ATTACHMENT C

RESPONDENT'S ARGUMENT

Attachment C

Nina Wasow (SBN 242047)
FEINBERG, JACKSON, WORTHMAN & WASOW LLP
2030 Addison Street, Suite 500
Berkeley, CA 94704
Tel: (510) 269-7998
Fax: (510) 269-7994
nina@feinbergjackson.com

Attorneys for Samuel Presten

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Disability Retirement of SAMUEL PRESTEN, Respondent, v. DEPARTMENT OF TRANSPORTATION DISTRICT 10, Respondent.	AGENCY CASE NO. 2024-0309 OAH NO. 2024120163 **RESPONDENT'S ARGUMENT**

The CalPERS Board of Administration should decline to adopt the decision of the Administrative Law Judge in the above-captioned case. The ALJ improperly rejected evidence of Respondent Samuel Presten's incapacity and failed to meaningfully consider the demands of his job. Mr. Presten is disabled within the meaning of the Government Code, and his application for disability retirement should be granted.

1. **Legal Standard and the ALJ's Decision**.

Mr. Presten is entitled to a disability retirement if he is "incapacitated physically or mentally for the performance of his or her duties." Govt. Code § 21156. "'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death." Govt. Code § 20026. Courts have held that incapacity means "the substantial inability of

the applicant to perform his usual duties." *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal. App. 3d 873, 876.

The ALJ took testimony from Mr. Presten, his treating physician Dr. Devireddy, and CalPERS' expert Dr. Tirmizi. All testified that Mr. Presten has disseminated coccidioidomycosis (Valley Fever) which requires him to be on antifungal medications for the rest of his life. Decision at 5, 8. As a result, Mr. Presten experiences chronic fatigue, dyspnea (shortness of breath) with exertion, weakness, and joint pain, among other symptoms. There is no dispute that fatigue and pain are common side effects of antifungal medications. Mr. Presten testified that he cannot walk more than a block without becoming exhausted and that he spends nearly all of his time at home. The only basis for denying his claim was that Mr. Presten's complaints are "subjective," and "objective" tests "demonstrated that Presten's lung capacity was normal." Decision at 9. Thus, the ALJ decided, Dr. Tirmizi's conclusion that Mr. Presten is not disabled is "more convincing." *Id*. at 11.

2. The ALJ's Errors.

a. Improperly Crediting Dr. Tirmizi's Opinion.

There were fundamental flaws with Dr. Tirmizi's opinion which the ALJ ignored. Dr. Tirmizi opined that Mr. Presten was not substantially incapacitated because pulmonary function testing showed that his lung capacity was normal. *See* Exs. 8, 10, 12; Decision at 5-6. However, pulmonary function testing performed in August 2023 (before Dr. Tirmizi's final opinion was issued), showed mild to moderate obstructive pulmonary impairment. *Id*.; Ex. H. None of Dr. Tirmizi's reports considered the opinion of Dr. Stewart Lonky addressing this pulmonary function testing. Exs. 8, 10, 12. Instead, Dr. Tirmizi simply found that Dr. Lonky (who repeatedly examined and evaluated Mr. Presten starting in 2017) "concluded that these results were consistent with previous findings." Decision at 6. This is a selective and misleading characterization of Dr. Lonky's opinions. In a 2022 opinion, Dr. Lonky stated, "[w]ith regard to his valley fever/coccidioidomycosis, I am awaiting a complete pulmonary function study. There is clearly post coccidioidomycosis lethargy, easy fatigability, and . . . persistent shortness of

breath. Although his examination does not reveal any significant wheezing, it is now time to get an updated pulmonary function study, which needs to be done both pre- and post-bronchodilator administration." Ex. E at 23. After the pulmonary function testing was done, Dr. Lonky provided a follow-up opinion in which he stated based on the results that Mr. Presten "has an impairment . . . related to his infection with coccidioidomycosis with Coccidioides immitis and his developing coccidioidomycosis which became disseminated." Ex. F at 23. Dr. Lonky's statement that the 2023 pulmonary function testing was "consistent with findings previously," *id*., was in no way an opinion that the pulmonary function testing was normal or that Mr. Presten is not impaired. Dr. Tirmizi did not testify to any disagreement with Dr. Lonky; he simply ignored Dr. Lonky's conclusion that Mr. Presten has a pulmonary impairment.

Further, Dr. Tirmizi did not explain, nor did the ALJ address, whether or how a person with a demonstrated obstructive pulmonary impairment can perform heavy physical duties (which, as discussed below, are required for the performance of Mr. Presten's job). Dr. Tirmizi acknowledged on cross-examination that he did not ask Mr. Presten to exert himself at all during his one-time examination (a fact not mentioned by the ALJ). *Cf*. Decision at 8. Thus, he (and the ALJ) lacked a reasonable basis to reject out of hand Dr. Devireddy's opinion – supported by Dr. Lonky – that Mr. Presten cannot tolerate exertion, rendering him incapable of doing his job.

Moreover, Dr. Tirmizi was "unable to state with certainty that Mr. Presten has a pulmonary disability due to disseminated coccidiodomycosis," but he offered no opinion whatsoever on whether chronic pain, fatigue, or psychiatric issues caused by coccidiodomycosis and/or the antifungal medications required to treat it render Mr. Presten incapacitated from his job. Exs. 8, 10, 12. The ALJ's full reliance on his partial opinion was erroneous. To the extent the ALJ focused solely on pulmonary symptoms, this was also erroneous: Mr. Presten's initial disability retirement election made clear that disseminated coccidiodomycosis has affected multiple systems of his body, and that he is unable to work as a result of chronic fatigue, joint pain, and muscle wasting *in addition to* difficulty breathing. Ex. 1.

Finally, Dr. Tirmizi relied on 2020 blood tests which showed normal titers for coccidiodomycosis. Decision at 5. But as he acknowledged in cross-examination, Dr. Tirmizi does not have particular knowledge or expertise regarding Valley Fever. Dr. Devireddy, who does have such expertise, explained that normal titers are not indicative of recovery to baseline compatible with performance of Mr. Presten's job. *Id*. at 8. The ALJ did not articulate any basis for rejecting Dr. Devireddy's opinion on this issue.

a. Rejecting Subjective Symptoms Without Legal Basis.

The ALJ did not find that either Mr. Presten or Dr. Devireddy lacked credibility. Instead, without citation to any authority, the ALJ dismissed their evidence as "subjective" and held that "Presten must submit competent, objective medical evidence." Decision at 10. A disability retirement claim must be based on "competent medical opinion," Government Code § 21156(a)(2). However, neither the Government Code nor the case law provide that only opinions based on "*objective*" evidence are competent.

Indeed, in *Parker v. PERS* (2018), 2018 WL 6444185, the Third District Court of Appeal rejected CalPERS' argument that the claimant's doctor's testimony about her condition, which was based on the claimant's subjective reports and the doctor's own examinations of the claimant, was not competent evidence that she was precluded from performing at least one of the usual and customary requirements of her job. As in this case, the ALJ in *Parker* had credited CalPERS' medical expert over the claimant's on the ground that the claimant had "subjective complaints" but not "competent, objective medical evidence." *Id*. at *3. The court disagreed, finding that the claimant's expert's opinion "was in part based on his own treatment of Parker" and "doctors routinely – and necessarily – rely on a patient's own account of a medical condition and the written opinions or evaluations of prior doctors." *Id*. at *9. Likewise, here, Dr. Devireddy's opinion that Mr. Presten is incapacitated from his job is based on his treatment of Mr. Presten since 2019. Ex. J. This is not a reason for the ALJ to have rejected his opinion, and the ALJ's insistence on "objective" evidence was improper. *See also Burboa v. County of Ventura* (2002), 2002 WL 475220 (Second District Court of Appeal decision affirming trial court finding that

claimant was incapacitated by "genuine" "subjective orthopedic complaints," despite the ALJ having found the claimant lacked credibility).[1]

b. Failing to Consider the Physical Demands of Mr. Presten's Job.

As noted above, the ALJ was required to consider the usual duties of Mr. Presten's job. Mr. Presten was a CalTrans Equipment Operator II. Exs. 13-15. It is undisputed that this is a heavy physical job which required loading trucks, lifting heavy equipment and materials, installing and/or repairing concrete, signs, fences, and guardrails, working on bridges, digging, and performing tree maintenance, traffic control, litter pickup, and a myriad of other tasks. *Id*. The job involved constant driving and frequent lifting/carrying, bending, twisting, and being exposed to dust, gas, fumes, or chemicals. Decision at 4. The ALJ mentioned these requirements but did not actually engage with Mr. Presten's ability to perform them.

Again, the ALJ did not make any finding that Mr. Presten lacks credibility. His own testimony about his severe fatigue, joint pain, shortness of breath, and array of other symptoms from Valley Fever and associated long-term antifungal therapy, along with Dr. Devireddy's opinion that Mr. Presten is unable to engage in sustained physical activity and requires supplemental oxygen for basic everyday tasks (Ex. J), demonstrates that he is substantially incapacitated from performing the physical requirements of an Equipment Operator II.

3. Conclusion

For the foregoing reasons, Mr. Presten respectfully requests that the Board decline to adopt the ALJ's decision and grant his claim for disability retirement benefits retroactive to the date of his election.

[1] In other contexts, courts have held that a treating physician's medical records including examinations and clinical observations *are* objective evidence of symptoms, particularly where the claimant's condition is difficult or impossible to prove through lab tests or scans. *See, e.g*., *Zuke v. American Airlines, Inc*., 644 Fed. Appx. 649, 654 (6th Cir. 2016) ("a treating physician's notes detailing the functional capabilities of a patient are objective evidence").

DATED: October 30, 2025

Respectfully submitted,

/s/ Nina Wasow

Nina Wasow (SBN 242047)
FEINBERG, JACKSON, WORTHMAN & WASOW LLP
2030 Addison Street, Suite 500
Berkeley, CA 94704
Tel: (510) 269-7998
Fax: (510) 269-7994
Email: nina@feinbergjackson.com