

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Mildred L. Smalley (Respondent) was employed by California State Prison, Centinela, California Department of Corrections and Rehabilitation (Respondent CDCR) as a dental hygienist. By virtue of her employment, Respondent was a state safety member of CalPERS.

On July 12, 2018, Respondent submitted an application for industrial disability retirement (IDR) on the basis of an orthopedic (neck) condition. CalPERS approved Respondent's application, her effective date of retirement was August 31, 2018.

On April 29, 2020, CalPERS notified Respondent that her IDR was under review to determine if she continued to meet qualifications for IDR, if she remains substantially incapacitated, and whether she is entitled to continue to receive benefits.

To remain eligible for 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 Luke Bremner, M.D., who interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Bremner also performed a comprehensive IME. Dr. Bremner opined that Respondent had a simple cervical strain/sprain, which required no more than 12 weeks of treatment. Dr. Bremner did not find Respondent disabled.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated so not eligible for continued IDR benefits, and should therefore be reinstated to her former 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 October 18, 2022. Respondent represented herself at the hearing. Respondent CDCR 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. Bremner testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Bremner's medical opinion is that Respondent can perform the duties of her position and is therefore no longer substantially incapacitated. Dr. Bremner diagnosed Respondent with cervicothoracic strain, degenerative disc disease and carpal tunnel syndrome, but the only diagnosis related to her injury was cervicothoracic strain. Although Dr. Bremner acknowledged that Respondent experienced some pain and numbness, he believes that those conditions are not substantially incapacitating. In Dr. Bremnar's opinion, Respondent is not disabled.

Respondent testified that she was unable to hold her neck in the position necessary to perform her job duties as a dental hygienist. While employed by Respondent CDCR, she would see 6-8 patients per day. Each visit required her to sit with her neck extended for 30-45 minutes. Now, she can only extend her neck for a few minutes. Further, intermittent numbness in her hands leaves her unable to perform the fine motor duties of her job.

Respondent called Dr. William Tontz, M.D. to testify. Dr. Tontz is an orthopedic surgeon with a specialty in spinal surgery. He has treated respondent at least 20 times since 2018. Dr. Tontz testified that Respondent's injury "lit up" a previously asymptomatic cervical stenosis. Dr. Tontz testified that an underlying asymptomatic condition such as cervical stenosis can be aggravated by an injury. Dr. Tontz believes Respondent shows signs of cervical stenosis and nerve injuries.

The ALJ found that CalPERS had the burden of proof to establish that Respondent is no longer substantially incapacitated from the performance of her usual duties as a dental hygienist. The ALJ found that both parties provided conflicting competent medical evidence. Because Dr. Tontz's opinion was informed by his treatment of Respondent over many years and review of all her medical records, the ALJ found Dr. Tontz's opinion more reliable and trustworthy.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ granted Respondent's appeal.

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

January 17, 2023

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