ATTACHMENT B

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

David M. Simpson (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge’s (ALJ) Proposed Decision dated June 19, 2019. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Respondent was employed by Respondent California State Prison Los Angeles County, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent is a state safety member of CalPERS.

On or about August 24, 2015, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (mid-back) condition. Respondent’s application was approved by CalPERS, and he retired effective January 29, 2015.

In 2018, CalPERS’ staff notified Respondent that he would be reevaluated, pursuant to Government Code section 21192, for the purpose of determining whether he remained substantially incapacitated and therefore entitled to continue to receive industrial disability retirement benefits.

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 John D. Kaufman, M.D., a board-certified Orthopedic Surgeon. Dr. Kaufman interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints and reviewed medical records. Dr. Kaufman also performed a comprehensive IME. Dr. Kaufman opined that Respondent is no longer substantially incapacitated from performing his job duties as a Correctional Officer.

After reviewing all of the medical documentation and the IME reports, CalPERS determined that Respondent is no longer substantially incapacitated, is 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 (OAH). A hearing was held on May 22, 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. Kaufman testified in a manner consistent with his examination of Respondent and the IME report. Dr. Kaufman testified that during the examination, Respondent complained of pain in his neck, bilateral shoulders, bilateral elbows, bilateral wrists/hands, entire back, bilateral hips, bilateral knees, bilateral ankles and feet. Dr. Kaufman performed a physical examination of Respondent with a focus on Respondent’s cervical spine, lumbar spine, bilateral shoulders, bilateral elbows, bilateral wrists, bilateral hands, bilateral hips, bilateral knees, bilateral ankles and bilateral feet.

Dr. Kaufman testified that Respondent had normal range of motion in all areas that were examined. Additionally, Dr. Kaufman measured the girth of Respondent’s biceps, forearms, wrists, thighs and calves and found that they displayed symmetry, demonstrating that there was no atrophy in Respondent's upper and lower extremities. Dr. Kaufman testified that he found no objective evidence of significant pathology related to Respondent’s neck, thoracic spine, bilateral shoulders, bilateral knees, bilateral ankles and bilateral hands. Dr. Kaufman’s medical opinion is that Respondent is no longer substantially incapacitated from performing his job duties.

Dr. Kaufman also reviewed Magnetic Resonance Imagery (MRI) reports presented by Respondent at the hearing. Dr. Kaufman testified that the MRI reports of Respondent's left knee and cervical spine were normal. The MRI report of Respondent's lumbar spine also confirmed Dr. Kaufman’s finding that there was a slight narrowing of the L5-S1 interspace. However, Dr. Kaufman stated that nothing in the MRI reports change his prior opinions regarding Respondent's medical condition and his ability to return to his employment as a Correctional Officer.

Respondent testified on his own behalf that he continues to experience pain and that he is unable to work an eight-hour shift without the assistance of narcotics. Respondent disagreed with Dr. Kaufman’s opinion that he could return to work. Respondent did not call any physicians or other medical professionals to testify. Respondent submitted medical records from his treating physicians to support his appeal.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found the testimony and reports of Dr. Kaufman credible and persuasive and noted that Respondent did not present competent medical evidence to refute Dr. Kaufman’s testimony. The totality of the
Evidence established that even though his condition may cause him discomfort or difficulty in the performance of his usual job duties, Respondent is no longer incapacitated from performing his duties as a Correctional Officer with CDCR based on an orthopedic (mid-back) condition. The ALJ concluded that Respondent is no longer eligible for industrial disability retirement.

In the Petition for Reconsideration, Respondent argues that the ALJ failed to properly consider the medical reports submitted by Respondent at the hearing. The Proposed Decision, however, confirms that the ALJ carefully reviewed and considered the medical reports submitted by Respondent. The ALJ considered two Magnetic Resonance Imagery (MRI) reports dated May 1, 2019, and May 9, 2019, from Robert Rabiea, M.D. and Stephen Shinault, D.O., respectively. The May 1, 2019 MRI report was of Respondent’s cervical and lumbar spine. The May 9, 2019 MRI report was of Respondent’s left knee and shoulder.

In the May 9, 2019 MRI report, Dr. Shinault noted Respondent’s left knee showed no evidence of tear, fracture, joint effusion or significant muscular atrophy. With regard to Respondent’s left shoulder, Dr. Shinault wrote that there was evidence of "minor diffuse tendinosis" and "minor subscapularis tendinosis," but otherwise, there was no evidence of tear, fracture, joint effusion or significant muscular atrophy.

Respondent did not call any medical professionals to testify regarding the MRI reports; however, according to Dr. Kaufman, the MRI of Respondent’s left knee and cervical spine were normal. The MRI report of Respondent’s left shoulder showed minor diffuse tendinosis and minor subscapularis tendinosis. Dr. Kaufman explained that minor tendinosis is a strain-type injury, involving the stretching of the muscle, and would not prevent Respondent from performing his usual job duties as a Correctional Officer.

Respondent also submitted a Panel Qualified Medical Evaluation (PQME) report dated June 11, 2018, from Mark Ganjianpour, M.D., as well as a Supplemental Medical-Legal Report dated December 1, 2018, from Dr. Ganjianpour. The ALJ included a summary of the key findings from these reports in the Proposed Decision. The ALJ noted that Dr. Ganjianpour did not testify at the hearing to explain his findings and diagnosis. Additionally, because Dr. Ganjianpour’s PQME report was prepared as a part of Respondent’s workers compensation claim, there was no evidence that his opinions were rendered based on the substantial incapacity standard in disability retirement cases. Moreover, Dr. Ganjianpour's opinions were refuted by Dr. Kaufman's findings and diagnosis. The ALJ properly concluded that under these circumstances, Dr. Ganjianpour's opinions are given little weight, and Dr. Kaufman is deemed to be a more credible expert witness, and his opinions are afforded greater weight.
No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the August 21, 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.

September 18, 2019

AUSTA WAKILY
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