ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Accusation (Involuntary Reinstatement from Industrial Disability Retirement) Of: ANGELA DEAN, Respondent, and CALIFORNIA HIGHWAY PATROL, Respondent.	Case No. 2012-0760 OAH NO. 2013010502

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on December 19, 2013.

Rory J. Coffey, Senior Staff Attorney, represented complainant Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Respondent Angela Dean appeared and represented herself.

Michael E. Whitaker, Supervising Deputy Attorney General, represented respondent California Highway Patrol.

Evidence was received and the record left open for the receipt of closing written argument. On March 13, 2014, complainant filed its post hearing brief that was marked exhibit 12 for identification and made a part of the record. On March 19, 2014, respondent California Highway Patrol filed its reply brief that was marked exhibit 113 for identification and made a part of the record. The matter was submitted on March 19, 2014.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED April 17, 2014
C. Bodily

ISSUE PRESENTED

Whether respondent Angela Dean remains substantially incapacitated for the performance of her usual duties as a California Highway Patrol Officer?

FACTUAL FINDINGS

1. Complainant Anthony Suine filed the Accusation solely in his official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Angela Dean (respondent Dean) was employed by respondent California Highway Patrol (respondent CHP) as an Officer. By virtue of her employment, respondent Dean was a state safety member of CalPERS subject to government code section 21151.

3. On or about June 20, 2000, respondent Dean submitted an application for industrial disability retirement. Industrial disability retirement was approved by CalPERS and respondent Dean was retired for disability effective March 7, 2001, on the basis of an orthopedic (back) condition.

4. In or about October of 2011, complainant ordered respondent Dean to undergo a medical examination to determine if she was still substantially incapacitated. Following the examination on December 6, 2011, complainant obtained medical reports concerning respondent Dean's orthopedic condition from competent medical professionals. After review of the reports, complainant determined that respondent Dean is no longer substantially incapacitated for the performance of her usual duties as a California Highway Patrol Officer.

5. Respondent Dean was notified of complainant's determination and was advised of her appeal rights by letter dated June 5, 2012.

6. Respondent Dean and respondent CHP filed timely appeals by letters dated July 2, 2012, and July 5, 2012, respectively.

Usual Duties of a California Highway Patrol Officer

7. Multiple documents describing the usual duties required of a California Highway Patrol Officer (CHP officer) were received in evidence. Complainant submitted a California State Personnel Board Specification document for the position reflecting September 6, 1995 revisions. Complainant also introduced a document entitled "CALIFORNIA HIGHWAY PATROL OFFICER 14 CRITICAL PHYSICAL ACTIVITIES," revised in April of 2010. Respondent CHP submitted a January 3, 2012 revision of the California State Personnel Board Specification document for the position, the same version of the critical physical activities document submitted by complainant, and a

June of 2000 version of a document entitled "CALIFORNIA HIGHWAY PATROL OFFICER TASK STATEMENT."

8. As explained in the Legal Conclusions below, CHP officers must be able to perform all of the critical physical tasks listed in the described documents. The required tasks that are relevant to this matter, based on testimony and reports of medical experts called by the parties, are crawling 50 feet; walking on uneven ground; performing a full standing search; stooping, squatting or bending to conduct a vehicle inventory search; removing spilled loads or traffic hazards such as lumber, large rocks or sacks of heavy materials weighing up to 50 pounds from roadway; dragging an incapacitated person weighing up to 200 pounds up to 35 feet; and physically restraining a resisting individual using reasonable force.

Respondent Dean's Injury Leading to Her Industrial Disability Retirement[1]

9. On February 15, 1997, respondent Dean was chasing a vehicle traveling over 100 miles per hour. Her patrol car collided with the right rear axle of a fully loaded pickup truck. Respondent's estimated speed at the time of the accident was 107 miles per hour. Respondent Dean was wearing a seat belt and the patrol car's air bag deployed. Respondent Dean suffered a cervical strain, a left hand contusion, bilateral knee contusions (from hitting the vehicle's dashboard), and lower back strain. The physician who treated her in Modesto, California, prescribed Vicodin for pain associated with her injuries. She was taken off work and referred to a worker's compensation physician for follow-up. X-rays of respondent's left hand and cervical spine were essentially negative. X-rays of respondent's knees showed some subtle patella (kneecap) spurring and evidence of an earlier anterior cruciate ligament (ACL) reconstruction. She was evaluated by Dr. Schaefer on March 28, 1997, for continuing knee pain. Dr. Schaefer felt respondent Dean had bilateral patellofemoral contusions from the dashboard impact, bilateral patellar tendinitis and bilateral decreased sensation in the areas surrounding the patellae. He recommended a quadriceps rehabilitation program and sedentary work duties.

10. On October 6, 1997, Dr. Armstrong began treating respondent Dean for her back injuries from the accident. Respondent Dean was working in the CHP headquarters on limited duty status with limited stooping and bending. Dr. Armstrong's impression was that respondent Dean had chronic non-radicular persistent low back pain, but he wanted to rule out central canal stenosis and sacroiliac (SI) joint pathology. He noted that her neck pain had, for the most part, resolved. He ordered lumbosacral x-ray views in flexion and extension to rule out instability and he ordered a lumbosacral MRI. The radiologist read the October 6, 1997 x-rays as negative.

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[1] Respondent Dean's history of treatment and evaluation following her injury and leading to her retirement were based on the summary included in Dr. Minor's report discussed below. None of the records or evaluations were received in evidence.

11. Dr. Armstrong saw respondent Dean on November 10, 1997 and reviewed the results of a bone scan performed on November 3, 1997. He suggested cortisone injections for possible sacroiliitis to confirm the diagnosis and provide relief. Dr. Armstrong continued respondent Dean on light duty for no more than six hours a day. The December 8, 1997 SI joint injections provided very minimal relief. Dr. Armstrong ordered discograms. The discograms produced no pain and did not show any significant degenerative changes. Dr. Armstrong expressed his bafflement at her symptom complex. He continued respondent Dean on light duty. On March 23, 1998, Dr. Armstrong pronounced respondent Dean permanent and stationary for worker's compensation purposes. He felt she had a slight permanent disability by reason of pain caused by prolonged sitting.

12. Dr. Kornblatt evaluated respondent Dean as a worker's compensation Qualified Medical Examiner on June 22, 1998. His diagnoses were chronic back low back pain with a chronic strain/sprain of the lower back and SI joints super-imposed on lower lumbar facet degeneration, mild neck strain/sprain, and chronic mid anterior patellofemoral pain in both knees. He felt her back condition reduced her capacity for lifting, pushing, pulling and carrying by 25 percent. In his opinion, she could not tolerate sitting for more than 30 to 45 minutes without a 5 to 10 minute break. He felt she should avoid prolonged kneeling or squatting because of her knees.

13. Dr. Armstrong stated his disagreement with Dr. Kornblatt in a September 4, 1998 report. Dr. Armstrong felt that respondent Dean could sit for sit for 30 to 60 minutes but should be allowed to change positions during the performance of her usual duties. He disputed that respondent Dean had significant sacroiliitis. Dr. Armstrong did not feel that she had lost 25 per cent of her capacity to lift, push, pull or carry.

14. Respondent Dean continued treatment and evaluation with various physicians including a spine surgeon and physiatrist. She continued to work at a light duty assignment with respondent CHP. On September 12, 2000, Dr. Armstrong performed a Qualified Medical Examination. Dr. Armstrong noted that respondent Dean had been seen by multiple evaluators and none had been able to specifically diagnose her ongoing symptomology. All of the doctors felt she was not a candidate for surgery. Dr. Armstrong opined that respondent Dean was fully capable of carrying out her usual and customary duties as a CHP officer. She had been taken off work in January of 2000, when she was pregnant. He felt she was capable of returning to work and her spinal and cervical conditions did not prevent her from doing so.

15. On January 18, 2001, Dr. S. Lazar performed a CalPERS evaluation of respondent Dean. Dr. Lazar felt she was unable to perform static strength, explosive strength, dynamic strength, trunk strength, stamina, dynamic flexibility, and fine mobility. She was unable, in his opinion, to wear a gun belt without precipitating significant back pain and discomfort. Dr. Lazar concluded that respondent Dean was permanently incapacitated for the performance of her duties. As noted above, respondent Dean was retired on industrial disability on March 7, 2001.

16. Since her retirement and up until at least June of 2011, respondent Dean continued to be treated by a chiropractor whom she began seeing in or about May of 2000. According to the medical records reviewed by Dr. Minor, she saw the chiropractor approximately once per month.

Competent Medical Opinion

John Champlin, M.D.

17. Dr. Champlin is board certified in family practice. He has been the primary treating physician for more than 100 injured CHP officers. Early in his career, while a senior resident at the University of California Medical Center, Dr. Champlin was separately employed by an entity working with the Commission on Peace Officers' Standards and Training to determine the physical requirements for officers. He performed EKGs on them as they ran through obstacle courses. Dr. Champlin is on the Qualified Medical Examiners and Independent Medical Examiners panels of the California workers' compensation system.

18. Dr. Champlin evaluated respondent Dean on or about October 28, 2013, at her request. His report was received in evidence. In a brief history, Dr. Champlin noted the significant automobile accident on February 15, 1997, from which respondent Dean suffered injuries to her neck, teeth, jaws, left shoulder, left wrist and low back. Dr. Champlin reported an earlier 1992 industrial injury and ACL repair. Dr. Champlin stated that respondent Dean had developed significant knee symptoms. She had a neurapraxia (loss of motor and sensory functions) over both patellar regions with absent sensation. She had some degree of weakness and clear atrophy in the left thigh. She had some decrease in dorsiflexion of her ankles, left greater than right. She experienced ongoing low back pain and intermittent sciatica.

19. Dr. Champlin's physical examination of respondent Dean revealed evidence of the ACL repair and decreased sensation of the patellar region. He reported 1.5 inches of atrophy at the midpoint of her left thigh as compared to the right. There was decreased strength in ankle dorsiflexion.

20. Dr. Champlin's report stated that respondent Dean had clear sensory deficits that "will make it difficult, if not impossible, for her to perform some aspects of physical methods of arrest." According to Dr. Champlin, respondent Dean is unable to have sufficient sensory input in her anterior knee region to kneel on her knees in situations that are poorly lit or contain debris from motor vehicle accidents. She would not be able to perform some aspects of a physical arrest that require her to kneel and squat while controlling an individual's back and manipulating his or her feet and ankles. These are actual disabilities and not based on pain complaints.

21. At the administrative hearing, Dr. Champlin testified that the condition of respondent's Dean's knees would cause balance problems for her. He explained that the persistent numbness in her knees, and particularly the left knee, which he described as

"insensate," impaired respondent Dean's "proprioception." This means a person's ability to feel the location of the body's extremities in space. Dr. Champlin said that without feedback from her "numb" knees, it would be easier for respondent Dean to lose her balance and fall over when kneeling, affecting a physical arrest or walking in unlit areas on broken glass or other debris.

Frank Minor, M.D.

22. At the request of CalPERS, respondent Dean was examined by Dr. Minor, a board-certified orthopedic surgeon. Dr. Minor examined respondent Dean on December 6, 2011. He prepared a report that was received in evidence. Dr. Minor testified at the administrative hearing.

23. Dr. Minor took a history from respondent Dean including the review of a health history questionnaire completed by her. Respondent Dean sustained a left knee bone contusion and ACL tear while in the CHP academy in November of 1991. She was treated conservatively. In October of 1992, her left knee gave out while she was trying to apprehend a suspect. In December of the same year, respondent Dean had reconstructive surgery for the torn ACL and a partial lateral meniscectomy (surgical removal of torn meniscus). She returned to full duty on July 27, 1993. Her medical history after the 1997 accident is traced above.

24. Respondent Dean described her then-current symptoms to Dr. Minor as a dull ache in her neck and lower back all of the time. Occasionally, the pain in her neck radiated from the right side into the mid back, especially if she slept wrong or turned her neck quickly. The pain in the back of her neck was aching and sometimes a burning type. Across her lower back, she had aching pain from left to right, with some stabbing symptoms on the right lumbar area. Respondent Dean had occasional sciatic-type symptomology which was worse when she used her gun belt or sat too long which she described as more than 30 to 45 minutes. She had continual "pins and needles" sensations in the front of her knees, especially while kneeling. Occasionally, the pain shot down into the right leg. She experienced stiffness and soreness in her left wrist and aching pain.

25. Dr. Minor performed a physical examination of respondent Dean, focusing on her areas of complaint and the basis upon which she was granted an industrial disability retirement. Dr. Minor checked respondent Dean's vital signs and her heart, lungs, and abdomen. The results of range of motion tests for her upper extremities were all within normal limits. Her reflexes were intact. She had good grip strength. Dr. Minor noted evidence of her past right elbow surgery and acromioplasty (rotator cuff repair) of her right shoulder. Dr. Minor examined respondent Dean's lower extremities. Range of motion was within normal limits, but Dr. Minor noted the numbness of the anterior surface of her left and right knees. Respondent Dean performed straight leg raising while lying down and sitting without difficulty or pain. Respondent's right thigh circumference was 43.8 centimeters and the left was 42.8 centimeters. Her right calf was .6 centimeters larger in circumference than

her left. Cervical motion was within normal limits, as was her lumbar motion. Respondent Dean was able to touch floor with her fingertips with her knees fully extended.

26. Dr. Minor's diagnoses for respondent Dean were cervical strain, lumbar strain, status post right knee ACL reconstruction and partial lateral meniscectomy, status post bilateral ankle fractures, status post left distal radius fracture, status post right Nirschl for total epicondylitis ("tennis elbow" surgery), and status post right shoulder acromioplasty. In the portion of his report labeled "DISCUSSION," Dr. Minor acknowledged the differing opinions of past evaluators regarding respondent Dean's capacity to perform the usual duties of a CHP officer. Dr. Minor related that respondent Dean told him that she could perform the duties of a CHP officer, but they would likely cause her to have neck and back pain. She told him that wearing a gun belt caused her back to hurt. Dr. Minor characterized the results of his physical examination of respondent Dean as "extremely normal." She could bend forward and touch her toes with ease. She had some discomfort extending her back, but good motion. She had excellent motion in her neck. There was some atrophy in her left leg, most likely associated with her earlier knee injuries. Dr. Minor concluded that respondent Dean was not substantially incapacitated for the performance of her usual duties.

27. During his testimony at the administrative hearing, Dr. Minor explained his findings and conclusions in greater detail. He said his physical examination of respondent Dean was essentially normal, except for the persistent sensitivity she experiences after left wrist carpal tunnel release surgery. Regarding respondent Dean's knees, Dr. Minor conceded that there is a small amount of muscle atrophy in the left knee when compared to the right, but added that her knee motions were good with ligamentous stability. While respondent Dean did have some loss of feeling in the front of both knees and could not feel a light touch, Dr. Minor did not agree with Dr. Champlin that this was a disabling condition. Dr. Minor explained sensation at the skin level is only one component of proprioception. Muscle tendon units also help locate the position of a person's extremities. Dr. Minor testified that if loss of sensation in the knees caused balance issues, patients with artificial knees or ACL reconstructions would have difficulty standing which is not the case. Moreover, nothing in Dr. Minor's overall physical examination of respondent Dean suggested a proprioception deficit.

28. On cross-examination, Dr. Minor said that respondent Dean could extract a 200 pound person from a car. He conceded that the maneuver might cause her neck and back pain, but she would get better. He said respondent Dean has the physical ability to extract a second person weighing that much, but the pain might prevent her from doing so. In his opinion, she might not be able to extract a third similar sized person. Dr. Minor felt that respondent Dean could accomplish an extraction wearing a 25 to 30 pound gun belt, but she might not be able to extract a third person. In the preparation of his report to CalPERS, Dr. Minor reviewed all of the 14 tasks described in the California Highway Patrol Officer Task Statement and concluded that respondent Dean could perform them.

Resolution of Conflict in Testimony of Dr. Champlin and Dr. Minor

29. Dr. Minor was the more persuasive expert witness on the question of respondent Dean's substantial capacity to perform her usual duties. Dr. Champlin's conclusions rested on the proposition that the numbness in the front of respondent Dean's knees impairs her ability to sense the location of her extremities in space which, in turn, causes her to lose her balance. Dr. Minor's testimony effectively debunked the theory that numbness in the front of a person's knees alone impairs his or her proprioception. Dr. Minor acknowledged that the strains that respondent Dean suffered in her serious accident might produce back and/or neck pain if respondent Dean is required to perform the more physically arduous tasks required of a CHP officer such as extracting a 200 pound person from a vehicle, but he credibly testified that she is physically capable of performing all of the critical tasks.

Other Findings

30. Respondent Dean was born on March 11, 1965. Thus, she was less than the minimum age for voluntary service retirement (50 years old) applicable to members of her classification when complainant ordered the medical examination to determine if she was still incapacitated for the performance of the usual duties of a CHP officer.

LEGAL CONCLUSIONS

1. Government Code section 21192 reads:

> The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of

residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

2. Government Code section 20026 reads, in pertinent part:

> 'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion....

3. Incapacity for performance of duty means the substantial inability to perform usual duties. (*Mansperger v Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; Hosford *v Board of Administration* (1978) 77 Cal. App.3d 854, 856-857.)

4. Vehicle Code section 2268 reads:

> (a) Any member of the Department of the California Highway Patrol, as specified in Sections 2250 and 2250.1, shall be capable of fulfilling the complete range of official duties administered by the commissioner pursuant to Section 2400 and other critical duties that may be necessary for the preservation of life and property. Members of the California Highway Patrol shall not be assigned to permanent limited duty positions which do not require the ability to perform these duties.
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> (b) Subdivision (a) does not apply to any member of the California Highway Patrol who, after sustaining serious job-related physical injuries, returned to duty with the California Highway Patrol and who received a written commitment from the appointing power allowing his or her continued employment as a member of the California Highway Patrol. This subdivision applies only to commitments made prior to January 1, 1984.
>
> (c) Nothing in subdivision (a) entitles a member of the California Highway Patrol to, or precludes a member from receiving, an industrial disability retirement.

5. The fairly recent case of *Beckley v. Board of Administration* (2013) 222 Cal. App.4th 691, held that a CHP officer must be able to perform all of the 14 critical tasks for the classification irrespective of the particular duty assignment of the officer

claiming disability (*Id.* at p 699.) The court rejected CalPERS' contention that subdivision (c) of Government Code section 2268 permitted CalPERS to consider only the duties that an individual CHP officer was performing when deciding a disability claim. (*Id.* at p. 701.)

6. Both of the medical experts used the 14 critical tasks of a CHP officer to define respondent Dean's usual duties as part of the equation to determine her capacity to perform her usual duties. Complainant established that respondent Dean is no longer incapacitated, physically or mentally, for performance of her duties as a CHP Officer.

ORDER

Respondent Dean's appeal from CalPERS' determination that she is no longer permanently disabled or incapacitated for the performance of her usual duties as a California Highway Patrol Officer is DENIED.

Dated: April 14, 2014

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings