

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Zachary D. Dean (Respondent) was employed by California State Prison, Corcoran, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS. On August 23, 2019, Respondent submitted an application for industrial disability retirement (IDR) on the basis of an orthopedic (left shoulder) condition. Respondent's application was approved by CalPERS, and he retired effective May 1, 2020.

In 2022, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive an industrial disability retirement.

To remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of his or her former position. The injury or condition which is the basis of the claimed disability must be permanent or of an extended duration which is expected to last at least 12 consecutive months or will result in death.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent to Don T. Williams, M.D. for an Independent Medical Examination (IME). Dr. Williams interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Williams also performed a comprehensive physical examination.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated. Respondent was therefore deemed no longer eligible for industrial disability retirement, and should be reinstated to his former position as a Correctional Officer.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A hearing was held on October 25, 2023. Respondent was represented by counsel at the hearing. Respondent CDCR did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent CDCR, pursuant to Government Code section 11520.

At the hearing, Dr. Williams testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Williams opined that Respondent had largely recovered, having regained strength in his shoulder, and achieved fairly good range of motion again. Dr. Williams' medical opinion is that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated.

Respondent testified on his own behalf. Respondent testified that he still regularly experiences debilitating pain in his shoulder and was incapable of doing the job of a Correctional Officer. Respondent explained that he was unable to physically fight off an inmate, fire a rifle, or even hold his arms above his head long enough to search the overhead compartments of a cell during an inspection. Respondent submitted medical records from his treating physicians to support his appeal, including records related to two shoulder surgeries. The records were admitted as administrative hearsay, which may be used for the purpose of supplementing or explaining other evidence but cannot be used on its own to support a finding.

Respondent also called an expert to testify on his behalf, Donald Pompan, M.D., a board-certified Orthopedic Surgeon. CalPERS had originally retained Dr. Pompan to evaluate Respondent's medical condition relating to his IDR application in 2019, and at that time Dr. Pompan opined that Respondent was substantially incapacitated. Dr. Pompan testified that he recently reexamined Respondent, and that Respondent still met the CalPERS' disability standard. Dr. Pompan was emphatic that Respondent was not capable of adequately defending himself.

At the hearing, both Respondent and Dr. Pompan testified that they disagreed with the results of Dr. Williams' examination and report.

The ALJ found that CalPERS bears the burden of proof and did not meet its burden. The ALJ found Respondent and Dr. Pompan's testimony more persuasive than Dr. Williams' testimony. The ALJ found that Respondent presented evidence which established he still suffered an impairment in his shoulder such that he could not safely fulfill the duties of a Correctional Officer, particularly with respect to fighting off an inmate. After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ granted Respondent's appeal.

For all the above reasons, staff argues that the Proposed Decision should be adopted by the Board.

January 16, 2024

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Staff Attorney