

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Cecilia LeBlanc (Respondent) applied for industrial disability retirement based on an orthopedic (neck) condition. By virtue of employment as a Registered Nurse (RN) for Respondent Mule Creek State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

On October 1, 2019, Respondent filed an application for service pending industrial disability retirement. She retired for service effective September 21, 2019 and has been receiving a service retirement allowance since that date.

As part of CalPERS' review of Respondent's medical condition, CalPERS sent Respondent to Robert K. Henrichsen, M.D., a board-certified orthopedic surgeon, for an Independent Medical Examination (IME). Dr. Henrichsen conducted the IME on January 28, 2020, and issued a report summarizing his findings on the same day. He reviewed Respondent's completed intake questionnaire and took an oral history, including her injuries, medical background, physical issues, and treatment. Dr. Henrichsen also conducted a physical examination of Respondent.

Dr. Henrichsen opined that Respondent suffers from chronic neck pain, but a work-related vehicle accident caused a "flare up." Respondent has attempted to treat her neck pain with a variety of measures, including physical therapy, chiropractic treatment, acupuncture, and massage. Respondent's CAT scan results indicated some foraminal narrowing. Respondent's February 2019 MRI scan shows "severe and advanced neural foraminal narrowing" on the right side as well as bilateral severe foraminal narrowing. Respondent's range of motion of her cervical spine was normal, but her lateral bending and rotation were limited. Dr. Henrichsen concluded that Respondent's neck mobility is reasonable but not perfect, there is no evidence of nerve root impingement, she may have some degenerative disc disease and arthritis, but not to a disabling extent.

On October 7, 2020, at CalPERS' request, Dr. Henrichsen authored a Supplemental IME Report after reviewing additional medical records and MRI imaging. His conclusions from the additional records did not change based upon this further review.

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 two-day hearing was held on May 17, 2021 and June 28, 2021. Respondent represented herself at the hearing. Respondent CDCR did not appear at the hearing, and the hearing proceeded as a default hearing against Respondent CDCR.

Prior to the hearing, CalPERS staff had multiple phone calls with Respondent explaining the hearing process 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. Henrichsen testified in a manner consistent with his examination of Respondent and his IME reports. Dr. Henrichsen's medical opinion is that Respondent's subjective complaints exceeded the objective findings. He also found that the Respondent's position was largely administrative. He acknowledged that Respondent was subject to work restrictions, but believed those restrictions were largely prophylactic in nature and therefore Respondent was not substantially incapacitated. He agreed that Respondent would experience bouts of pain if performing arduous tasks such as CPR, but he opined that the pain would not limit Respondent's work activities to such an extent as to rise to the level of a substantial incapacity.

Respondent testified on her own behalf that she service retired from her position when she determined it would not be safe for her to continue working. She also emphasized that at any given time, an RN working in a correctional facility must be able to act as a First Responder, and may have the sole responsibility for the supervision of inmates and/or the protection of personal and real property. She further testified that she does not believe she would be able to perform life-saving measures effectively or for very long, putting the inmate population at risk.

Respondent called Prudencio Balagtas, D.O., to testify on her behalf. Dr. Balagtas specializes in Physical Medication and Rehabilitation. Dr. Balagtas first saw Respondent for a Worker's Compensation Initial Consultation and continues to treat her. Dr. Balagtas opined Respondent "would have significant difficulty performing her job requirements without causing pain." He testified that if she were working consecutive shifts, Respondent's fatigue and increased pain could distract her from her patient care and impact her medical decision-making.

Respondent also called Joseph Sclafani, M.D., to testify on her behalf. Dr. Sclafani is a board-certified specialist in Physical Medicine and Rehabilitation and Pain Medicine. Dr. Sclafani evaluated Respondent twice for purposes of her worker's compensation claim. Dr. Sclafani reviewed Respondent's MRI images and determined Respondent had severe upper cervical foraminal narrowing. He found that Respondent's subjective complaints of pain were consistent with his objective findings, and opined that Respondent was incapable of performing the duties of an RN. He testified that

Respondent cannot safely and effectively return to her position as an RN because she cannot perform the duties in the job description in the unpredictable environment of a correctional facility.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found that the weight of the evidence supported Respondent's chronic, sometimes painful and debilitating, neck condition; including the 2019 MRI which provided objective proof of her neck issues. The ALJ held:

Dr. Henrichsen is correct that prophylactic restrictions cannot be the basis for disability retirement in most circumstances. Here, however, the job . . . specifically require[s] an RN to be able to provide basic life support and life-saving measures in an emergency. . . . Dr. Henrichsen's opinion that Respondent is not substantially incapacitated from performing her usual and customary duties was not persuasive. . . . Conversely, even though Drs. Balagtas and Sclafani evaluated [R]espondent for worker's compensation purposes, which applies a different standard, their opinions that respondent's condition puts her and her coworkers at risk were persuasive.

The ALJ concluded that Respondent was substantially incapacitated from performing the essential duties required of an RN in a corrections facility at the time of her application. Therefore, the ALJ determined her application for industrial disability retirement must be granted.

The Proposed Decision is well-reasoned and supported by the evidence admitted into the record. For those reasons, staff argues that the Proposed Decision be adopted by the Board.

September 15, 2021

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Staff Attorney