ATTACHMENT B

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

Michael J. Rigney (Respondent) was employed by Respondent High Desert State Prison, 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 or about October 9, 2012, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (left knee) condition. Respondent’s application was approved by CalPERS and he retired effective October 31, 2013.

In 2016, CalPERS staff notified Respondent that CalPERS conducts reexaminations 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 Robert K. Henrichsen, M.D., a board-certified Orthopedic Surgeon. Dr. Henrichsen interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Henrichsen also performed a comprehensive IME. Based on this information, Dr. Henrichsen opined that Respondent remained substantially incapacitated based on the condition of his left knee. However, after reviewing public social media postings made by Respondent showing him fishing and participating in fishing tournaments, Dr. Henrichsen reversed his opinion and found Respondent was no longer substantially incapacitated.

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. A hearing was held on February 19, 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.

At the hearing, Dr. Henrichsen testified in a manner consistent with his examination of Respondent and the reports prepared after the IME. Dr. Henrichsen’s medical opinion is that Respondent can perform the duties of his position, and is therefore no longer substantially incapacitated. Dr. Henrichsen explained that Respondent applied for disability retirement after an October 2011 incident at work, where Respondent was participating in baton training and twisted his left knee. Respondent was originally diagnosed as having a torn meniscus and medial articular surface injury. Dr. Henrichsen evaluated Respondent in 2013, and at that time found that Respondent remained substantially incapacitated.

On physical examination in 2016, Dr. Henrichsen found that Respondent had normal strength to stand on his heels and toes, somewhat limited ability to bending his knees to be in a squatting position, and relatively normal range of motion, with a negative nerve traction test suggesting no nerve infringement in the knee. In his original report, Dr. Henrichsen found Respondent remained substantially incapacitated because of the condition of Respondent’s left knee as noted in an arthroscopy summary, affirming the meniscus tear and articular surface defect.

In his supplemental report, however, Dr. Henrichsen reviewed x-rays and public social media postings that were not available to him during his initial evaluation in November 2016. He found that the x-rays showed no arthritic changes and that Respondent’s left knee was otherwise normal. The public social media postings, according to Dr. Henrichsen, did not demonstrate any evidence of favoritism or difficulty with either knee. The videos and images showed, according to Dr. Henrichsen, that Respondent could bend part way, climb over rocks, squat down, get his left knee on the ground to display caught fish, and accomplish a variety of other maneuvers, including standing in front of Respondent’s fishing boat. For these reasons, Dr. Henrichsen ultimately concluded that Respondent was no longer substantially incapacitated.

Respondent testified on his own behalf. Respondent testified that he believed his physical condition had not changed since his evaluation with Dr. Henrichsen in 2013. Respondent argued that Dr. Henrichsen is not an expert in fishing or traveling on fishing boats, and that his opinions regarding the public social media postings should be given less weight. Respondent argued the public social media postings were deceiving because they did not show what happened before and after the photographs or videos were taken. For example, in one of the photographs showing Respondent partially knelt down on his left knee, Respondent testified that immediately after the picture was taken, he fell down because his left knee would not hold him. Respondent therefore argued that the lack of comprehensive information made the videos and photographs unreliable. Respondent also testified and demonstrated, by submission of photograph
time stamps, that approximately one-half of the public social media postings that were posted after his injury in 2011 contained photographs of events that occurred prior to the injury. For these reasons, Respondent argued that photographs taken before the injury were not relevant.

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, based upon Respondent’s testimony regarding when the photographs were taken and the lack of context provided by the images, they were not a reliable basis upon which Dr. Henrichsen could make a medical finding. The ALJ found that CalPERS did not establish sufficient foundation for Dr. Henrichsen to rely upon the photographs as evidence of Respondent’s physical condition after the 2011 incident. For these reasons, the ALJ found that CalPERS had not met its burden to prove Respondent was no longer substantially incapacitated, and granted Respondent’s appeal.

Staff disagrees with the ALJ’s ultimate conclusion, but recognizes that the evidence proffered by Respondent at hearing regarding the timing and context of the public social media postings forms a sufficient evidentiary basis for the ALJ to determine that the postings were not sufficiently reliable, in this case, for use by Dr. Henrichsen as the basis for his medical opinions.

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

June 19, 2019

KEVIN KREUTZ
Senior Attorney