ATTACHMENT B

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

Daisy S. Chisholm (Respondent) worked for Respondent Department of State Hospitals - Stockton (Respondent DSH - Stockton) as a Psychiatric Technician. By virtue of her employment, Respondent is a state safety member of CalPERS.

Respondent filed an application for industrial disability retirement based on orthopedic (neck and right shoulder) conditions on September 14, 2016.

As part of CalPERS’ review of Respondent’s medical condition, Robert J. Kolesnik, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Kolesnik interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints and reviewed her medical records. Dr. Kolesnik opined that Respondent is not substantially incapacitated from performing her job duties as a Psychiatric Technician.

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 of the 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 (OAH). A hearing was held on June 10, 2019. Respondent represented herself at the hearing. Respondent DSH - Stockton 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. Kolesnik testified in a manner consistent with his examination of Respondent and the IME report. Dr. Kolesnik completed a thorough physical examination of Respondent and testified that Respondent complained of pain every time he touched her and that she seemed to be exaggerating symptoms. He did not note any atrophy which would normally be expected if someone was in such a degree of pain that they were not using a particular body part (i.e., shoulder, arms, etc.)
Specifically, he noted Respondent's biceps and triceps were intact with no atrophy, defects or deformities. Similarly, Respondent's elbows had normal alignment and no angular or rotatory deformities. Respondent reported diffuse pain in her right shoulder when moving her right elbow. No atrophy, deformities or defects were observed in Respondent's forearms, wrists or hands, although Respondent complained of pain in her right wrist with all motion. Respondent had full range of motion of all fingers and both thumbs. On the grip-strength test, Respondent put forth poor effort on the right and Dr. Kolesnik could not even obtain a grip strength. The left was normal. Ultimately, Dr. Kolesnik opined that there was no job duty of a Psychiatric Technician that Respondent was physically incapable of performing.

At the hearing, Respondent testified that she sustained an injury at work in July 2014, when she fell after she was hit from behind by a staff member who was pushing a cart. Respondent was treated for her injury and returned to work with no restrictions. Respondent claims she has "limitations" that she "should not" lift anything over her head, should not sit and should not push or lift anything over five pounds. Respondent also submitted medical reports, a declaration from her treating physician and a functional capacity evaluation which were admitted as administrative hearsay. Respondent did not call any physicians or other medical professionals to testify.

Respondent also testified that she gave "two weeks notice" to her employer to attend jury duty. Respondent claimed that her employer told her if she was not back in time from jury duty, she would be fired. Respondent testified that she began experiencing chest pain, back pain, and all her "injuries" flaring up. Respondent was taken to the hospital by an ambulance and never returned to work after the incident.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that the only competent medical opinion provided at the hearing was the testimony and reports from Dr. Kolesnik, an expert Orthopedic Surgeon with extensive experience in conducting orthopedic examinations. Dr. Kolesnik conducted a thorough examination of Respondent. The ALJ also found other than her subjective complaints of pain, there was no corresponding objective evidence of any limitations. Specifically, given the level of pain Respondent expressed, atrophy would have been expected - but was completely nonexistent. Further, Respondent exaggerated her complaints of pain. Her range of motion, hands and wrists were noted as normal, yet she exhibited no grip strength whatsoever in her right hand. Finally, even assuming Respondent’s complaints of pain were not exaggerated, the ALJ concluded pain alone is not a sufficient basis upon which to grant a disability retirement.

The ALJ concluded that the competent medical evidence established that Respondent is not physically incapable of performing the duties of a Psychiatric Technician and Respondent is not entitled to industrial disability retirement.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to “make technical or other minor changes in the Proposed Decision.” In order to avoid
ambiguity, staff recommends that the Proposed Decision be modified by inserting the word, “industrial” before the words, “disability retirement” on page 2, in the “Issue” and “Summary” paragraphs and on page 17, paragraphs one and two; and by inserting in the Order, the phrase, “an industrial disability retirement” instead of, “a disability retirement.”

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

August 21, 2019

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Senior Attorney