

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Rosanne Valek (Respondent) applied for industrial disability retirement on May 2, 2019, based on orthopedic (low back, right hip) conditions. By virtue of her employment as a Fire Apparatus Engineer for Respondent California Department of Forestry and Fire Protection (Respondent CalFire), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Neil Katz, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Katz interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Katz initially opined that Respondent is substantially incapacitated to perform her usual job duties, based on multiple job-related injuries.

Upon review of surveillance performed on Respondent, Dr. Katz changed his medical opinion. After reviewing the surveillance videos, Dr. Katz no longer believed she was substantially incapacitated and he "questioned her credibility." In the surveillance videos, he observed Respondent lifting a large dog crate, dragging a large object into the garage, pulling trash cans from the curb, sweeping her driveway, lifting children and "using a lot of force" pulling a dog on a leash. He also observed Respondent lifting and carrying two gallons of paint in each hand to the back of her vehicle. Dr. Katz estimated one can of paint weights approximately 12 pounds, so she was lifting a total of 48 pounds. Each pound of weight carried is equivalent to three extra pounds of stress to Respondent's back and knees. Dr. Katz testified that the surveillance "shows capabilities beyond what she said she could do." He "did not observe any difficulty in her movements" which is atypical if she were in need of hip replacement.

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 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 November 3, 2021. Respondent was represented by counsel at the hearing. Respondent CalFire did not appear at the hearing.

At the hearing, Dr. Katz testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Katz' medical opinion is that Respondent is not substantially incapacitated to perform her job duties as a Fire Apparatus Engineer.

Respondent called three witnesses to testify on her behalf. Mark Lopez, Retired CalFIRE Fire Captain, testified that Respondent worked for him for two seasons. She was "a very capable firefighter." Mr. Lopez reviewed the surveillance videos, and testified that they reflected ordinary activities in life. Most times, a firefighter's work is not ordinary and is rarely conducted on flat ground. The activities in the videos were very different than fighting a fire in a smoke-filled area on uneven ground.

Julie Hutchinson, Retired CalFIRE Battalion Chief, testified that a seasonal firefighter is a "work horse." They pull hoses off engines that are higher than regular engines and are continually climbing off and on the engines. During a fire, they prepare a "hand line" which requires moving rocks, brush, and vegetation to make a fire line. This is arduous work and "very physically demanding every day." If someone "doesn't relieve you, you keep working." Ms. Hutchinson observed the surveillance videos, opining that they show "mundane tasks" that many people can do. But Ms. Hutchinson testified "just because she can do day-to-day mundane tasks, doesn't mean she could do the work required of a firefighter." Ms. Hutchison observed that Respondent's gait was unique, and she did not observe much lifting, which might indicate Respondent's caution.

Respondent called her treating physician Dr. Shail Vyas to testify. Dr. Vyas is an orthopedic surgeon, with a specialty in sports medicine and arthroscopic surgery. He has treated Respondent's orthopedic conditions since April 2019. Dr. Vyas' ordered an MRI of Respondent's right hip, which showed arthritis, a labrum tear and a cam lesion (a misshapen femoral head). He recommended a corticosteroid injection for her hip, and four epidurals for her lower back. Both the injections and epidurals give only temporary relief. Dr. Vyas also reviewed an MRI of Respondent's shoulder which showed a tear in the labrum (the ring around the socket which helps stabilize the shoulder). In August 2020, Dr. Vyas performed a hip arthroscopy, which did not resolve her issues. The main issues in her hip were arthritis and torn labrum. The most definitive treatment would be a hip replacement, but in Dr. Vyas' opinion Respondent was too young. Dr. Vyas reviewed the surveillance, and opined that Respondent was possibly able to complete the activities because she was still receiving relief from the corticosteroid injection. Because of the objective findings (which in his opinion matched her subjective complaints), Dr. Vyas opined that she is substantially incapacitated to perform her usual job duties.

Respondent testified on her own behalf regarding her injuries, orthopedic condition, medical condition and job duties. She testified that she cannot fulfill her duties as Fire Apparatus Engineer. For example, Respondent cannot save another firefighter and his/her equipment (approx. 300 pounds), along with her own body and equipment because she is unable to drag that much weight.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found that firefighting is a physically demanding occupation that Respondent is no longer capable of performing due to her disabilities. The ALJ gave more weight to the testimony of Respondent's treating physician, Dr. Vyas, because it was objective evidence based on his treatment over a period of more than two years. Moreover, Dr. Vyas' opinion was consistent with the findings of her workers' compensation doctor who also examined her on several occasions. Dr. Vyas' opinion was consistent with Respondent's subjective complaints.

The ALJ gave CalPERS IME Dr. Katz's medical opinion less weight, because it changed due to his review of the surveillance videos. However, the ALJ found neither his supplemental report nor his testimony provided a sound explanation as to the basis for his change of opinion, or how the activities observed on the surveillance videos related to Respondent's ability to carry out her job requirements at CalFIRE.

The ALJ found the duties of a Fire Apparatus Engineer to require repetitive movements, the ability to respond in emergency situations, and to continue until the situation has been resolved or the firefighter has been relieved. None of the activities in the surveillance resembled tasks required of a firefighter. For example, being able to carry 2 cans of paint for a short period of time, does not equate to being able to drag a fire hose up a hill or rescue an individual by crawling on her stomach dragging an additional 300 pounds. The general duties of a Fire Apparatus Engineer include strenuous work that is physically demanding due to the repetitive and sustained nature of the job. Firefighting requires a unique set of skills and physical abilities that Respondent can no longer perform.

The ALJ concluded that Respondent is 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 the word "industrial" be inserted before the words "disability retirement" on page two, under "Issue" and page four, number four of the Proposed Decision.

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

January 18, 2022

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