ATTACHMENT B

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

Tyson J. Mrosek (Respondent) was employed by Respondent California Department of Forestry and Fire Protection (Respondent Cal Fire) as a Firefighter II Paramedic (Firefighter). By virtue of his employment, Respondent was a state safety member of CalPERS. On or about April 15, 2013, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (back) condition. Respondent’s application was approved by CalPERS and he retired effective May 29, 2013.

In 2017, 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 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 IME.

As part of Dr. Fait’s IME, he also reviewed an investigation report prepared in connection with CalPERS’ reexamination of Respondent (the Investigation Report). The Investigation Report detailed various activities Respondent enjoyed doing while he received an industrial disability retirement. For example, the Investigation Report documented Respondent competing in a significant number of BMX-style bicycle races, participating in mountain bike races, ziplining, and wake surfing. The Investigation Report contains photographs from Respondent’s public social media accounts documenting Respondent’s participation in these activities.

Last, Dr. Fait also conducted medical research regarding rehabilitation guidelines for active military members. Dr. Fait conducted this research to determine the expected recovery of individuals who work in jobs that are vigorous in nature. Dr. Fait’s medical research indicated that U.S. military personnel have a reasonable expectation to return to activities such as parachute jumping and diving as part of their active-duty military responsibilities after they undergo a total disc arthroplasty (a type of back surgery).
Following his examination and review of all the documentation provided to him, Dr. Fait opined that Respondent is not substantially incapacitated from the performance of his usual job duties. Based on Dr. Fait’s objective findings, there was no objective evidence of a continued orthopedic condition related to Respondent’s back, and the evidence contained in the Investigation Report showing Respondent participating in a variety of physical activities, it was Dr. Fait’s medical opinion that Respondent should be capable of returning to work and performing the usual and customary duties of a Firefighter. Dr. Fait opined that Respondent was only putting forth fair effort during the examination. Dr. Fait also opined that Respondent was exaggerating his complaints. Dr. Fait based this opinion, in part, on the fact Respondent complained of being in pain at a 9/10 level in a visit to a chiropractor on November 9 and 14, 2016, but was able to participate in and win a BMX bike race on October 22, 2016, as well as attending another race on November 5, 2016.

After reviewing all medical documentation and the IME report, 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 Firefighter II.

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 20, 2019. Respondent was represented by counsel at the hearing. Respondent Cal Fire did not appear at the hearing.

At the hearing, Dr. Fait testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Fait testified that he did not observe any deformity with Respondent’s lumbar spine, there was no evidence of atrophy or radiculopathy in the lower extremities, and that Respondent was able to walk on his heels and toes and squat. Dr. Fait testified that upon examination, Respondent had full motor strength in all lower extremity muscle groups and his reflexes were intact and symmetric. Dr. Fait testified that Respondent did have some restricted range of motion with his back and there was mild to moderate tenderness on palpation. However, Dr. Fait testified that he was skeptical that Respondent was putting forth a full effort. Dr. Fait’s skepticism was based on the fact Respondent was competing in competitive bike races, and the pictures he reviewed of Respondent did not show him in any apparent distress. In addition, Dr. Fait’s skepticism of Respondent’s reported pain level was based on the fact Respondent was complaining to his treating physicians and chiropractor of being at a 9 out of 10 pain level, while at the same time competing in bike races.

Dr. Fait reviewed the physical requirements and essential functions of Respondent’s job as a Firefighter. In addition, Dr. Fait conducted medical research to determine the ability of individuals who have had back surgery similar to Respondent, to return to work that is strenuous in nature. Dr. Fait obtained research showing that there is a reasonable expectation that military personnel with similar injuries will return to active-duty responsibilities, and these responsibilities include parachute jumping and diving.
Ultimately, Dr. Fait testified that it is his medical opinion that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated.

CalPERS also presented the testimony of an Investigator who reviewed Respondent’s social media accounts, reviewed online results of bicycle races that Respondent competed in, and attempted to conduct surveillance of Respondent at a bike race he was scheduled to compete in. The uncontroverted evidence presented by CalPERS' Investigator established that Respondent participated in, and won, numerous BMX bicycle races between October 2015 and July 2017. The evidence also established that Respondent participated in a yearly mountain bike race known as the Kamikaze Games in 2013 and 2015. The evidence presented by CalPERS' Investigator showed that the Kamikaze Games involves bicyclists riding down fire break roads on Mammoth Mountain. The 2013 Kamikaze Games race took place on September 6, 2013, which was approximately 5 months after Respondent submitted his Industrial Disability Retirement Application.

CalPERS' Investigator also testified to his attempts to obtain information from Respondent’s public social media presence. He testified that he was able to obtain postings and pictures from Respondent’s Facebook page and Instagram account. The Investigator testified that shortly after CalPERS notified Respondent that he was being reevaluated, Respondent’s online accounts were either deleted or marked as private.

CalPERS' Investigator also testified that he attempted to conduct surveillance of Respondent at the 2017 Kamikaze Games race. However, despite being confirmed to compete in the race, Respondent failed to show up at that particular race.

Respondent testified on his own behalf. Respondent testified that he initially injured his back while attempting to lift, with his coworkers, a morbidly obese individual. Respondent testified that he reinjured his back while attempting to remove an individual from a car after a crash. Respondent testified that he ultimately underwent surgery to replace a disc in his back and did not return to work after his surgery.

Respondent admitted that he rode mountain bikes in the Kamikaze Games, and also participated in numerous BMX races. Respondent testified that he was on a BMX team and that his family also was part of the team. Respondent testified that he stopped participating in the BMX races in 2017 because of the pain he experienced.

Respondent testified that he never asked his treating physicians whether he should participate in the bicycle races. He testified that he never specifically told his treating physicians that he was participating in the bicycle races, until he was seen by Dr. Bergey in connection with an examination done a few days prior to the hearing. Respondent testified that he never informed his doctors about his racing, or asked whether he should participate in these type of activities, because the doctors informed him that he should return to as much as his normal life as possible.
Respondent acknowledged that the Investigation Report accurately shows him wakesurfing. However, he testified he only did it one time, that it was not a high impact activity, and that it caused him pain. Respondent also admitted that the Investigation Report accurately depicted him at a whitewater recreation center, and that he ziplined at the center. However, he denied actually participating in whitewater rafting at the center.

Respondent testified about the physical requirements of being a Firefighter, including the weight of the equipment he would have to wear and carry when responding to an emergency. Although Respondent signed the physical requirements form submitted with his application indicating a Firefighter never has to lift more than 100 lbs, he testified that he did not believe this was accurate. It was Respondent’s testimony that he did not believe he would be able to perform all of his duties as a Firefighter.

Respondent also called Dr. Darren Bergey to testify on his behalf. Dr. Bergey is the doctor who performed Respondent’s back surgery and continued treating him after the surgery.

Dr. Bergey testified that the result of Respondent’s surgery was fair, and as a result Respondent continues to have on-going symptoms associated with his back injury. Dr. Bergey testified that as a result of Respondent’s ongoing symptoms, he referred him to a chiropractor for additional treatment. Dr. Bergey testified that he would need to perform a full functional capacity examination to determine Respondent’s true capacity to lift heavy objects. However, for prophylactic reasons Dr. Bergey placed certain lifting restrictions on Respondent. In addition, Dr. Bergey testified that he did not believe Respondent could reliably or predictably lift heavy items.

Dr. Bergey testified that he found objective signs of radiographically and guarding during his recent examination of Respondent. In addition, Dr. Bergey found that Respondent’s range of motion was somewhat limited, and that he was concerned Respondent would not be able to twist laterally, run and preform repeated bending, stooping and extending.

Dr. Bergey testified that Respondent never informed him that he was participating in bike races. Dr. Bergey testified that he was initially concerned about the truthfulness of Respondent’s reported symptoms as a result of the activities he was performing. However, it was Dr. Bergey’s opinion that Respondent’s ability to perform these activities was consistent with his evaluation.

Ultimately, Dr. Bergey testified that he did not consider his recommendations to be prophylactic in nature because he does not believe that Respondent could repeatedly perform the usual and customary duties of a Firefighter. Dr. Bergey testified that he believes Respondent could perform the duties in an emergency, he does not believe he could reliably perform them in a repetitive manner, which he believes is a requirement of Respondent’s position.
After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ granted Respondent’s appeal. The ALJ found that CalPERS has the burden in this matter to establish that Respondent is no longer substantially incapacitated. The ALJ found that Dr. Fait and Dr. Bergey are both experienced and qualified orthopedic surgeons and were both credible witnesses. The ALJ also found that Respondent was a credible witness.

The ALJ found that it was his role, as a trier of fact, to determine which witness is more persuasive. Dr. Fait did not directly discuss with Respondent the Investigation Report or the underlying materials contained in the Investigation Report. Although Respondent did not disclose the activities he participated in to Dr. Bergey until days before the hearing, the ALJ ultimately found Dr. Bergey’s opinion to be more persuasive because he directly discussed with Respondent all of the activities he was, and was not, able to perform.

The ALJ ultimately determined that it is his opinion that Respondent would not be able to perform the repetitive tasks required of a Firefighter, and that for this reason CalPERS failed to establish that Respondent is no longer substantially incapacitated.

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.” In order to avoid ambiguity that Respondent’s disability retirement has been “industrial,” staff recommends that the word “industrial” be inserted before the words “disability retirement” in the “Issue” paragraph and paragraph 14 on page 20 of the Proposed Decision.

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

June 19, 2019

JOHN SHIPLEY
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