ATTACHMENT B

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

Fernando M. Malasan (Respondent) applied for disability retirement based on an orthopedic (back) condition. By virtue of his employment as a Food Service Technician I for Respondent Department of State Hospitals Napa (Respondent Napa State Hospital), Respondent was a state miscellaneous member of CalPERS.

Respondent filed an application for service pending disability retirement on July 13, 2016 and has been receiving benefits since that time.

As part of CalPERS’ review of Respondent’s medical condition, Joseph Anthony Matan, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Matan interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Matan opined that Respondent is in good condition despite his feelings of back strain and is fully capable of performing his work duties as a Food Service Technician I.

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 duration which is expected to last at least 12 consecutive months or will result in death.

After reviewing all medical documentation and the IME reports, 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. A hearing was held on March 7, 2019. Respondent represented himself at the hearing. Respondent Napa State Hospital did not appear at the hearing and was found to be in default.

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. Matan testified in a manner consistent with his examination of Respondent and the IME report. Dr. Matan’s medical opinion is that there is no work that Respondent needed to perform as a Food Service Technician I which he was
incapacitated from by his orthopedic medical condition. Dr. Matan noted that while Respondent complained of some lower back pain, he was not restricted from his job duties. Dr. Matan believes that Respondent is exaggerating his complaints of pain, staggering in exaggeration of his discomfort upon the test requiring walking on his heels. Dr. Matan found no objective findings to substantiate the need for work restrictions. (Proposed Decision, page 3.) Dr. Matan determined that Respondent had a normal back exam. Therefore, Respondent is not substantially incapacitated.

Respondent testified on his own behalf that on the day he was stricken with current pain, he was lifting milk cartons and became dizzy and had back pain but continued to work through his shift. Respondent called no witnesses to testify on his behalf, including calling no physicians nor other medical professionals to testify. Respondent submitted no medical records from his treating physicians to support his appeal. He did offer the hearsay medical report of his Workers’ Compensation reviewing physician, but that report was centered on the standards for Workers’ Compensation findings, not the standards for CalPERS disability requirements. The ALJ determined that “(u)nder Government Code section 11513, subdivision (d), the hearsay medical report of Dr. Manijeh Ryan is not sufficient to support a finding that respondent is incapacitated for the performance of duty.” (Proposed Decision, page 5.)

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 was capable of performing his job duties. The ALJ determined that “. . . changes to the spine which were noted in an MRI could be normal and age-related, and that other studies were normal.” (Proposed Decision, page 4.) The ALJ determined that the only medically competent evidence at hearing, the testimony and reports of Dr. Matan, whom the ALJ found to be extensively experienced and credible, do not establish disability.

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.

June 19, 2019

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