ATTACHMENT B

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

Juan G. Nielsen (Respondent) was employed by Respondent California Rehabilitation Center, 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 September 24, 2015, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (bilateral knee) condition. Respondent’s application was approved by CalPERS, and Respondent has been receiving his industrial disability retirement since that time.

In 2017, Respondent was notified by CalPERS that it 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 Robert J. Kolesnik, M.D., a board-certified Orthopedic Surgeon. Dr. Kolesnik interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Kolesnik also performed a comprehensive IME.

Dr. Kolesnik opined that Respondent is not substantially incapacitated from performing his usual and customary job duties.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated, making him ineligible for continued 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 (OAH). A hearing was held on April 24, 2019. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing.

At the hearing, Dr. Kolesnik testified in a manner consistent with his examination of Respondent and the report prepared after the IME. On physical examination, Dr. Kolesnik noted that Respondent’s surgically repaired right knee was stable on flexion and extension. When Dr. Kolesnik took circumferential measurements of Respondent’s knees, the measurements were within the range of normal.
Dr. Kolesnik noted that Respondent’s knees did not grind or pop when moved. It was also significant that there was no atrophy, which is the wasting away of muscles from non-use, in Respondent’s lower limbs.

Dr. Kolesnik also reviewed Respondent’s medical records, which showed thinning of the cartilage in Respondent’s right knee. Dr. Kolesnik also reviewed the 2015 IME report of Hose Kim, M.D., in which Dr. Kim found Respondent to be substantially incapacitated.¹ The objective findings in Dr. Kolesnik’s 2018 evaluation were largely identical to the objective findings at the time of Dr. Kim’s 2015 IME report. However, Dr. Kolesnik found that Respondent could perform all of his job duties as a Correctional Officer. Hence, Dr. Kolesnik’s medical opinion is that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated.

Ronny Ghazal, M.D., Respondent’s treating Orthopedic Surgeon, testified on Respondent’s behalf. Dr. Ghazal performed the ACL reconstruction on Respondent in 2015, and last saw Respondent professionally in September 2018. Dr. Ghazal testified that Respondent’s x-rays showed Osteoarthritis. Since he began seeing Respondent in 2014, Dr. Ghazal believes that Respondent’s knee condition has deteriorated. Dr. Ghazal stated that there was nothing that physically prevented Respondent from squatting, running, walking up stairs, or returning to work. However, Dr. Ghazal is of the opinion that Respondent’s knees would eventually swell if he returned to work, ultimately rendering him unable to perform his job as a Correctional Officer.

Respondent testified on his own behalf. Respondent stated that he cannot stand for long periods of time, and that he cannot run. Respondent testified that, while working as a Correctional Officer, he was required to subdue inmates. Respondent does not think he could subdue inmates, or even perform some of the less strenuous aspects of his job, due to his knee condition.

Respondent also submitted medical records from his Qualified Medical Evaluator (QME) to support his appeal. Those records were admitted as administrative hearsay, although some of the QME’s findings were consistent with the findings of Dr. Kolesnik.

The ALJ found that the competent medical opinion presented by Dr. Kolesnik was more persuasive that than from Dr. Ghazal. Dr. Ghazal’s opinion was speculative and did not meet the standards required for a disability retirement.

Conversely, Dr. Kolesnik’s opinion was reasonable and based on the findings of his physical examination of Respondent. The opinion of Dr. Kolesnik was persuasive in finding that Respondent can substantially perform his usual and customary duties as a Correctional Officer for CDCR. Although performing the duties may cause Respondent pain, experiencing some pain is insufficient for a finding of substantial incapacity under the CalPERS standard.

Hence, after considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent’s appeal.

¹ Respondent’s industrial disability retirement was initially granted based on Dr. Kim’s IME report.
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 final clause in the final sentence in paragraph one on page two be changed from “and was retired for disability effective immediately” to “and his retirement for disability was retroactive to September 25, 2015.” In addition, the word “still” in the first line of the of paragraph 10 on page 10 should be changed to read “no longer.”

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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