performing the usual and customary duties of a Supervising Correctional Cook and that Respondent had failed to adequately rebut CalPERS’ evidence.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. In the Petition for Reconsideration, Respondent complains regarding the findings made by the CalPERS IME. However, those same complaints were part of Respondent’s testimony at the hearing and were considered and rejected by the ALJ. The Proposed Decision that was adopted by the Board at the August 15, 2018, meeting was well reasoned and based on the credible evidence presented at hearing. There is nothing new for the Board to reconsider. The Board should deny the Petition for Reconsideration.

September 26, 2018

RORY J. COFFEY
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