ATTACHMENT B

STAFF'S ARGUMENT

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STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Caprina D. Zarate (Respondent) was employed by Respondent Department of Developmental Services, Porterville State Hospital (Respondent DDS) as a Psychiatric Technician. By virtue of her employment, Respondent was a state miscellaneous member of CalPERS. On or about January 26, 2016, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (neck) condition. Respondent's application was approved by CalPERS and she retired effective May 11, 2016.

In 2017, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that she would be reevaluated, pursuant to Government Code section 21192, for the purpose of determining whether she remains substantially incapacitated and therefore entitled to continue to receive an industrial disability retirement.

In order to remain eligible for industrial disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of her 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 K. Henrichsen, M.D., a board-certified Orthopedic Surgeon. Dr. Henrichsen interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Henrichsen also performed a comprehensive IME. Dr. Henrichsen opined that Respondent is no longer substantially incapacitated from performing her job duties as a Psychiatric Technician. Dr. Henrichsen opined that Respondent underwent a successful surgery and there are no specific job duties that she is unable to accomplish at this time.

After reviewing all medical documentation and the IME report, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for industrial disability retirement, and should therefore be reinstated to her former position as a Psychiatric Technician.

Subsequent to CalPERS' determination, Respondent provided CalPERS with updated medical records for consideration. Dr. Henrichsen reviewed the additional medical records and issued a Supplemental IME report. Dr. Henrichsen's opinion did not change; Dr. Henrichsen opined that Respondent is no longer substantially incapacitated from performing her job duties as a Psychiatric Technician.

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 July 25, 2019. Respondent was represented by counsel at the hearing. Respondent DDS did not appear at the hearing.

At the hearing, Dr. Henrichsen testified in a manner consistent with his examination of Respondent and the reports prepared after the IME. Dr. Henrichsen testified about his medical background, and in particular his history with performing surgeries similar to the one Respondent underwent and the results he typically saw in patients after they underwent surgery. Dr. Henrichsen testified that Respondent's surgery is a common one and that Respondent had very good results from her surgery. Consequently, Dr. Henrichsen testified that it is his medical opinion that Respondent can perform the duties of her position and is therefore no longer substantially incapacitated.

Dr. Henrichsen testified that he found no objective reason why Respondent would be unable to perform all of her usual duties. Dr. Henrichsen found no objective reason why Respondent cannot work with her arms above her shoulders and opined that there is no objective basis for restricting Respondent's driving, standing or walking.

Dr. Henrichsen's opinion was also based on the fact Respondent worked until the day before her neck surgery, and that the surgery was successful. Dr. Henrichsen opined that if Respondent could work prior to the surgery, and her medical condition improved after undergoing the surgery, she should be able to work after she recovered from the surgery. It was Dr. Henrichsen's opinion that Respondent had a healed cervical spine, good neck mobility, and normal neurological findings. Dr. Henrichsen concluded that there are no specific job duties that Respondent was unable to accomplish at the time he performed his IME of Respondent. Based on Dr. Henrichsen's examination and the review of her medical records, it was his opinion that any restrictions placed on her were merely prophylactic and not supported by any objective medical findings.

Respondent testified on her own behalf. Respondent testified about her employment history, how the injury initially took place, and the treatment she has received since the injury. Respondent testified that she continues to experience pain. Respondent testified that she does not believe that she is able to perform the usual duties of a Psychiatric Technician.

Respondent also called Dr. Joseph Capell to testify on her behalf. Dr. Capell is a board-certified Physical Medicine and Rehabilitation physician. Dr. Capell examined Respondent for purposes of determining her CalPERS disability retirement status. Dr. Capell reviewed Respondent's medical records and conducted a physical examination. He issued a report and testified consistent with the contents of his report.

Dr. Capell testified that Respondent had some tenderness at the base of her skull and neck. Dr. Capell believed Respondent was restricted from performing certain job duties, such as no working with hands at or above shoulders. Dr. Capell felt that the restrictions were not prophylactic. Dr. Capell did not provide significant testimony regarding what

objective findings supported his conclusion that Respondent is substantially incapacitated, or to support his statement that Respondent's condition had worsened since Dr. Henrichsen performed his IME. Similarly, Dr. Capell did not provide significant testimony regarding what objective findings support his opinion that his restrictions were not prophylactic.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal. The ALJ found that CalPERS had the burden of establishing Respondent is no longer substantially incapacitated from performing the usual duties of a Psychiatric Technician. The ALJ found that CalPERS met its burden.

The ALJ found that Dr. Henrichsen was a more persuasive witness. The ALJ made this finding, in part, on the basis that Dr. Henrichsen, as a board-certified Orthopedic Surgeon, has greater specialized knowledge from an orthopedic standpoint, and that Dr. Capell "made very little objective orthopedic findings to support his opinion…." In addition, the ALJ found that Dr. Henrichsen's medical opinion that Respondent was no longer substantially incapacitated was supported by Respondent's medical records. Further, The ALJ found that Respondent failed to provide competent medical evidence to support her subjective complaints of continued neck problems and pain.

The ALJ concluded that in "the absence of sufficient competent medical findings to support [R]espondent's continued pain complaints, it cannot be found that [R]espondent continued to be substantially incapacitated from performing the usual duties of a Psychiatric Technician." Consequently, the ALJ determined that Respondent should be reinstated from industrial disability retirement.

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

November 20, 2019

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JOHN SHIPLEY
Senior Attorney