

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Brian A. Van Iderstine (Respondent) applied for industrial disability retirement based on an orthopedic (low back) condition. By virtue of employment as a Fire Apparatus Engineer for Respondent Department of Forestry and Fire Protection (Respondent CalFire), Respondent was a state safety member of CalPERS.

Respondent filed an application for industrial disability retirement on December 22, 2017.

As part of CalPERS' review of Respondent's medical condition, Arthur M. Auerbach, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Auerbach interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Auerbach initially opined that Respondent was substantially incapacitated from performing his usual and customary duties. Dr. Auerbach was provided with additional medical records and asked to review such records. Following his review, Dr. Auerbach issued a Supplemental IME Report. Dr. Auerbach again offered an opinion that the additional medical records did not change his opinion that Respondent was substantially incapacitated. Dr. Auerbach was asked to review surveillance images obtained through investigation of Respondent. In a second Supplemental IME Report, Dr. Auerbach offered an opinion that Respondent appeared, in the sub rosa video, to not be as disabled or incapacitated as he had stated to Dr. Auerbach and as was documented in entries in various medical records. On that basis, Dr. Auerbach changed his opinion and stated that Respondent was not substantially incapacitated.

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 reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position.

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 January 23, 2020. Respondent was represented by counsel at the hearing. Respondent CalFire did not appear at the hearing.

Dr. Auerbach did not testify at the hearing. Prior to the hearing, Dr. Auerbach experienced serious health problems, such that CalPERS was informed that he would

not be able to appear at the hearing, even if the hearing were to be continued. Dr. Auerbach ceased being available to serve as an IME for CalPERS. Accordingly, copies of Dr. Auerbach's initial IME and Supplemental IME Reports were introduced and received into evidence as administrative hearsay. A copy of Dr. Auerbach's second IME Report was not offered into evidence, since Dr. Auerbach was not available to explain why he had changed his opinion based upon viewing sub rosa images of Respondent.

Respondent testified on his own behalf. Respondent testified that he injured his low back as a result of a fall of approximately five feet out of a fire truck onto the ground, landing on his buttocks. Following the incident, Respondent has not returned to work as a CalFire Fire Apparatus Engineer. He experiences constant low back pain, which is made worse by bending and lifting. Respondent described how he is limited in the amount of time that he can stand and/or sit. Respondent identified typical duties involved in firefighting that he is no longer capable of performing.

Respondent also called Andrew Burt, M.D., to testify on his behalf. Dr. Burt is a board eligible Orthopedic Surgeon. Dr. Burt examined Respondent and reviewed medical records. Dr. Burt observed restricted range of motion in Respondent's lumbar spine. Dr. Burt's observations were identical to those made by Dr. Auerbach during his evaluation of Respondent. Dr. Burt also documented a 1.5 cm atrophy in Respondent's left calf, which is consistent with Respondent's claims of pain radiating from his low back down his left leg and is objective evidence (muscle shrinkage) due to nerve damage. Dr. Burt offered his opinion that Respondent was, and is, permanently incapacitated from performing his usual and customary duties.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ concluded that competent medical evidence demonstrated that Respondent is substantially incapacitated from performing the usual and customary duties of a Fire Apparatus Engineer with CalFire.

The ALJ concluded that Respondent is eligible for industrial disability retirement.

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

April 22, 2020

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Rory J. Coffey  
Senior Attorney