

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED**

Kimberlee A. Dicks (Respondent) applied for industrial disability retirement based on orthopedic (left shoulder, left elbow, left knee, bilateral hand and wrist) conditions. By virtue of her employment as a Correctional Lieutenant (CL) for Respondent California State Prison Corcoran, California Department of Corrections and Rehabilitation (CDCR), Respondent was a state safety member of CalPERS.

Respondent filed an application for service pending industrial disability retirement on August 20, 2018 and has been receiving benefits since that time.

As part of CalPERS' review of Respondent's medical condition, Don T. Williams, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Williams interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records and performed a physical exam. Dr. Williams opined that Respondent is physically capable of doing her job as a CL for CDCR.

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 (OAH). A hearing was held on August 26, 2019. Respondent represented herself at hearing. Respondent CDCR did not appear at the hearing.

At the hearing, the ALJ received documentary evidence demonstrating that CalPERS had provided both Respondent and CDCR with proper notice of the date, time and place of the hearing. The ALJ found that the matter could proceed as a default against CDCR, pursuant to Government Code section 11520.

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.

Copies of written job descriptions for the position of CL for CDCR were received into evidence and considered by the ALJ.

At the hearing, Dr. Williams testified in a manner consistent with his examination of Respondent and the IME report. Dr. Williams' medical opinion is that there are no occupational functions Respondent is incapable of performing as a CL and that Respondent has no restrictions linked to her symptoms. He testified that Respondent's prior right thumb injury resolved and allowed her to return to work, her knee and elbow injuries resolved, and her shoulder surgery was successful. He further testified that his examination revealed that she had regained sufficient range of motion. Moreover, although Respondent had concerns about performing her duties and reinjuring herself, Dr. Williams opined that "[t]here is always a risk of injury, but she is physically capable of doing her job." Therefore, Dr. Williams concluded that Respondent is not substantially incapacitated.

Respondent testified on her own behalf to the history of her injuries, the surgeries she received, the pain and discomfort she experiences, and her limitations as a result of her injuries. She further testified that she does not intend to ever return to her previous employment with CDCR as a CL because the job has become more dangerous and she wants to avoid re-injury. Respondent did not call any physicians or other medical professionals to testify. Respondent did not submit medical records from her treating physicians to support her appeal.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent failed to offer sufficient, competent medical evidence to establish that she was substantially and permanently incapacitated from performing the usual duties of a CL for CDCR, at the time she applied for industrial disability retirement.

The ALJ further found as follows:

The medical evidence CalPERS presented established that [R]espondent's orthopedic condition did not render her incapable of performing her usual CL functions and duties. Dr. Williams was thorough, capable, and persuasive in reaching his opinion that [R]espondent was not substantially and permanently incapacitated from performing the usual duties of a CL, and he employed the standards applicable in these types of disability retirement proceedings. His opinion that [R]espondent's orthopedic condition was not adequately supported by objective medical evidence was persuasive and consistent with the medical records he reviewed.

The ALJ concluded that Respondent is not eligible for 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 on page 12, paragraph 2, the definition for Government Code section 20026 be corrected from “. . . mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion” to “. . . mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion.” Staff also recommends that on page 3, paragraph 2, the date “October 30, 2014” be corrected to “August 20, 2018.”

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

November 20, 2019

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Attorney