ATTACHMENT C

RESPONDENT'S ARGUMENT

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October 26, 2022

RE: In the Matter of Application for Industrial Disability Retirement of John A. Cano

John Cano was and is permanently incapacitated from his duties as a Correctional Counselor I. The evidence demonstrates that after tearing his triceps tendons from the bone, the applicant remains unable to perform the functions of his job due to his lack of strength in his arms. The Board should not rely on the proposed decision because it fails to consider the applicant's inability to perform required, non-negotiable essential functions of his job, and blatantly ignores the medical evidence. Additionally, the proposed decision erroneously relies on Dr. Williams' opinion without regard to Dr. Williams' severely inadequate physical examination and the extensive medical evidence that contradicts his opinion.

I. THE PROPOSED DECISION FAILS TO RECOGNIZE THE APPLICANT'S REQUIRED JOB DUTIES

At the time of his injury, John Cano was a Correctional Counselor I ("CCI") at Pleasant Valley State Prison, a California correctional facility. A CCI is responsible for inmate classification, program assignment, and performing sworn peace officer duties. This requires a CCI to respond to inmate altercations, defend others during inmate assaults, lift/carry 20 to 50 pounds frequently, and lift/carry over 100 pounds to physically restrain, wrestle, and/or drag an inmate out of a cell. A CCI has a special designation as a responder to alarms and inmate altercations and attacks. Responding to the unpredictable and violent events within the prison is not an option for a CCI. They must respond, and in doing so, be able to perform the physical requirements of the job. A failure to do so will lead to disciplinary action, including termination.

CalPERS and the IME Dr. Williams suggested that a CCI merely sits at a desk performing clerical duties and rarely performs the peace officer functions of the job. However, certain job functions are so germane to the nature of a position that the frequency in which that the function is performed does not

negate the significance of its role in a job position. The alleged infrequency of having to wrestle or physical restrain an attacking inmate or defend others during inmate riots is not relevant. The employer's orders require performance of such functions. For example, the vast majority of career police officers never fire their weapon in the line of duty. However, they must be able to perform this function at any given moment. There is no regard for the infrequency that the function is performed, as the lives of the police officer, her colleagues, and the general public are at stake. As such, a police officer whose injuries prevent her from firing her weapon is permanently incapacitated from her job. Such is the case here as well. A CCI's peace officer duties, while not occurring every single day, are such a vital aspect of the job that they must be recognized as immune to an argument that they are performed infrequently. A failure to recognize these functions as uncompromising essential is certain to result in death. Moreover, adopting CalPERS's argument would effectively strip every Correctional Counselor in the state of California of their peace officer duties and render these numerous requirements of a sworn peace officer meaningless. Given the number of correctional facility employees throughout California, including Correctional Counselors, this matter is certain to arise again. As such, this matter contains significant legal or policy determination that is likely to reoccur.

II. THE PROPOSED DECISION IGNORES THE MEDICAL EVIDENCE AND SUPPORTS ITS FINDINGS WITH PROVABLY FALSE FACTS

The proposed decision's reasoning is deeply flawed, as it relies on Dr. Williams' report without considering whether the opinion is based on substantial medical evidence. First, the medical records do not support Dr. Williams' conclusion. Secondly, Dr. Williams' severely inadequate physical examination lacks any findings to rely on. As such, Dr. Williams' cannot point to any evidence to support his conclusion. As it stands, Dr. Williams' opinion is based on nothing more than speculation and conjecture. By relying on Dr. Williams' speculative opinion, the proposed decision does not contain a complete analysis of the issues.

The proposed decision is also flawed in that it suggests that Respondent failed to carry his burden that the applicant was incapacitated because he had a "successful surgery." This is clearly not dispositive of whether the applicant is permanently incapacitated. Successful surgery does not indicate anything

regarding whether one can perform their duties.

The proposed decision also states that Dr. Fleming's opinion receives less weight because 1) Fleming noted limited range of motion when the records actually demonstrated full range of motion, and 2) Fleming merely relied on complaints of pain and weakness. The ALJ's reasoning would be sound, however, the reasoning stands upon facts that are provably false.

First, the ALJ cited a January 2022 medical record as evidence that Dr. Fleming's opinion on diminished range of motion was incorrect, however the January 2022 medical record states that the applicant has, "mildly diminished flexion of the bilateral elbows." Moreover, even Dr. Williams notes the Applicant's diminished range of motion on page 4. (CalPERS Exhibit 8, noting applicant's range of motion as 3 to 180 degrees.) Quite obviously, this is evidence of the applicant's limited range of motion. Dr. Fleming was not wrong. Perhaps the ALJ failed to read the medical evidence. This is not a reason to give Dr. Fleming's report less weight. In fact, the opposite is true.

Secondly, Dr. Fleming does not merely rely on subjective complaints of pain and weakness as the proposed decision suggests. Dr. Fleming's opinion relies on numerous physical examinations, medical records, and objective strength testing performed by multiple other doctors to determine whether the Applicant is substantially incapacitated. Dr. Simonian treated and Dr. Moazzaz evaluated the applicant several times. Dr. Fleming used this evidence to make his determination. For example, opining that the applicant had limited range of motion is based on objective range of motion testing performed by Dr. Moazzaz. Moreover, Dr. Fleming's opinion on the applicant's severely diminished strength is based on the strength testing performed by Dr. Simonian and Dr. Moazzaz. Dr. Simonian's physical examination found that the applicant could not push over 40 pounds, and Dr. Moazzaz's objective testing revealed that the applicant could not lift or carry over 40 pounds. The applicant's unrebutted testimony also noted the inability to lift over 40 pounds. Given these examinations, the applicant was clearly unable to frequently lift or carry up to 50 pounds, occasionally over 100 pounds, or even respond and defend against inmate altercations as his job duties require. As such, Dr. Fleming used the objective testing from other evaluations to determine the applicant is permanently incapacitated. The alleged fact that Dr. Fleming "relied on

subjective complaints" should not give Dr. Fleming's opinion less weight because it is not true.

The proposed decision failed to recognize 1) Dr. Williams' obviously inadequate physical examination and 2) his blatant disregard for the medical evidence. Moreover, the proposed decision seemingly approaches Dr. Fleming's reliance on the numerous adequate physical examinations and comprehensive review of the medical evidence with willful blindness.

The fact that Dr. Williams performed a physical examination with the applicant does not give his opinion more weight than Dr. Flemings'. Dr. Williams' physical examination, if it can be called that, was merely an opportunity for Dr. Williams to determine whether the applicant could perform his duties. Unfortunately, Dr. Williams did not use that opportunity.

Dr. Williams testified that his report contained a complete recording of the examination; however, the report demonstrates the examination's glaring inadequacies. By his own admission, Dr. Williams only did two things during the physical examination – 1) determine the range of motion, and 2) request the Applicant to stand up from a chair. This is a far cry from a comprehensive physical examination required to determine whether the applicant is permanently incapacitated due to an injury to his bilateral elbows. Dr. Williams admitted that he did not perform any objective strength testing. When asked where the objective measurements were from the "chair test," Dr. Williams stated he did not use any. When asked what other tests he performed to determine the Applicant's strength, Dr. Williams answered that he did not perform any others. Dr. Williams does not know the applicant's strength because he did not perform any tests to properly determine Applicant's strength.

In this examination, strength testing would have been a vital component in determining whether the applicant is permanent incapacitated. The ability to perform many of the essential functions largely depends on strength. Dr. Williams did an "evaluation" and provided an opinion. However, he did not perform any testing during that evaluation to form a competent opinion. Despite being specifically asked, Dr. Williams' report did not identify any objective findings in the physical examination or the medical records to show that the member is not substantially incapacitated. His opinion cannot be based on the physical examination because there is nothing within said examination to rely on. As such, Dr. Williams'

physical examination carries no weight.

Without a proper examination, Dr. Williams can only rely on medical records and physical examinations of other doctors to form an opinion. The examinations performed by other doctors and the medical evidence completely contradict Dr. William's opinion. But they strongly support Dr. Fleming's.

Dr. Moazzaz performed multiple examinations which included 1) inspection of the elbows, 2) palpation of the elbows, radial head, and epicondyle, 3) range of motion testing, 4) motor control testing, 5) vascular review, 6) special testing for instability, and 7) objective strength testing for the triceps. Based on his examinations, Dr. Moazzaz disagrees with Dr. William's conclusion. Dr. Simonian performed the applicant's surgery and treated him for two years. He also disagrees with Dr. Williams' opinion.

On 8/3/20, Dr. Simonian saw the Applicant and noted that the applicant's triceps were, "extremely weak and has extreme difficulty even extending with 5-pounds weights." Yet, just two weeks later, Dr. Williams stated the applicant could perform all the essential functions. In April 2020, Dr. Simonian noted that the Applicant's recovery would take longer than twelve (12) months. In July 2020, Dr. Simonian again stated that it may take more than a year for the applicant to completely recover and he may be left with some degree of permanent disability. Yet, just one month later, Dr. Williams opined that the applicant could immediately return to his job full duty without restriction. The stark differences between the treating physician' findings and Dr. Williams' findings cannot be reconciled.

After reviewing Dr. Williams' report, Dr. Simonian even wrote a rebuttal. He stated that the applicant has severe weakness in both upper extremities. Dr. Simonian added that Dr. Williams' opinion is "unrealistic and does not reflect a complete understanding of the nature of the injury and severity." He, again, reiterated that it would take at least a year for the Applicant to recover. Thus, Dr. Williams cannot rely on the medical records to form his opinion because the medical records directly contradict Dr. Williams' opinion. Dr. Fleming, however, used all the medical evidence as a basis to form his opinion that the applicant is permanently incapacitated from his job duties.

The proposed decision reasons that the personal interaction makes Dr. William's report more persuasive. However, at no point does the decision use Dr. Williams' reasoning to demonstrate why Dr.

William is correct. Instead, the ALJ takes Dr. Williams' final opinion and accepts it as true without further investigation. A layman's review of Dr. Williams examination and the underlying medical evidence clearly demonstrates that his opinion is unsupported. No record, even his own examination, supports his view. His final opinion is built on mere speculation and conjecture. An in-person evaluation in and of itself does not make a doctor's opinion substantial evidence. The examination relied on must be sufficient to provide a basis for the opinion. Dr. Williams did not rely on a competent physical examination, and he did not rely on the medical evidence. Dr. Fleming, however, relied on the adequate physical examinations of multiple doctors and a comprehensive review of the records.

As such, Dr. William's opinion is speculation. The proposed decision is grossly inaccurate and cannot be reconciled with the facts in evidence.

III. CONCLUSION

Dr. Fleming's opinion carries more weight than Dr. Williams' opinion. Dr. Fleming used Dr. Simonian's and Dr. Moazzaz's comprehensive physical examinations and the entirety of the medical records to provide a competent opinion. It is clear Dr. Fleming's opinion is not merely based on "complaints" or "subjective reporting" as the proposed decision inaccurately claims. Dr. Williams, however, based his opinion on an inadequate physical examination without objective testing and willful blindness to the medical evidence. The proposed decision does not contain a complete analysis as it fails to consider the facts of the case. The proposed decision's reasoning is erroneous.

Therefore, the Board should decline to adopt the proposed decision in favor of its own that grants the service-connected disability retirement, or at very least, remand the issues for further investigation to avoid a grave injustice to the Applicant and many injured Correctional Counselors in the future.

FERRONE & FERRONE

Zachary W. Tomlinson

ZACHARY W. TOMLINSON
Attorney at Law

cc: See attached Proof of Service.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 4333 Park Terrace Dr., Suite 200, Westlake Village, CA 91361.

On October 26, 2022, I served the foregoing documents described as **RESPONDENT'S ARGUMENT DATED OCTOBER 26, 2022 RE: JOHN CANO / OAH CASE #: 2021020647** on the parties listed below via email and in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

Board Services Unit Coordinator
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John Cano
[redacted]

( ) BY PERSONAL SERVICE: I delivered such envelope(s) by hand to the individual at office(s) of the addressee(s) noted above.

(X) BY MAIL: I am "readily familiar" with the firm's practice of collection and processing corresponding for mailing. It is deposited with the U.S. Postal Service on that same day in ordinary course of business. I am that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of the deposit

( ) BY FEDERAL EXPRESS: I caused said envelope(s) to be sent by Federal Express to the address(s) noted above.

( ) BY FACSIMILE: I caused said document(s) to be transmitted by facsimile during normal business hours of 8:00 a.m. to 5:00 p.m. to the addressee(s) noted above.

Executed on October 26, 2022, at Westlake Village, California.

I DECLARE under penalty of perjury under the law of the State of California that above is true and correct.

Jennifer Carr
JENNIFER CARR