ATTACHMENT B

STAFF'S ARGUMENT

Attachment B

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Stephanie L. Ortiz (Respondent) applied for industrial disability retirement based on orthopedic (neck, wrists, right shoulder) conditions. By virtue of her employment as a Public Safety Dispatcher II for Respondent California Highway Patrol (Respondent CHP), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Lincoln S. Yee (Dr. Yee), a board-certified Orthopedist, performed an Independent Medical Examination (IME). Dr. Yee interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Yee opined that Respondent's orthopedic conditions did not prevent her from performing her usual and customary duties as a Public Safety Dispatcher II for Respondent CHP.

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 January 9, 2020. Respondent represented herself at the hearing. Respondent CHP 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. Yee testified in a manner consistent with his examination of Respondent and the IME report. He explained that the medical records he reviewed as part of his examination of Respondent revealed that she began experiencing pain in her right wrist and hand while typing on the job. The pain spread over time to her right shoulder and elbow, and her back. Respondent missed work intermittently in 2015 and 2016 to receive treatment but stopped working entirely in 2017, according to medical

records that Dr. Yee reviewed and summarized in his report. When Dr. Yee saw Respondent in August 2018, she complained of severe neck and shoulder pain, with frequent headaches that prevented her from reading, working, driving for any length of time, and enjoying any recreational activities.

Dr. Yee testified at the hearing that on examination, Respondent had full range of motion in the cervical spine, with no muscle spasm, tenderness or asymmetry, and no pain with cervical traction or contraction. Dr. Yee also testified that he did observe some limitation in Respondent's right lateral rotation of the neck, and some diminished sensation, as well as pain and weakness in her upper extremities, but no muscle atrophy on those areas. Respondent also had full range of motion in her shoulders, and in her elbows, wrists and hands.

Based on his examination of Respondent, review of medical records and evaluation of various MRI reports and x-rays, Dr. Yee testified that there was no objective, clinical findings that would preclude Respondent from returning to work as a Public Safety Dispatcher II for Respondent CHP. Based on the lack of objective findings to substantiate Respondent's complaints, Dr. Yee testified that he found Respondent was not substantially incapacitated.

Dr. Yee explained that he did take into consideration whether Respondent would experience pain and numbness with repetitive use of the affected areas while serving as a Public Safety Dispatcher II. However, since he found no structural abnormalities in those areas, and given the overall difficulty in objectively measuring a person's pain, Dr. Yee testified that he ultimately could not find Respondent to be substantially incapacitated.

Dr. Yee also issued a supplemental report, in which he reviewed additional records regarding Respondent's condition. Dr. Yee noted that those records included recommendations from a workers' compensation-retained physician that Respondent be precluded from certain movements and activities, including heavy lifting, repetitive activity above the shoulder level, and power grasping with the right wrist. Dr. Yee testified at the hearing that these restrictions might help Respondent avoid pain, but that based on the objective evidence before him at examination, he felt that Respondent could still perform these tasks if required.

Respondent testified on her own behalf that her neck pain causes excruciating headaches if she sits upright for more than two hours, and that she was only able to work for two hours at the dispatch center in 2017, the last time she worked, before the pain forced her to stop. Respondent did not call any physicians or other medical professionals to testify. Respondent did submit medical records from her treating physicians to support her appeal. Those records were reviewed and considered by Dr. Yee. After the hearing,

Respondent submitted a 2019 report from Dr. Michael C. Luciano, a physician who evaluated Respondent for determining Respondent's eligibility for workers' compensation benefits, not CalPERS benefits.

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 prove, by a preponderance of the evidence, that she was substantially incapacitated. The ALJ found that Dr. Yee's medical opinion was persuasive and supported by the evidence, and that Respondent failed to rebut Dr. Yee's opinion with expert medical testimony or evidence. Though Respondent "may have received an impairment rating in Workers' Compensation proceedings," the ALJ held, "that rating is not dispositive of whether she is substantially incapacitated from the performance of [her] usual duties for purposes of disability retirement." Additionally, the ALJ gave little weight to the hearsay recommendations by Dr. Luciano that Respondent be returned to work with certain restrictions, because the issue before the Court was not whether "Respondent's employer could provide accommodation, but rather, whether [R]espondent is substantially incapacitated." For these reasons, the ALJ concluded that Respondent is not eligible for industrial disability retirement.

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

March 18, 2020

_____

Kevin Kreutz
Senior Attorney