

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Anna E. Hutcheson (Respondent) applied for industrial disability retirement, on October 2, 2017, based on orthopedic (ankles, knees, hips, shoulders, arms, wrists, back and neck) conditions. By virtue of her employment as a Library Technical Assistant for Respondent California State Prison-Centinel, California Department of Corrections and Rehabilitation (Respondent CDCR,) Respondent was a state safety member of CalPERS.

Respondent filed an application for industrial disability retirement and has been receiving benefits since that time.

As part of CalPERS' review of Respondent's medical condition, James M. Fait, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME) of Respondent on May 21, 2018. Dr. Fait interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints and reviewed her medical records. Dr. Fait opined that Respondent was not permanently disabled or incapacitated from performing the usual and customary duties of a Library Technical Assistant.

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 of the medical documentation and the IME reports, 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 27, 2020. Respondent represented herself at the hearing. Respondent CDCR did not appear.

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. Fait testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Fait noted that his examination included an

interview with Respondent where he asked about her current complaints, relevant history of injuries, past medical history, family and social history and daily activities. Dr. Fait provided a summary of his interview with Respondent during his testimony.

Dr. Fait testified that Respondent complained of pain in nearly all of her musculoskeletal system; however, there was no objective evidence to support Respondent's subjective complaints of pain. Dr. Fait explained that there was no evidence of radiculopathy (as she had no paraspinal spasms in her neck or back), no evidence of focal weakness and no evidence of asymmetry of reflexes in the upper or lower extremities. Dr. Fait also noted Respondent had evidence of healed surgical scars in the right shoulder, bilateral knees and bilateral ankles, but she had relatively symmetric range of motion of both shoulders, and she had no evidence of anterior cruciate ligament injury of the right ankle as shown by MRI. Further, Dr. Fait explained she had no more than trace effusion of the right knee and no evidence of varus or valgus instability or of malalignment of the right or left knee; had healed surgical scars on both ankles but no evidence of deformity, crepitation or instability.

Dr. Fait further testified that Respondent had a slow gait and poor balance, but she did not require a brace for ambulation. Dr. Fait also testified that Respondent only put forth a fair effort, and he suspected she was magnifying her complaints.

Dr. Fait reviewed additional medical records, including reports from Dr. John Lane, Dr. Frederick Arbenz and Dr. Beth Bathgate as well as diagnostic imaging and testing results of Respondent. Dr. Fait noted that Respondent demonstrated a more extensive range of motion in her bilateral shoulders on March 15, 2018, compared to his physical examination of Respondent on May 21, 2018. Dr. Fait again felt that Respondent was magnifying her symptoms. Dr. Fait also noted that a progress report by Dr. Lane on January 23, 2020, reported that Respondent had virtually normal flexion and abduction of her bilateral shoulders.

Dr. Fait opined that while Respondent reports pain with activities such as walking, climbing stairs, sitting, driving or transferring, there is no objective evidence, either on physical examination or on diagnostic studies, that would preclude the performance of such activities. Overall, Respondent has functional range of motion of the neck and upper and lower extremities without evidence of radiculopathy, muscular weakness, atrophy or instability. Dr. Fait further testified that while Respondent may experience pain with performance of the activities of a Library Technical Assistant, he could not find evidence that Respondent is substantially incapacitated from performing the activities.

Respondent testified on her own behalf regarding her injuries and her ability to perform her job duties. Respondent testified that she was injured at work in November 2008, when she fell off of a platform during a prisoner graduation ceremony. Respondent testified that she fell six to seven feet and hit a metal fire extinguisher box. She underwent right shoulder surgery and right knee surgery in 2010 and returned to work in July 2011. Respondent testified that she injured her left hand at work in January 2012, when it was caught in the steering wheel of a golf cart. She was

released from work duties for two weeks. Respondent further testified that she broke her right ankle in July 2013, when she stood up from sitting on her couch at home. She had right ankle surgery that same month and was released from work duties. She returned to work on September 2, 2014, and she used a golf cart and scooter to transport herself around the prison. Respondent crashed her scooter and flipped over the handlebars on September 21, 2014. Respondent did not return to work after this last injury.

Respondent submitted medical records from her treating physicians and diagnostic studies, including MRIs, x-rays, EMG and nerve conduction testing to support her appeal. However, she did not have a medical provider testify at the hearing.

Respondent also presented the testimony of Louis Madrid regarding her injuries and the impact it has had on her daily activities. Mr. Madrid lives with Respondent and testified that her medical conditions worsened about two and half years ago, and "she could not do much of anything." She could not stand for more than 10 to 15 minutes at a time; she could not walk around the house without bumping into things; and she sometimes could not make it to the bathroom in a timely manner. Mr. Madrid testified that he was frustrated about her medical conditions.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found persuasive Dr. Fait's conclusion that Respondent was not incapacitated from performing her job duties and Respondent offered no competent medical opinions to refute his opinion. The ALJ therefore found that Respondent failed to meet her burden of proof, and her application must be denied.

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 inserting the word, "industrial" in front of the words, "disability retirement" on page 3, in the Summary of Decision; page 4, in paragraphs two, three and four and page 11, paragraph eighteen of the Proposed Decision.

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

April 22, 2020

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