ATTACHMENT B

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

Veronica Henderson (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision dated April 9, 2019. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent filed an application for disability retirement on September 6, 2017, based on orthopedic (bilateral knee and low back) conditions.

As part of CalPERS’ review of Respondent’s medical condition, Hose Kim, M.D., a board-certified Orthopedist, performed an Independent Medical Examination (IME). Dr. Kim interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints and reviewed her medical records. Dr. Kim opined that Respondent was not substantially incapacitated from performing her job duties.

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 report, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A hearing was held on March 11, 2019. Respondent represented herself at the hearing. Respondent DMV did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her 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. Kim testified in a manner consistent with his examination of Respondent and the IME report. Dr. Kim testified that during his examination of Respondent, he observed that she had a reduced range of motion to her lumbar spine on flexion and extension and reduced range of motion to both her knees on flexion. Dr. Kim noted no other significant findings in his examination. Following the
examination, Dr. Kim ordered x-rays of Respondent’s knees. The x-rays were taken on February 2, 2018. Dr. Kim reviewed the x-rays and noted in his IME report that they revealed good alignment of Respondent’s knees with well-maintained joint spaces. According to Dr. Kim, Respondent appeared to be cooperating with the examination but her subjective complaints far outweighed the objective findings as contained in her x-rays. Additionally, he stated that though Respondent had significant complaints of pain in her knees and lower back, he found no objective evidence of an orthopedic condition that would explain her subjective complaints. Based on this lack of any objective findings, Dr. Kim opined there were no activities Respondent would be physically unable to perform.

Respondent testified on her own behalf regarding her orthopedic conditions. Respondent testified that she had undergone knee surgery to her left and right knees. After her surgery, she went back to work at the DMV; however, due to her complaints of pain, the DMV reduced her hours from eight to four per day. Respondent’s recollection differed from Dr. Kim’s recollection of the examination. Specifically, Respondent testified that she was not able to ambulate freely or squat during the examination and that she was in pain during much of the examination. Respondent presented medical records from Kaiser Permanente from October 18, 2016 until December 19, 2018. She did not call any physicians or other medical professionals to testify.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ upheld CalPERS’ determination and denied Respondent’s appeal. The ALJ found that Respondent did not present competent medical evidence to establish that, by reason of an orthopedic condition, she is substantially incapacitated from the performance of her usual duties as a Motor Vehicle Representative employed by the DMV. The ALJ found Dr. Kim’s testimony was credible and forthright. He provided objective observations to substantiate his conclusions that Respondent had no significant physical abnormalities during his physical examination. Dr. Kim provided objective findings based upon his physical examination that Respondent’s orthopedic complaints to her lower back and knees did not render her substantially incapacitated to perform the duties of her position as a Motor Vehicle Representative. In addition, Respondent offered insufficient objective medical evidence to establish that she is incapable of performing her required job duties. The ALJ held that the evidence provided is insufficient to establish that Respondent was substantially incapacitated from performing her usual job duties at the time of her application for disability on September 6, 2017, based on the orthopedic condition of her back and knees.

The ALJ concluded that Respondent is not eligible for disability retirement.

In her petition for reconsideration, Respondent makes two arguments: (1) CalPERS erroneously processed her application for disability retirement as an application for industrial disability retirement; and (2) CalPERS was not aware of and did not consider complaints she filed against Dr. Kim.
First, CalPERS processed Respondent’s application as a disability retirement – not an industrial disability retirement. CalPERS denied Respondent’s application for disability retirement based on competent medical evidence that established that she was not substantially incapacitated from performing her job duties as a Motor Vehicle Representative.

Second, at the hearing, Respondent testified regarding her complaints against Dr. Kim. The ALJ considered these complaints in the Proposed Decision. The Petition for Reconsideration does not offer any new information that has not already been considered on this point.

Respondent does not provide new evidence that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the May 15, 2019, meeting was well reasoned and based on the credible evidence presented at hearing.

For all the above reasons, staff argues that the Petition for Reconsideration be denied.

June 19, 2019

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