

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Reinstatement from Industrial Disability

Retirement of:

ZACHARY D. DEAN, Respondent

and

**CALIFORNIA STATE PRISON, CORCORAN, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent**

Agency Case No. 2022-0509

OAH No. 2022100050

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference on October 25, 2023, from Sacramento, California.

Mehron Assadi, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Thomas J. Tusan of the Law Office of Thomas J. Tusan represented respondent Zachary D. Dean, who was present.

No one appeared for or on behalf of respondent California State Prison, Corcoran, California Department of Corrections and Rehabilitation (Department). The Department's default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to the Department only.

Evidence was received and the record was left open to allow Mr. Dean to resubmit his exhibits as separate files. The record was closed and the matter submitted for decision on November 1, 2023.

Mr. Dean did not resubmit his exhibits by the specified deadline. Therefore, the exhibits he had previously submitted as a single file were stricken, the record was reopened, and he was given additional time to resubmit his exhibits. Mr. Dean submitted four exhibits, which were marked as Exhibits A through D. Exhibits A and B were admitted for all purposes and Exhibits C and D were admitted as administrative hearsay, without objection, as previously discussed at the hearing. The record was closed and the matter submitted for decision on November 8, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Dean was a Correctional Officer with the Department. He is a state safety member of CalPERS by virtue of his former employment.

2. Mr. Dean applied for an industrial disability retirement on August 23, 2019, due to an orthopedic (left shoulder) condition. His application was approved on

that basis nine months later. He has been receiving industrial disability retirement benefits since May 1, 2020.

3. On August 11, 2021, CalPERS notified Mr. Dean that his continued eligibility for disability retirement benefits was under review. He was asked to complete a disability reevaluation questionnaire, treating physician packet, and authorization for release of medical records, and return them to CalPERS. CalPERS sent him a second notice two months later.

4. On April 15, 2022, CalPERS notified Mr. Dean and the Department of its determination that Mr. Dean was no longer substantially incapacitated for the performance of his usual duties as a Correctional Officer due to an orthopedic (left shoulder) condition. CalPERS further advised that Mr. Dean would be reinstated to his former position. CalPERS notified Mr. Dean and the Department of their right to appeal CalPERS's determination.

5. Mr. Dean timely appealed CalPERS's determination. On September 14, 2022, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Division, signed the Accusation in this matter. The Accusation presents the issue of whether Mr. Dean remains substantially incapacitated for the performance of his usual duties as a Correctional Officer with the Department.

History of Injury

6. Mr. Dean began working for the Department as a Correctional Officer in March 2003. He held that position for approximately 17 years before retiring for disability.

7. On August 26, 2017, Mr. Dean accompanied Charles Manson from Corcoran State Prison to an outside hospital for medical treatment. Mr. Manson was a "high-profile" inmate, which meant the number of medical staff allowed in the room with him was limited. Therefore, Mr. Dean and other Correctional Officers accompanying Mr. Manson were responsible for helping with nonmedical duties that would otherwise be performed by medical staff, such as transferring Mr. Manson from his bed to a gurney.

8. Mr. Dean was in the process of transferring Mr. Manson from his hospital bed to a gurney when he injured his left shoulder. The injury was not immediately debilitating, although he felt pain almost immediately. He continued to work for about a week before seeking medical treatment through the worker's compensation system.

9. Mr. Dean initially received conservative treatment through the worker's compensation system, including medical evaluations, physical therapy, and steroid injections. He was prohibited from working approximately one week after his injury. He was never medically cleared to return to work.

10. Mr. Dean's symptoms did not improve with conservative treatment, and Dr. Simonian performed left shoulder surgery on January 25, 2018. A magnetic resonance image showed a tear to the left labrum, a rim of soft tissue or fibrous cartilage surrounding the shoulder socket. The surgery was intended to repair the tear, clean up the area, and repair shredding of the muscle.

11. Mr. Dean underwent extensive physical therapy post-surgery and had multiple steroid injections. Neither appeared to provide relief, leading him to apply for industrial disability retirement.

A Correctional Officer's Duties

12. The Department of Corrections and Rehabilitation, Division of Adult Institutions, says the following about a Correctional Officer's duties:

Under the supervision of the Correctional Sergeant, the Correctional Officer (CO), as a sworn peace officer, is responsible and accountable for carrying out the primary duty of public protection, and performs duties that vary among institutions, and among designated posts within an institution, due to factors such as the varying security levels of inmates, the design of correctional facilities, geographical location, and the number of inmates.

Assignments for the class include duty in towers, housing units, reception centers, kitchens, outside crew supervision, search and escort, control booths, yard gun posts and transportation.

13. A Correctional Officer must be capable of performing the following duties: (1) work in any post and any adult institution/camp; (2) perform peace officer duties in adverse, stressful, or unpleasant situations; (3) work at least 40 hours per week plus overtime; (4) wear approved personal protective equipment; (5) qualify on firing range; (6) defend himself and others, disarm, subdue, and apply inmate restraints, and swing arms forcefully; (7) remain functional after exposure to gas or chemicals; (8) search inmates for contraband; (9) stand, sit, walk, run, climb, stoop, crawl, and crouch; (11) lift, carry, push, pull, press, and brace; (12) move arms, reach, move head and neck, twist body, and move hands/wrist independently of each other. The duty to defend himself and others includes being able to use a baton with

sufficient force to overcome an inmate during an incident and to overcome an inmate trying to take his weapon from him.

Original Independent Medical Examination

14. CalPERS originally retained Donald Pompan, M.D., to evaluate Mr. Dean and determine whether he was substantially incapacitated for the performance of his usual duties as a Correctional Officer due to an orthopedic (left shoulder) condition. Dr. Pompan obtained his medical degree from the University of California, Irvine School of Medicine. He completed a residency in orthopedic surgery at UCLA Medical Center. He is a board-certified orthopedic surgeon.

15. Dr. Pompan performed an Independent Medical Evaluation (IME) on Mr. Dean on April 30, 2020. He conducted a thorough history, which included interviewing Mr. Dean about how he injured himself and his present complaints, past medical history, surgical history, and social history.

16. Dr. Pompan physically examined Mr. Dean's shoulders. Mr. Dean had a reduced range of motion upon flexion and extension of his left shoulder when compared to his right, 130 degrees/180 degrees and 30 degrees/60 degrees, respectively. External rotation of the shoulder was reduced on the left as compared to the right at 70 degrees and 80 degrees, respectively. Mr. Dean was also limited on internal rotation of the left shoulder when compared to the right. Abduction was 130 degrees on the left and 170 degrees on the right.

17. Mr. Dean's left shoulder blade protruded abnormally and moved abnormally when he moved his arm. He demonstrated some weakness upon abduction and slight rotator cuff weakness upon external rotation in his left shoulder but not his right.

18. Dr. Pompan reviewed Mr. Dean's medical records, which showed a history of largely conservative medical treatment of his left shoulder injury. His symptoms did not appear to improve, and he continued to have a reduced range of motion of his left shoulder. Dr. Pompan also reviewed Mr. Dean's essential functions and physical requirements as a Correctional Officer with the Department.

19. An investigator with CalPERS conducted video surveillance of Mr. Dean performing various activities throughout the community. Dr. Pompan reviewed the surveillance and concluded "most of the activities were quite benign, in which an individual was getting in and out of his car or standing by his house. There were some times in the video where he would be getting some items in and out of his car."

20. Dr. Pompan concluded Mr. Dean was substantially incapacitated for the performance of his usual duties as a Correctional Officer due to an orthopedic (left shoulder) condition. He explained:

Mr. Dean underwent a left shoulder surgery two years ago. He has consistently been documented to have decreased range of motion since the surgical procedure. He had two disability evaluations done in which there was documented decreased range of motion of the left shoulder. On my examination today, he continues with the decreased range of motion. In addition, he has weakness around the musculature of the shoulder, especially in regard to shoulder abduction. These limitations prevent him from using the left shoulder fully and in such a fashion that is required to perform his specific job duties as a correctional officer.

21. Dr. Pompan concluded the following about specific duties Mr. Dean could not perform due to his disability:

Mr. Dean is unable to perform the lifting of over 125 pounds. He is unable to do the very heavy pushing and pulling that is occasionally required. In addition, he cannot do the overhead activities such as performing cell searches overhead that is occasionally required. Most of all, he is unable to adequately defend himself, which would require subduing an attacker. He cannot swing the baton with force with the left shoulder. All of these are required activities of a correctional officer.

22. CalPERS granted Mr. Dean an industrial disability retirement based on Dr. Pompan's IME.

Subsequent IME

23. CalPERS notified Mr. Dean that his continued receipt of industrial disability retirement benefits was under review to determine if he was still substantially incapacitated for the performance of his usual duties as a Correctional Officer. CalPERS hired Don Williams, M.D., to perform an IME.

24. Dr. Williams obtained his medical degree from Case Western Reserve Medical School. He completed an orthopedic surgery residency at New York Orthopedic Hospital Columbia Presbyterian Medical Center. He is a board-certified orthopedic surgeon.

25. Dr. Williams performed his IME on Mr. Dean on March 18, 2022. He obtained a history of Mr. Dean's injury, as well as his past medical history, family history, current symptomology, activities of daily living, and social history.

26. Dr. Williams performed a physical examination. Mr. Dean had "good motion of the neck" upon flexion, extension, and rotation. Although he had a reduced range of motion of the left shoulder when compared to the right, all movements were within normal limits. Forward flexion was 165 degrees/180 degrees, abduction was 165 degrees/180 degrees, external rotation was 90 degrees bilaterally, and internal rotation was 75 degrees/90 degrees.

27. Although Mr. Dean had some tenderness over the subacromial area of his shoulder, he had "excellent strength." His "biceps muscle [was] strong."

28. Dr. Williams reviewed medical records. He characterized the records as showing "gradually increasing and improving range of motion." One was a Panel Qualified Medical Evaluation Joanne Halbrecht, M.D., performed on July 19, 2019. Dr. Williams summarized Dr. Halbrecht's physical examination as showing "full abduction, full flexion bilaterally, normal external, normal internal, full motion of the shoulder." Dr. Pompan characterized the same record as indicating a "significant decrease in internal rotation level, left shoulder."

29. Dr. Williams reviewed Mr. Dean's essential functions and physical requirements as a Correctional Officer with the Department. He was given a DVD purportedly containing CalPERS's video surveillance of Mr. Dean, but it was blank.

30. Dr. Williams concluded Mr. Dean is no longer substantially incapacitated for the performance of his usual duties as a Correctional Officer. He explained:

Mr. Dean has excellent strength in his motion, graded 5/5, and he is a very muscular gentleman. His rotator cuff is intact. He had slight labrum changes. He does have slight loss of motion, but certainly a functional range of motion and his motions have improved since prior QME's and IMEs. The fact that he has excellent strength and great functional range of motion leads me to believe that he is not incapacitated and maintains muscular status. Opinions are based on many years of orthopedic experience with similar shoulder conditions, with documentation of improvement. He has returned to his pre-injury baseline.

DR. WILLIAMS'S SUPPLEMENTAL REPORTS

31. CalPERS provided Dr. Williams the surveillance video of Mr. Dean. Dr. Williams reviewed the video and wrote a supplemental report. He explained that nothing he saw in the video changed his opinion that Mr. Dean was no longer substantially incapacitated.

32. CalPERS provided Dr. Williams additional medical records for review. Dr. Williams reviewed the records and wrote a supplemental report. He summarized the records as follows:

These medical records document that [Mr. Dean's] rotator cuff is intact but has some mild tendinitis in the rotator cuff. He has an old AC joint injury, which Dr. Simonian notes has been asymptomatic. He did have treatment of some glenoid problems. Dr. Simonian did talk about allowing for further

debridement. The examinee states that his shoulder hurts with repetitive pushing and pulling, repetitive overhead over 15 pounds, repetitive baton use.

33. The additional records did not change Dr. Williams's opinion. He explained, "[Mr. Dean] does have some prophylactic preclusions under work comp that will reduce shoulder pain. However, the CalPERS disability retirement decision differs from prophylactic work restrictions under Workers' Compensation."

Dr. Pompan's Subsequent IME

34. Mr. Dean asked Dr. Pompan to reevaluate him and determine if he was still substantially incapacitated. Dr. Pompan performed a second IME on August 14, 2023.

35. Dr. Pompan noted William Previte, D.O., performed a Qualified Medical Evaluation on Mr. Dean in December 2022. Dr. Previte found continued decreased range of motion in the left shoulder when compared to the right. "There was most significantly decreased internal rotation." He concluded Mr. Dean's disability prevented him from using his left shoulder to perform repetitive overhead work, push or pull more than 15 pounds, or repeatedly swing and strike with a baton.

36. Mr. Dean reported to Dr. Pompan that Dr. Simonian performed a second surgery on the left shoulder on April 13, 2023. Dr. Pompan did not review an operative report for that surgery. However, Mr. Dean explained he felt no different than when he originally saw Dr. Pompan in 2020. He continued to complain of diffuse pain in his left shoulder "'all over.'"

37. Mr. Dean continued to show poor range of motion in his left shoulder when compared to his right. Flexion was 140 degrees/180 degrees, extension was 30 degrees/60 degrees, abduction was 130 degrees/170 degrees, and adduction was 30 degrees/40 degrees. He continued to lack "significant internal rotation."

38. Mr. Dean's left shoulder blade continued to protrude abnormally and move abnormally when he moved his arm. He still had weakness upon abduction and slight rotator cuff weakness upon external rotation in his left shoulder but not his right.

39. Dr. Pompan concluded Mr. Dean remains substantially incapacitated. He rationalized:

On my examination, [Mr. Dean] continues to have decreased range of motion. He continues to have the scapular dysrhythmia. His examination is essentially what it was when I saw him back in 2020. This individual cannot work full duty as a Correctional Officer.

[¶] . . . [¶]

In terms of Dr. Williams' opinion, Dr. Williams opined that Mr. Dean has a fully functional shoulder and could perform the full duty correctional officer work. Clearly this was not true—Mr. Dean continued to have shoulder pain after Dr. William's [*sic*] examination and then required a second surgery. Dr. Williams did not discuss the fact that Mr. Dean works as a correctional officer and thus needs to be fully functional, including being able to swing a baton and

defend himself. Thus, Dr. Williams had opined that Mr. Dean could work as a Correctional Officer, yet Mr. Dean's shoulder condition was such that he required another surgery. While I have not seen his records, Dr. Simonian clearly had an indication to take him back to surgery.

[¶] . . . [¶]

Therefore, in conclusion, my opinions as expressed in my prior report are reinforced. While he is just 3.5 months post-surgery and he can make some gains in terms of range of motion and correcting some of his scapular dysrhythmia, it is highly doubtful that he would be able to improve enough to do activities such [as] forcefully swinging a baton with his left arm and defend[ing] himself against an attacker. With a reasonable degree of medical certainty, he will not be able to return to his full duty as a correctional officer.

Hearing Testimony

DR. POMPAN

40. Dr. Pompan testified consistently with his two IME reports. He articulated a clear understanding of the different standards for qualifying for worker's compensation benefits and qualifying for CalPERS disability retirement benefits. He recognized that worker's compensation law allows for prophylactic work restrictions, whereas the Public Employees' Retirement Law (Gov. Code, § 20000 et seq.) does not.

41. Dr. Pompan reiterated that Mr. Dean remains substantially incapacitated for the performance of his duties as a Correctional Officer. He was adamant that Mr. Dean was physically incapable of defending himself or others during an altercation with an inmate or subduing an inmate. Although Mr. Dean is right-handed and his injury is to his left shoulder only, Dr. Pompan believed it unrealistic to require Mr. Dean to use only his right upper extremity when defending himself and others and trying to subdue inmates.

DR. WILLIAMS

42. Dr. Williams also testified consistently with his IME. He articulated a clear understanding of the different standards for qualifying for worker's compensation benefits and for qualifying for CalPERS disability retirement benefits.

43. Dr. Williams mostly agreed with the opinions Dr. Pompan expressed in his original IME. He agreed Mr. Dean was substantially incapacitated for the performance of his usual duties when he originally applied for industrial disability retirement. However, Dr. Williams believed Mr. Dean has since largely improved and regained strength and range of motion in his left shoulder such that he is no longer substantially incapacitated.

MR. DEAN

44. Mr. Dean explained he frequently responded to altercations between inmates while working as a Correctional Officer. Therefore, it was essential for him to have sufficient strength and dexterity to effectively swing a baton, take inmates to the ground, and defend himself and others from attack.

45. Mr. Dean is right-handed, and his preference would be to always use his right hand and arm to swing a baton, subdue an inmate, or defend himself and others. The fluid nature of working in a correctional facility, however, required him to be able to always perform those duties with both hands and arms. For instance, he may be assisting with physically removing an inmate from a cell and the limited space may require him to use his non-dominant hand and arm. Or, he may be subduing an inmate with his dominant hand and arm while also using his non-dominant hand and arm to defend himself and the inmate.

Analysis

46. CalPERS previously granted Mr. Dean's application for industrial disability retirement on the grounds that he was substantially incapacitated for the performance of his duties as a Correctional Officer due to an orthopedic (left shoulder) condition. He is under the minimum age for voluntary service retirement for a Correctional Officer, and CalPERS decided to evaluate his continued eligibility for disability retirement benefits. CalPERS has the burden of proving Mr. Dean's left shoulder condition is no longer substantially incapacitating and he should be reinstated as a Correctional Officer.

47. The persuasive evidence established Mr. Dean remains substantially incapacitated due to a left shoulder condition. Dr. Pompan's opinion that Mr. Dean is incapable of using his left upper extremity to defend himself and others from an attack or to subdue an inmate was more persuasive than Dr. Williams's opinion to the contrary. Dr. Pompan based his opinion on a thorough physical examination. His physical findings were substantially the same as those he made during his first IME. CalPERS relied on the latter findings when granting Mr. Dean a disability retirement.

Dr. Williams concurred with Dr. Pompan's original conclusion that Mr. Dean was substantially incapacitated.

48. Dr. Pompan's testimony was supported by the Department of Corrections and Rehabilitation, Division of Adult Institutions', description of a Correctional Officer's essential functions. Additionally, it was bolstered by Mr. Dean's explanation that the fluid and unpredictable nature of a Correctional Officer's job required him to have full use of both upper extremities, which was credible.

49. Dr. Williams' opinion that Mr. Dean is no longer substantially incapacitated was not persuasive. Although Dr. Williams explained he largely agreed with Dr. Pompan's initial conclusion that Mr. Dean was substantially incapacitated when he applied for industrial disability retirement, he believed Mr. Dean subsequently regained strength and range of motion in his left shoulder. However, that conclusion was contradicted by Dr. Pompan's calculation of Mr. Dean's range of motion 17 months after Dr. Williams.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. CalPERS has the burden of proving by a preponderance of the evidence that Mr. Dean is no longer substantially incapacitated for the performance of his usual job duties as a Correctional Officer with the Department and should be reinstated to his former position. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000, Precedential Decision 99-03) <<https://www.calpers.ca.gov/docs/99-03-starnes-chp.pdf>>.) This evidentiary standard requires CalPERS to produce evidence of such weight that, when balanced against

evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, CalPERS must prove it is more likely than not that Mr. Dean is no longer substantially incapacitated for the performance of his usual job duties as a Correctional Officer with the Department and should be reinstated to his former position. (*Lillian F. v. Super. Ct.* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

2. Mr. Dean is a state safety member of CalPERS by virtue of his former employment as a Correctional Officer with the Department. He was granted an industrial disability retirement based on an orthopedic (left shoulder) condition on May 28, 2020, pursuant to Government Code section 21151, subdivision (a). That statute provides that “any . . . state safety . . . member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.” Incapacity for the performance of duty must be established by “competent medical opinion.” (Gov. Code, § 21156, subd. (a)(2).)

3. “Disability” and “incapacity for performance of duty” are defined in Government Code section 20026, which provides:

“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, as determined by the board . . . on the basis of competent medical opinion.

(*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876
[“We hold that to be ‘incapacitated for the performance of duty’ within section 21022¹
means the *substantial* inability of the applicant to perform his usual duties.”])

4. A member receiving disability retirement benefits who is under the minimum age for voluntary service retirement may be required to undergo medical evaluation to confirm he remains substantially incapacitated. (Gov. Code, § 21192.) A state safety member determined to no longer be substantially incapacitated shall be reinstated to his former position or one in the same classification. (Gov. Code, § 21193.) Mr. Dean is under the minimum age for voluntary service retirement for a Correctional Officer, which is age 50. (Gov. Code, § 21060, subd. (a).)

Conclusion

5. CalPERS did not meet its burden of demonstrating Mr. Dean is no longer substantially incapacitated for the performance of his usual duties as a Correctional Officer due to an orthopedic (left shoulder). Therefore, there is no legal basis for terminating Mr. Dean’s industrial disability retirement benefits and reinstating him to his former position as a Correctional Officer with the Department.

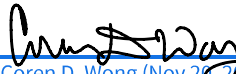
ORDER

Respondent Zachary D. Dean’s appeal from CalPERS’s determination that he is no longer substantially incapacitated for the performance of his usual duties as a Correctional Officer with respondent California State Prison, Corcoran, California

¹ Predecessor to Government Code section 20026.

Department of Corrections and Rehabilitation due to an orthopedic (left shoulder) condition and should be reinstated to his former position is GRANTED.

DATE: November 20, 2023


Coren D. Wong (Nov 20, 2023 09:09 PST)

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings