

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Respondent Brian Simons (Respondent) applied for Service Pending Industrial Disability Retirement on September 27, 2019, based on orthopedic (right ankle and foot) conditions. By virtue of employment as a Correctional Officer for Respondent California State Prison - Corcoran, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS. Respondent has been receiving service benefits since October 1, 2019.

As part of CalPERS' review of Respondent's medical condition, Steven H. Silvers, D.P.M. performed an Independent Medical Examination (IME). Dr. Silvers interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Silvers opined that Respondent did "not have an impairment that rises to the level of substantial incapacity to perform [his] usual job duties." Dr. Silvers' opinion was based on his examination and review of medical records, job descriptions, and surveillance taken of Respondent. According to Dr. Silvers, Respondent would have "some difficulty in performing certain tasks but does not meet the threshold or demonstration of substantial incapacity." After review of additional medical reports, Dr. Silvers' opinion remained unchanged.

In order to be eligible for industrial disability retirement, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of his 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 July 19, 2021. Respondent represented himself 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 his 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. Steven H. Silvers, D.P.M. testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Silvers' competent medical opinion

is that Respondent is not substantially incapacitated to perform his job duties. Therefore, Respondent is not disabled.

Respondent testified on his own behalf. He testified that he was a Correctional Officer for Respondent CDCR between 2016-2017. He experienced numbness and cramping in the outer two toes of his right foot. He has daily pain and does not believe he could run or respond to emergencies. He believes his continued employment makes him a liability, placing himself and others at risk. Respondent did not call any physicians or other medical professionals to testify and did not submit medical records from his treating physicians to support his appeal.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent bears the burden to establish eligibility to industrial disability retirement by a preponderance of the evidence. Respondent failed to meet his burden and is therefore ineligible for industrial disability retirement. The ALJ found the only medical evidence submitted was Dr. Silvers' testimony and reports, and Dr. Silvers' found that Respondent is not substantially incapacitated. Respondent failed to present any medical evidence to establish his disability, so his appeal was denied.

The ALJ concluded that Respondent is not eligible for industrial disability retirement.

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

November 17, 2021

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