ATTACHMENT B

STAFF'S ARGUMENT
STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Steve N. Novencido (Respondent) was employed by Respondent California Substance Abuse Treatment Facility & State Prison - Corcoran, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS.

On November 8, 2011, Respondent applied for industrial disability retirement (IDR) based on an orthopedic (back) condition. CalPERS approved the application and placed Respondent on IDR. Respondent was under the minimum age for voluntary service retirement applicable to members of his classification at that time.

On February 6, 2018, CalPERS notified Respondent that his IDR benefits were under review to determine if he continued to meet the qualifications to receive IDR.

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 of the claimed disability must be permanent or of an extended duration which is expected to last at least 12 consecutive months or will result in death.

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

After reviewing all medical documentation and the IME report, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for IDR, 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. A hearing was held on February 20, 2019. 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.
CalPERS presented the testimony of CalPERS staff, Nelson Cooper, who investigated Respondent. Respondent is currently employed as an Assistant Strength and Conditioning Coach at the University of Southern California (USC). Mr. Cooper’s Internet research yielded numerous photographs and videos of Respondent engaged in his current employment duties and engaged in physical activities such as running, jumping, and performing crunches while holding a kettlebell weight. During the surveillance, Mr. Cooper also observed Respondent carrying a grocery bag in his right hand and a case of water which he placed into the trunk area of his car.

At the hearing, Dr. Fait testified in a manner consistent with his examination and the IME report. Dr. Fait testified that there was no objective evidence of a substantial incapacity in this case. He summarized the medical records, which established that Respondent could ambulate without a limp, get in and out of a vehicle, and shop without apparent difficulties. Respondent's physical examination showed an essentially functional and nearly full range of motion of his entire lower lumbar spine. Dr. Fait testified that there was no evidence of radiculopathy, muscle weakness, atrophy of the lower extremities, and asymmetric reflexes. Respondent presented only subjective complaints of numbness and tingling that were documented to have resolved months earlier by the Respondent’s treating surgeon. Dr. Fait’s medical opinion is that Respondent can perform the duties of a Correctional Officer and is therefore no longer substantially incapacitated.

Respondent testified on his own behalf. Respondent testified that his current position involves working with the university’s various sports teams, i.e., volleyball, basketball, football, track, diving, tennis, and lacrosse, to make them faster, stronger, and keep them injury-free. Respondent provides instructions on proper exercise techniques, writes exercise programs, and demonstrates exercises and functional movements.

Respondent testified that he suffers from only intermittent pain, and that he had no pain on the days the photos and videos found by Mr. Cooper were shot. Respondent admitted that the spinal surgery on November 17, 2017, resulted in an approximate 80 percent improvement in his physical condition; however, he believes he is less capable of performing physically-stressful work because the surgery has made his spine more vulnerable. Respondent feels he is unable to perform many of the duties of a Correctional Officer such as taking a large inmate to the ground in the event of a fight or wearing 35 pound belt eight hours a day in an uncontrolled environment.

At the hearing, Respondent also testified that he disagreed with the results of Dr. Fait’s examination and report; however, he did not call any physicians or other medical professionals to testify.

The ALJ found that the only competent medical evidence was presented by Dr. Fait. It established that Respondent is no longer substantially incapacitated from performing his duties as a Correctional Officer for Respondent CDCR. The ALJ commented that, since his spinal surgery in November 2017, Respondent has made sufficient progress that he...
is able to engage in physical activities that would be “unfeasible” for an individual who is substantially incapacitated. The ALJ found Dr. Fait’s report and testimony convincing.

After considering all the evidence introduced, as well as arguments by the parties at the hearing, the ALJ denied Respondent’s appeal and upheld CalPERS’ determination. The ALJ found that the evidence established that Respondent was no longer substantially incapacitated and that he should be reinstated.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the Proposed Decision.” There are two instances in the Proposed Decision that omit the word “industrial” before the term “disability retirement.” To avoid ambiguity, staff recommends the word “industrial” be inserted before “disability retirement” on page one, paragraph six and on page two, paragraph one of the Proposed Decision.

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

April 17, 2019

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