

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter Regarding the Application for Industrial
Disability Retirement of:**

JOHN DEIS, Respondent,

and

**R J DONOVAN CORRECTIONAL FACILITY, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent.**

Agency Case No. 2021-0711

OAH No. 2021120821

PROPOSED DECISION

Jami A. Teagle-Burgos, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on June 7, 2022, and July 18, 2022.

Preet Kaur, Senior Attorney, represented petitioner Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Joseph P. Heathman, Attorney at Law, represented respondent John Deis, who was present at the hearing.

No appearance was made by or on behalf of respondent R J Donovan Correctional Facility, California Department of Corrections and Rehabilitation (CDCR). Upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against CDCR pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on July 18, 2022.

ISSUE

Was Mr. Deis substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer for CDCR due to an orthopedic (neck) condition when he filed his application for industrial disability retirement?

SUMMARY OF DECISION

The sole issue on appeal is whether Mr. Deis was substantially incapacitated for the performance of his usual and customary duties as a Correctional Officer with CDCR on the basis of an orthopedic (neck) condition at the time he applied for industrial disability retirement. Competent medical evidence introduced at hearing established

Mr. Deis was physically incapable of performing several of the essential functions of a Correctional Officer due to an injury he sustained on December 5, 2018, and which had not improved at the time he applied for industrial disability retirement. Therefore, his application is granted.

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Deis was employed by CDCR as a Correctional Officer. By virtue of his employment, he was a state safety member of CalPERS subject to Government Code section 21151.

2. On November 16, 2020, Mr. Deis filed a Disability Retirement Election Application with CalPERS. In the "Application Type" section he checked the box marked "Industrial Disability Retirement." Mr. Deis identified his disability as an orthopedic (neck) condition. His disability occurred on December 5, 2018, at R J Donovan Correctional Facility when he was "assaulted by an inmate during transportation."

3. CalPERS obtained medical records and documents related to Mr. Deis's condition, and a sub rosa investigative report with surveillance videos. CalPERS selected Darren Thomas, M.D., independent medical examiner (IME), to perform a disability evaluation. Dr. Thomas provided CalPERS with a report containing his findings and conclusions. After reviewing all of the information received, CalPERS determined that when Mr. Deis filed his application for industrial disability retirement, he was not permanently disabled or incapacitated from performing the usual and customary duties of a Correctional Officer.

4. On May 24, 2021, CalPERS notified Mr. Deis that his application for industrial disability retirement was denied. CalPERS advised him of his right to appeal.

5. On August 5, 2021, CalPERS notified Mr. Deis it received his letter in which he filed a timely appeal.

6. On November 19, 2021, petitioner filed the statement of issues in his official capacity. The statement of issues and jurisdictional documents were served on respondents and this hearing ensued.

Job Analysis and Physical Requirements for a Corrections Officer

7. CDCR's Job Analysis outlines the tasks and duties of a Correctional Officer. Dr. Thomas relied upon this record in formulating his opinions. The following are pertinent excerpts from the Job Analysis:

Correctional Officers may be assigned to work in a correctional institution such as guard tower control room/booth, dining room, housing unit/dorm, kitchen, bakery, hospital, gymnasium, classroom, visiting room, entrance gate, plaza area, library, community service crew, administrative segregation, transportation, outside patrol, range/arsenal, truck sally port, receiving and release, . . .

The Correctional Officer provides security and directs inmates . . . patrols assigned areas for evidence of forbidden activities, infractions of rules and unsatisfactory attitudes or adjustment of prisoners . . . employ weapons or force to

maintain discipline and order among prisoners when necessary. . . .

Correctional Officers must wear uniforms . . . of shirt, pant, regulation cap, badge, boot (high or low . . .) and waist belt weighing approximately eight pounds which holds a radio, flashlight, keys, handcuffs, etc. In the Administrative Segregation unit, . . . required to wear titanium vests (stab proof vests) and side-handle batons.

Equipment that can be utilized . . . includes a two-way hand held radio, side handle baton, binoculars, flight lights, large cell and door keys, clipboards, hand trucks or dollies, whistles . . . various kinds of restraint devices, shot guns, high powered rifles, and hand guns. . . .

8. The Job Analysis provides the following physical/mental demands required of a Correctional Officer where "occasional" is 1/3 or less of the work day, "frequent" is 1/3 to 2/3 of the work day, "continuous" is 2/3 or more of the work day, "light work" involves lifting 20 pounds maximum with frequently lifting of up to 10 pounds, and "very heavy work" involves lifting in excess of 100 pounds:

- Occasional to continuous walking; occasional running; occasional to frequent climbing; occasional crawling and crouching; occasional to continuous standing/sitting; and occasional to frequent stooping/bending;
- Frequent lifting/carrying light to medium range (20 to 50 pounds), and occasional lifting/carrying very heavy range (over 100 pounds) including inmates weighing up to 400 pounds; occasional to frequent pushing/pulling;

occasional to continuous reaching; and occasional reaching (overhead); occasional to continuous arm movements; frequent to continuous hand/wrist movement; occasional bracing/pressing of legs/feet; frequent to continuous twisting of body;

- Frequent to continuous head/neck movement: Must be able to move or use head/neck during regular duties such as observing/surveillance of inmates; head/neck movements include side-to-side and flexing downward and backward; head/neck movements become awkward when conducting cell searches or looking under/over and around things in a 10 foot by 10 foot cell or other cramped spaces; and
- Indoor or outdoor, or combination, of locations; exposure to varying weather conditions and temperatures; and wide range of working surfaces including dirt, asphalt, grass, concrete, steel, staircases, and linoleum/tile covered floors, and dirt, grass or kitchen areas that may become slippery.

9. The Physical Requirements document for a Correctional Officer listed various physical tasks and the frequency required to complete these tasks. Tasks required to be performed "constantly/more than 5 hours" per day are standing, bending (neck), and twisting (neck); "frequently/3-6 hours" per day are lifting/carrying up to 25 pounds, walking, bending, twisting (waist), pushing/pulling, handling, computer use, walking on uneven ground, and driving; and "occasionally/up to 3 hours" per day are lifting/carrying more than 50 pounds, crawling, kneeling, climbing, squatting, reaching (above/below shoulder), pushing/pulling, and exposure to excessive noise/extreme temperature. This document was signed by Mr. Deis's "employer", a lieutenant, (signature not legible) and Mr. Deis on August 24, 2020.

CalPERS's Investigative Report and Sub Rosa Videos

10. On March 25, 2021, Sarah Garcia, an investigator for CalPERS, prepared an investigative report with videos, which included findings of a State Compensation Insurance Fund (SCIF) investigation with sub rosa videos. Mr. Deis was found to have social media accounts on Facebook, Twitter, and Instagram with undated posts of the name/logo of a nightclub, his father being in the hospital, his stress about a doctor appointment, and him being home sick. Mr. Deis had a Poshmark online account with posts showing four shirts for sale. The SCIF investigator noted "there was no references to [his work injury], physical activity after [his work injury], upcoming events, previous injuries, or current employment."

11. In photos and videos, undated, taken from the social media accounts of Mr. Deis and other individuals, the following is what can be seen of Mr. Deis's activities: he was pushing a shopping cart, with nothing in it, outside a mall in Tijuana, Mexico; he was sitting with friends possibly at a bar and looking into the camera while holding a shot glass; he was moving to the music beat while sitting in a car going through a car wash; he was dancing with friends where he somewhat moves to the music beat with his left hand raised; he was standing outside the driver's side of a vehicle; he was wearing a virtual reality headset and holding controllers while standing and slowly moving his body; being on the ride "Splash Mountain"; and he was standing and/or walking on a trail. He was tagged on social media accounts of friends, and vice versa, in a picture of him standing in front of a DJ table and he tagged an upcoming music festival.

12. In a surveillance video on June 16, 2020, Mr. Deis's home garage door opens automatically and he removes a medium-sized metal dolly from the garage and wheels it toward the hatch door of an SUV; opens the SUV's hatch door where a large

box can be seen with a "Char Broil" label and photo of a barbeque; slightly pulls the box towards his body by holding the plastic ties on the box; lowers the box onto the ground by using his knee to balance the box while his neck, head, and back are stiffly positioned; unsuccessfully attempts to slide the dolly under the box and position the box onto the dolly; returns the dolly to the garage by rolling it there; and pulls the box on the ground, by holding the plastic ties, to the backyard.

13. The SCIF investigation report indicates Mr. Deis retains a pharmacy technician license. A sub rosa video shows him at 7:20 a.m. on January 19, 2021, sitting in a vehicle for 24 minutes at a pharmacy parking lot, exit the vehicle and walk a few steps and enter the side door; and drive away from the pharmacy at 4:41 p.m. A second sub rosa video shows him at 7:17 a.m. on January 20, 2021, leave his house in his vehicle and arrive at 7:35 a.m. at the pharmacy and enter the side door. The report references Mr. Deis being seen filling prescriptions inside the pharmacy, but the record contains no videos or photos of him doing such activity.

CalPERS's Independent Medical Evaluation Conducted by Dr. Thomas

14. The following is a summary of the medical evaluation and testimony of Darren Thomas, M.D., a board-certified orthopedic surgeon and IME who was selected by CalPERS to perform an independent medical examination of Mr. Deis on May 7, 2021. Dr. Thomas earned his medical degree from the Uniformed Services University of the Health Sciences (USUHS) in 2007. He serves in the United States Navy and has been stationed at the Naval Medical Center in Portsmouth, Virginia; Camp Lejeune, in North Carolina; Marine Corps Mountain Warfare Training; Naval Medical Center in San Diego; and OrthoCare Hand Center, in Charlotte, North Carolina. In the military, he has served as an orthopedic, hand and upper extremity, staff surgeon; assistant resident

director, professor of surgery at USUHS; and credentialed committee member. He has several publications in medical journals.

15. Dr. Thomas interviewed Mr. Deis and asked about his chief complaints, work history, and relevant medical history. He reviewed documents received from CalPERS, including Mr. Deis's medical records from his treating surgeon, evaluations by other physicians, the Job Analysis and Physical Requirements for a Correctional Officer, and the investigative report with surveillance and sub rosa videos. He prepared a written report on May 7, 2021, the day of the examination, and he testified at this hearing. His testimony was consistent with his report.

16. Dr. Thomas noted Mr. Deis underwent a C5-6 anterior cervical discectomy and fusion on November 11, 2019, by Larry Dodge, M.D., his treating surgeon. He was found to be permanent and stationary by a qualified medical examiner, Wesley Nottage, M.D., as of July 4, 2020, with restrictions of no lifting over 15 pounds, avoid repetitive neck motion, no prolonged overhead gazing, due to radiculopathy at C6, chronic, and slight sensory changes in the right hand. Mr. Deis reported being able to perform only light activity, difficulty standing for 30 minutes to one hour, inability to perform forceful activities with his arms and hands, and pain interfering with travel and social activities.

17. Upon examination, Dr. Thomas found Mr. Deis had an avoidant affect that was due to stress or an attempt to hide something. He had specific pain behaviors that were outside of proportion of the organic findings. He had inconsistent physical motor function testing, and his overall tests were transient and inconsistent such that he was not presenting his full potential physically. There was a complaint of pain with almost no motion in his neck. Yet, he had a normal gait and was able to perform tandem heel-to-toe walk without loss of balance. While he had some reproduction of

pain symptoms with rotation of the shoulders and thorax, he had a negative Spurling's test. He also had a negative Romberg test where he was able to hold his arms out, at shoulder level, close his eyes, and not lose balance. He was able to turn his head down and flex and not lose balance. There was no muscle atrophy or skin tone changes that would have been indicative of severe radiculopathy. He had intact pinprick sensation and intact light-to-touch sensation. He had significant pain behaviors and guarding with shoulder and spinal range of motion measurements, but his focused shoulder range of motion was inconsistent with non-measured spontaneous motion observed throughout the remainder of the exam. Dr. Thomas diagnosed Mr. Deis with cervical spondylosis, moderate, status-post anterior cervical discectomy and fusion at C5-6 with electrodiagnostic confirmed chronic C6 radiculopathy. He agreed with Dr. Dodge that the cervical spondylosis was moderate to severe.

18. Concerning the sub rosa and other videos, Dr. Thomas noted Mr. Deis had "focused motions" during his exam that were severely limited, but in the videos he was seen lifting his arms and carrying "heavy objects." There was a "discordance with focused exam measurements versus what was in the sub rosa video."

19. Dr. Thomas concluded that Mr. Deis does not have an actual and present orthopedic cervical spine impairment that arises to the level of substantial incapacity to perform his usual job duties. He used an example of a professional hockey player who can return to playing hockey after undergoing surgery. Mr. Deis had an absence of functional deficits, so it was not necessary for him to have restrictions including prophylactic restrictions such as not performing work involving altercations.

20. On cross-examination, Dr. Thomas reported the last time he performed a spinal surgery was four years ago, and spinal injuries consist of less than one percent of his medical practice.

Treating Physician Reports and Testimony by Dr. Dodge

21. The following is a summary of the reports and testimony of treating physician, Larry Dodge, M.D. a board-certified orthopedic surgeon. He earned his medical degree from the University of California, San Francisco (UCSF), in 1980. He was a surgical intern at the University of Michigan; junior resident of orthopedic surgery at UCSF; resident in hand surgery at Pacific Medical Center, in San Francisco, and junior resident in orthopedic surgery at San Francisco General Hospital; chief resident in orthopedic surgery at Highland General Hospital in Oakland and UCSF's Moffitt Hospital in San Francisco; resident in orthopedic surgery at Kaiser Hospital in Oakland; and a fellow in spine and spinal cord injury at Case Western Reserve University, Veterans Administration Medical Center, and University Hospitals of Cleveland. He has numerous publications in medical journals, and he was appointed as a clinical instructor at Case Western Reserve University and University of California, San Diego. He has served as the chairman of the department of orthopedic surgery at Scripps Mercy, in San Diego. He has performed 13,000 surgeries as the primary surgeon of which 3,000 to 4,000 were spinal surgeries.

22. Dr. Dodge is Mr. Deis's treating spinal surgeon. He reviewed Mr. Deis's medical records, the Job Analysis and Physical Requirements for a Correctional Officer, and the investigative report with surveillance and sub rosa videos. Dr. Dodge testified at this hearing. His testimony was consistent with his treatment records.

23. Dr. Dodge first examined Mr. Deis on May 22, 2019, where he found tenderness in the neck, a positive Spurling's test, and radicular pain in the right arm which was produced with rotation of the head and neck. He was not grossly weak in his arms, but there were symptoms of nerve root compression. He had tried physical therapy and acupuncture that gave him slight improvement, so Dr. Dodge

recommended an epidural injection that was denied by insurance. Mr. Deis continued to struggle with neck and arm pain, and weakness down his right arm, so it was determined that surgical treatment was the most reasonable approach. The frequency of radicular symptoms, prior to surgery, waxed and waned, but was constant to some degree. He would have flaring pain that changed day to day, and hour to hour. Dr. Dodge's examination of his right arm would also change. At times, he would have weakness of the right upper extremity as shown in electrodiagnostic testing performed by a neurologist that showed nerve damage in the right hand. This was consistent with the magnetic resonance image (MRI) of his neck. These were "very significant objective findings" where his subjective complaints matched the objective findings. Concerning waxing and waning of symptoms, this is a typical scenario with patients where there may be no detection of motor deficits during an evaluation, but a few weeks later during another evaluation, weakness will be detected. This was the case with Mr. Deis's right arm. Dr. Dodge had the "advantage" as Mr. Deis's treating physician, to examine him on several occasions and see how his condition changed at exams such that he would have "good days and bad days."

24. Dr. Dodge performed surgery on Mr. Deis on November 11, 2019, which consisted of an anterior cervical discectomy and fusion. He placed a spinal plate, four screws, and a piece of bone between the vertebrae. A patient will recover from surgery in three to four months, to one to two years, depending on the patient – it varies from person to person. The surgery helped Mr. Deis to some degree, although it did not eradicate his symptoms, unfortunately. The goal is some improvement, but the surgery does not give a person a "normal spine." Mr. Deis reached a medical plateau on July 14, 2020, but he was still having moderate amounts of neck pain and occasional radiculopathy in his right arm. A new MRI was obtained on the same day, which showed spurs and foraminal stenosis that was moderate to severe. This was a relevant

concern that could not be ignored because Mr. Deis's condition could potentially put others at risk if he returned to an arduous job and suffered paralysis that would cause harm to himself or others. Dr. Dodge assigned the following work restrictions for Mr. Deis: avoiding pushing/pulling greater than 40 pounds; lifting no more than 15 pounds; and no repetitive turning of the neck. At the hearing, he added a restriction of avoiding altercations such as situations of fighting an inmate or breaking up fights amongst inmates.

25. Concerning Dr. Thomas's IME, Dr. Dodge testified that Dr. Thomas evaluated Mr. Deis on one occasion where there were no physical signs of sensation loss at that time. However, in Mr. Deis's situation, depending on the inflammation of his nerve, his symptoms changed from day to day and week to week. Hence, it was not unusual that Dr. Thomas did not find radiculopathy during his one exam.

26. Concerning the sub rosa video, Dr. Dodge testified this was the "only film that showed any strenuous activity" of retrieving a dolly, trying to remove a large box from the back of a vehicle, sliding the box out of a car, and dragging the box on the ground to the side of the house. If the box were 85 pounds – an estimate – it would not surprise Dr. Dodge that Mr. Deis was able to do this activity. However, it is not Dr. Dodge's advice to do this activity because it sets up a patient for exacerbations or flares of pain. When asked how he would "square" this activity with his work restrictions, Dr. Dodge stated the work restrictions are applicable when doing an activity during an eight-hour work day, during a five-day work week, and "not once every three weeks." After seeing this video, he would not alter the work restrictions he assessed because Mr. Deis has moderate to severe stenosis in his neck. He is not saying Mr. Deis could not bend and twist his head and neck, but he does have loss of motion, and while he could perform light to maybe moderate work, he could not

perform heavy work where he would get into an altercation that could cause neurological problems.

27. On cross examination, Dr. Dodge correctly stated CalPERS's standard for industrial disability retirement versus deeming an individual to be permanently impaired for workers' compensation purposes.

Testimony of Mr. Deis

28. The following is a summary of the testimony of Mr. Deis. He used to work as a pharmacy technician at R J Donovan Correctional Facility. After seeing the day-to-day activities of the officers and understanding what they were making "money-wise," he decided it would be a good career for him to provide for his family. He attended the academy for Correctional Officers that was in northern California. There were 360 students in his class, and he was the only one who was assigned at R J Donovan Correctional Facility because he was "brought back on the Warden's request." He had spoken to the Warden about wanting to become a Correctional Officer, and the Warden knew his work ethic as a pharmacy technician, so "he put the word to come back to Donovan." He was placed at "Charlie Yard" for seven to eight months under Lieutenant Poladian, and he transferred to the Administrative Segregation Unit (AdSeg) for one year, also under Lieutenant Poladian. AdSeg consists of inmates who get into trouble within the prison because of drugs and crimes against other inmates. He then went to Echo Yard Facility, which was a new yard where the inmates – such as child molesters and gang drop outs – were mixed together. It was common knowledge gang members wanted to "get out of Echo Yard quickly" because after "48 hours" their "paperwork in the gang would be no good" and they would be "unwanted to their gang at that point."

29. On the date of his injury, December 5, 2018, Mr. Deis and his partners went to pick up six or seven inmates being transferred to Echo Yard Facility. When they removed the first inmate from the vehicle who was in restraints, the other inmates "rushed the guy in restraints" who fell onto Mr. Deis. He remembered falling on the floor, getting back up and getting squashed by inmates being pushed into him, and he lost his footing and hit a solid interior concrete/cinder block wall. He was not immediately aware he had any injury to his neck. A nursing evaluation at work was done right after the incident, and bruising was noted on his right arm. He told the nurse that he was fine. He went back to work the next day and noticed "something was not right with his neck," but he kept going back to work for almost one month because he was trying to continue to work.

30. Mr. Deis's symptoms worsened. The stiffness in his neck became more prevalent and his headaches became consistent to the point they were unbearable. He finally reported his injury to Lieutenant Luna. He was sent to be seen at a clinic and was referred to Dr. Dodge who prescribed conservative treatment of physical therapy and exercises, which did not work. An epidural was not approved by his insurance, so Dr. Dodge proceeded with spinal surgery because he had pain doing down his arm and numbness on the "fat part of his right hand." After surgery, he felt well because the pain that radiated down his right arm became less frequent. Prior to surgery, he had this pain every couple of hours. After surgery, he had this pain once or twice a week, and sometimes it was really quick or a few minutes, but it was never constant. Now, his pain and headaches increase with activities like bending his head for too long. Some days he will wake up and feel "excellent," and other days he feels "really bad and downhill." He "cannot predict on any particular day how he's going to feel." However, if he is more active, he can "definitely feel it the next day."

31. Mr. Deis estimated that his work belt weighed 15 to 20 pounds because it held a couple handcuffs and several other items. He wore a stab proof vest, and once in a while had to wear riot gear. He had to call for "medical aid service" about four to five times a day in Echo Yard Facility, which required him to get the inmate on a gurney and into an ambulance. He had to break up fights, a couple of times a week, between inmates or because of assaults on officers. He loves his job and misses it.

32. On the day of his evaluation by Dr. Thomas, Mr. Deis was having a "good day." He did not have much of a conversation with Dr. Thomas.

33. Concerning the sub rosa video, he purchased a barbeque for his father at Walmart where the workers loaded it into his car. He was responsible for unloading it. He lowered the barbeque from the car to the ground by using its weight. When he realized the barbeque did not fit on the dolly, he grabbed one of the straps and "dragged it to the side yard."

34. Concerning the surveillance videos outside of a pharmacy, Mr. Deis testified his friend has a pharmacy who he helps in "kind of a per diem thing." He does prior authorizations for him, maybe a couple times a week, to help when the pharmacy is backed-up. His friend "knows his situation as far as his neck." He helps depending on "how he feels." At the date of the hearing, he had not been there in three weeks.

Testimony of Lieutenant Poladian

35. The following is a summary of the testimony of Michael Poladian, a healthcare lieutenant at R J Donovan Correctional Facility, who testified in support of Mr. Deis. Lieutenant Poladian is familiar with Mr. Deis from when they worked together a few years back when Mr. Deis was assigned to a building that he was in charge of. They worked together for four to five years, and he was Mr. Deis's direct supervisor for

two years. Mr. Deis did “everything he was supposed to do” at work. He was “cool, calm, collected” and used a lot of de-escalation techniques where they had “very dangerous inmates.” Their job is to “respond to violence” and “stop violence and maintain the health and safety of inmates.” The gear they wear can get heavy especially during a 16-hour shift. Mr. Deis was a “good officer” and he “still is a good officer.” Lieutenant Poladian stated, “[Mr. Deis] did his job well.”

Testimony of Lieutenant Luna

36. The following is a summary of the testimony of Jose Luna, a correctional lieutenant at R J Donovan Correctional Facility, who testified in support of Mr. Deis. Lieutenant Luna is familiar with Mr. Deis because he was his supervisor, on and off, at the prison. Mr. Deis was dependable and honest, and the supervisors could count on him to handle his daily duties and support other staff. The gear that is worn weighs between 40 to 50 pounds depending on the disturbance, and it can be heavier. They wear helmets, too. There were disturbances on average of two to three times a day, during an eight-hour shift, and there were riots maybe once or twice a month. He was in contact with Mr. Deis after his injury, and advised him to seek medical help. He completed the Physical Requirements of Position form for Mr. Deis.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.].....The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Purpose of CalPERS's Laws

3. The court in *Lazan v. County of Riverside* (2006) 140 Cal App 4th 453, examined the purpose of CalPERS's legislation, noting it serves two objectives: inducing persons to enter and continue in public service, and providing subsistence for disabled or retired employees and their dependents. A disability pension is intended to alleviate the harshness that would accompany termination of an employee who became medically unable to perform his or her duties. Generally, CalPERS's legislation is to be construed liberally in favor of the employee to achieve these objectives. Moreover, eligibility for retirement benefits does not turn upon whether the employer dismissed the employee for disability or whether the employee voluntarily ceased work because of disability. (*Id.* at p. 459.)

Applicable Code Sections

4. Government Code section 20021 defines "Board" as "the Board of Administration of the Public Employees' Retirement System" (CalPERS).

5. Government Code section 20026 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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

6. Government Code section 21150, subdivision (a), provides that a member who is “incapacitated for the performance of duty shall be retired for disability . . . ”

7. Government Code section 21151 provides that a state safety member, such as respondent, who is “incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . . ”

8. Government Code section 21152 sets forth who may make the disability retirement application.

9. Government Code section 21154 states:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997 is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for

disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

10. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability. The determination of incapacitation shall be based on competent medical opinion.

Appellate Authority

11. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

Interplay between CalPERS's Disability Retirement and Workers' Compensation

12. Government Code section 21166 provides:

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board, or in the case of a local safety member by the governing body of his or her employer, is industrial and the claim is disputed by the board, or in case of a local safety member by the governing body, the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.

13. Although the Public Employees' Retirement Law and the Workers' Compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. Courts may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Pearl v. W.C.A.B.* (2001) 26 Cal.4th 189, 197.)

14. Receipt of any type of disability in a related workers' compensation proceeding does not establish qualification for a disability retirement. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) Nor does the issuance of prophylactic work restrictions or a

reasonable fear of injury justify granting an industrial disability retirement. (*Hosford, supra, at p. 863-864.*) Workers' compensation appeal board determinations do not apply to industrial disability retirement proceedings. (*English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal. App. 3d 839, 844-845; *Hawpe v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

15. Generally, a Workers' Compensation Appeals Board proceeding concerns whether the employee suffered *any* job-related injury, and if that injury resulted in some permanent residual loss, the Workers' Compensation Appeals Board awards the employee a permanent disability rating. Retirement boards, on the other hand, focus on a different issue: whether an employee has suffered an injury or disease of such magnitude and nature that he is incapacitated from substantially performing his job responsibilities. Because of the differences in the issues, "[a] finding by the [Workers' Compensation Appeals Board] of permanent disability, which may be partial for the purposes of workers' compensation, does not bind the retirement board on the issue of the employee's incapacity to perform his duties." (*Bianchi v. City of San Diego* (1989) 214 Cal App 3d 563, 567, citations omitted.)

16. A Workers' Compensation Appeals Board's finding that an injury is work related is res judicata in a later application for benefits made to a City Employees' Retirement Fund. (*Greatorex v Board of Admin* (1979) 91 Cal.App.3d 54.)

17. Although the schemes of the retirement boards and the Workers' Compensation Appeals Board are independent and serve different functions, their purposes are in harmony rather than in conflict and applying workers' compensation laws by analogy to retirement board cases may be appropriate as it seems clear that the tendency is to view the two bodies of law as compatible rather than the opposite. (*Heaton v. Marin County Employees' Retirement Bd.* (1976) 63 Cal.App.3d 421,428.)

18. Workers' Compensation laws and the Public Employees' Retirement Act are not coordinated in all respects, are administered by independent boards, but do supplement each other. The jurisdiction of each is exclusive only in relation to its own objectives and purposes but overlaps on a single issue of fact only - whether an injury or disability is service-connected. The retirement board does not lose its inherent power to retire a city employee who "is physically or mentally incapacitated for the performance of duty" simply because the employee may also be eligible for workers' compensation benefits. (*Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 213.) There, although the court agreed that the injured employee had correctly pointed out that only workers' compensation laws prohibited an award if the employee unreasonably refused surgery, and that the Public Employees' Retirement Act contained no such provision, the *Reynolds* court held that neither the California Constitution nor the Labor Code restricted a retirement board from exercising its authority to determine eligibility and the board could apply workers' compensation laws by analogy when making its finding of eligibility or non-eligibility. (*Ibid.*)

Competent Medical Opinion

19. CalPERS makes its determination whether a member is disabled for retirement purposes based upon "competent medical opinion." That determination is based on the evidence offered to substantiate the member's disability. (*Lazan v. County of Riverside* (2006) 140 Cal. App. 4th 453, 461, distinguished on other grounds.)

20. Evidence Code section 801 provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

21. The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the trier of fact in the search for the truth, and "no hard and fast rule can be laid down which would be applicable in every circumstance." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37-38.)

22. A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact but the expert's opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 529-530.)

23. Determining both the nature of Mr. Deis's medical condition, and whether that condition incapacitated him physically for the performance of his duties, is sufficiently beyond common experience that expert testimony is required.

Evaluation

24. In this case, Dr. Thomas, the CalPERS IME, assessed Mr. Deis had no work restrictions and was not substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer. This was primarily based on his single evaluation of Mr. Deis resulting in negative Spurling's and Romberg tests, his ability to turn his head down and flex and not lose balance, and intact pinprick and light-to-touch sensation. He noted the sub rosa video showed Mr. Deis lift a large box, which was inconsistent with his subjective complaints of pain in his neck and right arm. However, Dr. Thomas diagnosed Mr. Deis with cervical spondylosis, moderate, with chronic C6 radiculopathy, and agreed with Dr. Dodge the cervical spondylosis was moderate to severe. Dr. Thomas also acknowledged he last performed a spinal surgery about four years ago, and spinal surgeries consist of less than one percent of his practice.

25. To the contrary, Dr. Dodge has been the treating physician and spinal surgeon for Mr. Deis since 2019. He noted it was normal for Mr. Deis's radicular symptoms to wax and wane from day to day and hour to hour, and he was not surprised Mr. Deis had few objective findings on the single day he was examined by Dr. Thomas. Dr. Dodge referenced the objective findings that are in the record and show weakness of the right upper extremity, as shown in electrodiagnostic testing, and a post-surgical MRI of the neck that shows spurs and moderate to severe foraminal stenosis. Dr. Dodge's found Mr. Deis's conditions and symptoms called for restrictions of avoiding pushing/pulling greater than 40 pounds, no lifting more than 15 pounds,

no repetitive turning of the neck, and avoiding altercations, which were consistent with his formulated assessment over many examinations both pre-surgery and post-surgery. Dr. Dodge remarked it was not a surprise to see Mr. Deis was able to remove a large box weighing about 85 pounds onto the ground from a vehicle, and drag it along a side yard. After seeing this video, he did not alter his restrictions and he continued to assess that Mr. Deis, at the time of his application, was substantially incapacitated from performing his usual job as a Correctional Officer. In addition, Dr. Dodge was able to correctly define disability retirement for CalPERS versus disability as it pertains to workers' compensation. He has performed thousands of spinal surgeries, and he has treated Mr. Deis over a three-year period. For these reasons, the competent medical opinion of Dr. Dodge is afforded greater weight than that of Dr. Thomas.

26. In addition, the other surveillance videos, photos, and social media posts of Mr. Deis do not demonstrate much. A video shows him pushing a shopping cart that was empty. Other videos and photos show him hardly moving to music while sitting in a car going through a car wash; sitting with friends while raising – below shoulder level – a shot glass; dancing with friends but hardly dancing and more like slow movement to the beat with his left arm hardly raised; sitting in his car for nearly 24 minutes before he enters a pharmacy where he performed work activity that cannot be seen; standing in front of a DJ table and doing nothing more than placing his hand on the equipment; hardly walking while wearing a virtual reality headset and holding hand-held consoles; and standing on a trail with no indication whether he had been hiking or just standing in one area.

27. Moreover, Lieutenants Palacio and Luna had first-hand knowledge of Mr. Deis's work ethic and credibility because they served as his direct supervisors at R J

Donovan Correctional Facility. They spoke highly of Mr. Deis. They were keenly aware that work duties of a Correctional Officer include frequent disturbances involving violence and requiring breaking up inmates from fighting each other and/or assaulting officers, and that tactical gear must be regularly worn in different circumstances and could get heavy.

28. Finally, Mr. Deis testified to having good and bad days with respect to his radicular pain and ability to carry out activities. The *Mansperger* court looked to the duties of the claimant's position to assess whether the claimant, considering his disabilities, could perform the duties which are common and recurrent in the job or which are critical to the job. The general duties of a Correctional Officer require "frequent to continuous head/neck movement: . . . head/neck movements include side-to-side and flexing downward and backward; . . ." The position also requires "frequent lifting/carrying light to medium range (20 to 50 pounds), and occasional lifting/carrying very heavy range (over 100 pounds) including inmates weighing up to 400 pounds; . . . occasional to continuous arm movements; . . ." The overall evidence demonstrates that, at the time of his application, Mr. Deis was not able to perform his usual duties as a Corrections Officer, especially relating to the requirement of frequent to continuous head/neck movement and occasionally lifting/carrying over 100 pounds. Mr. Deis had, and continues to have, radiculopathy in his neck and down his right arm. This was corroborated by pre-surgery electrodiagnostic testing and MRI that showed chronic C-6 radiculopathy and nerve damage in the right hand, and post-surgery MRI that showed spurs and moderate to severe foraminal stenosis, as well as a diagnosis of moderate to severe cervical stenosis.

29. For these reasons above, Mr. Deis's application should be granted.

ORDER

Respondent John Deis's Disability Retirement Election Application for Industrial Disability Retirement, dated November 16, 2020, is granted.

DATE: August 17, 2022



JAMI A. TEAGLE-BURGOS

Administrative Law Judge

Office of Administrative Hearings