

ATTACHMENT C
RESPONDENT'S ARGUMENT

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September 3, 2013

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RE: JOHN M. FOGERTY
 Ref. No.: 2012-0695



RESPONDENT'S ARGUMENT

The above matter is calendared for consideration by the Board at its regular meeting on 9/18/13. Respondent John M. Fogerty ("Fogerty"), through his attorneys, the Law Offices of O'Mara & Hampton, submits his written argument against the Proposed Decision, wherein the Administrative Law Judge ("ALJ") concluded Fogerty's 2011 application for industrial disability retirement was untimely, and Fogerty has failed to establish all the elements of estoppel.

Of note, this was not a disability hearing, but rather only to determine if Fogerty's application should be allowed. Fogerty maintains the evidence at hearing demonstrates each element of estoppel is met. Fogerty's industrial disability retirement application should be allowed to proceed and be considered on the merits of medical evidence.

In determining that Fogerty has not established the elements of estoppel, at page 6 of the 7/16/13 Proposed Decision, the ALJ states:

Respondent failed to establish element (1) (that CalPERS was apprised of the fact that respondent did not know about the six month requirement), and/or element (2) (that CalPERS intended for respondent to rely on a lack of information when he missed the six month filing deadline).

The ALJ further states, quoting Government Code §20160(a)(3):

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section.

Fogerty disagrees. The testimony at hearing demonstrates Fogerty did not know there was a six-month time limit within which to refile his application. He was still being treated by three doctors. Had he known of such time limit, he would have contacted his attorney and proceeded accordingly. As Fogerty testified, he thought everyone knew of his ongoing medical treatment. (*See Hearing Transcript, page 82.*)

Fogerty did make a reasonable inquiry to CalPERS in May 2007 as to what he needed to do to continue the disability retirement application process. He was informed he would need to submit a new application, which he did on 11/14/11. Fogerty's reliance on the information given to him by CalPERS was reasonable and justified, given his understanding of the workings of a sister state agency to his employer, the California Highway Patrol. As Fogerty testified, the communications he had with CalPERS were cordial, and he felt they were very professional. Unfortunately, CalPERS failed in its communications to its member to give significant important information concerning the time within which he needed to resubmit his application.

At page 5 of the Proposed Decision, under #4, the ALJ acknowledges Fogerty's 35-year career with the CHP and his advancement to the rank of chief, but states:

He has gained sophistication in reading and interpreting laws and regulations in the course of his duties as a CHP officer and Chief. Respondent knows, or reasonably should have known, that most governmental forms/applications have time limitations and that laws have statutes of limitations. Consequently, respondent is assumed to have known the contents, including the time limitations, of Government Code section 20160.

However, *there is nothing to support this standard raised by the ALJ.* Contrary to the ALJ's assumptions, the evidence at hearing shows the limitations Fogerty had relative to his work as an officer. It also shows that during the last few months of his work and after he left the Department, he continued to have medical issues which impeded and impaired his thought processes.

Furthermore, Fogerty's credible testimony reflects his experience with the CHP does not indicate he had significant or unique knowledge of CalPERS procedures, but rather that *important information is provided in writing.* In this matter, despite the fact that Applicant was advised telephonically that he could resubmit his disability retirement application, as discussed at pages 30 and 31 of the Hearing Transcript, no evidence establishes he was informed of the six-month time limitation within which to resubmit his application until receipt of CalPERS' 6/26/12 letter by Certified Mail.

Examination of CalPERS' witness, Mari Cobbler, at pages 17 and 18 of the Hearing Transcript establishes that CalPERS had no specific knowledge as to whether Applicant had been provided any counseling, or whether an information booklet had ever been provided to him.

Also significant is the automatic system used by CalPERS for cancellation of applications, as discussed on page 22 of the Transcript, lines 21-25. There is no evidence or testimony showing the automatic system provides applicants with information regarding the six-month rule. At page 23, Ms. Cobbler confirmed that CalPERS had no copy to support that a notification letter regarding timelines had ever been sent to Applicant because at that time system-generated letters were not saved.

However, CalPERS did send Fogerty letters regarding other important matters. Page 27, lines 8-14, discuss Fogerty having been informed *in writing* regarding his effective retirement date, the amount of his retirement warrant, and when the first warrant would be received.

It follows that if the six-month filing limitation was of significance, as CalPERS maintains, *CalPERS had an obligation to provide Fogerty this information.* Despite the fact that Fogerty was advised to resubmit an application, as discussed at pages 30 and 31 of the Transcript, *no evidence establishes he was informed of the six-month rule prior to the Certified letter dated 6/26/12.*

On page 33 and 34, Ms. Cobbler testified that her involvement in the case occurred in or about March of 2013. On page 35, lines 15-22, she talks about the lack of information she had as to what counseling Applicant had been provided.

Other instances demonstrating the failure of the CalPERS system are shown through Ms. Cobbler's testimony. For example, at page 36, mention is made that the application for retirement which CalPERS had (*Exhibit 5*) only showed basal cell cancer. However, page 38 of the Transcript discusses Applicant's additional body parts and medical issues.

At page 39, lines 12-15 discuss the fact that CalPERS' Customer Touch Point Reports show no record of an information booklet ever having been provided to Applicant. Furthermore, on page 40, lines 16-18, Ms. Cobbler states she had no knowledge as to what discussion occurred with Applicant on 3/16/07. She further stated on page 41, lines 2-5, that she was unaware as to whether any other discussions occurred.

At page 48, lines 13-16, Ms. Cobbler states that CalPERS had a new program and the work was backed up, thereby attempting to provide a rationale for CalPERS' failure to inform Applicant of the six-month rule.

Page 49, lines 22-24, reflect receipt of the 6/26/12 letter by Certified Mail. At page 50, Ms. Cobbler states that all denial letters are sent Certified "so the member's aware that the application was denied. And also to — it gives them their appeal rights". This statement clearly acknowledges CalPERS' awareness as to the significance of an applicant's appeals rights and the deadline for appeal. *Yet Applicant was never sent the Certified letter informing him of his rights and the time limitations prior to CalPERS' 6/26/12 correspondence.*

The testimony of CalPERS' witness, Mari Cobbler, underscores the failure of CalPERS and its system to provide important information to its members in writing and, particularly when time limitations are concerned, in a timely manner which would have allowed Fogerty to act. Indeed, Ms. Cobbler's testimony supports Fogerty's decision that estoppel should apply.

Recapping the four elements of estoppel, Fogerty maintains they have been met and his disability retirement application should be reviewed:

(1) *"The party to be estopped must be apprised of the facts."* Here, the party to be estopped is CalPERS. There is no indication whatsoever, and CalPERS did not assert, that it was not apprised of the facts. CalPERS knew the application was cancelled in April 2007. CalPERS knew a new application could be submitted. CalPERS knew the Government Code section on which they would permit a new application to be filed referenced a time limit of six months, but failed to inform Mr. Fogerty of same.

(2) *"The party must intend or reasonably believe that his or her conduct will be acted upon."* Fogerty maintains CalPERS must have intended or reasonably believed he would act on the information given to him by CalPERS based on CalPERS' position as the administrator of retirement benefits for members of the California Highway Patrol, and its fiduciary duty to Mr. Fogerty as a member of the CHP and CalPERS Retirement System. Of note, at hearing, CalPERS did not dispute that this element is met.

(3) *“The party asserting the estoppel must be ignorant of the true state of facts.”* Here, the party asserting the estoppel, Mr. Fogerty, was clearly ignorant of the true state of facts — that there was a time limitation within which he needed to resubmit his application.

(4) *“The party asserting the estoppel must actually rely upon the other party’s conduct to his or her detriment.”* Here, Fogerty, the party asserting the estoppel, actually relied on CalPERS’ conduct in informing him that in order to continue the Application for Industrial Disability Retirement process, he needed to submit a new application, but not advising him of any time limitation within which to do so. Fogerty’s reliance on the information given to him by CalPERS was reasonable and justified, given his understanding of the workings of a sister state agency to his employer, the California Highway Patrol. As Fogerty testified, the communications he had with CalPERS were cordial, and he felt they were very professional.

In reliance on the information CalPERS gave him, he delayed filing his new application until November 2011 — while he continued to receive medical treatment for his orthopedic and psychological conditions — to his detriment upon learning that the new application was deemed untimely by CalPERS, when CalPERS had provided no information as to any time limit for submission until 6/26/12.

The ALJ’s Proposed Decision rests on the unsubstantiated notion that, based on Fogerty’s long career with the CHP and his advancement to the rank of Chief, he “is assumed to have known the contents, including the time limitations, of Government Code §20160”. Again, there is nothing to support this as the standard for determining Fogerty’s knowledge or reliance. Rather, the ALJ’s “assumption” as to Fogerty’s knowledge confirms Fogerty did not know the contents or the time limitations of Government Code §20160. Had he been so informed prior to the Certified letter of 6/26/12, he would have acted accordingly.

Based on the totality of evidence presented at hearing, Fogerty maintains he has met his burden to establish the elements of estoppel. His application for disability retirement submitted in November 2011 should be considered and reviewed on the merits of the medical evidence. The ALJ’s determination that Fogerty is assumed to have knowledge which he in actuality did not have should not be the basis for denying review of Fogerty’s application. Ironically, the WCJ’s comments support the elements of estoppel in confirming Fogerty simply did not know the true facts of the time limitations for refiling his application, when CalPERS should have fully informed him in writing, but failed to do so until long after the fact when it was too late for Fogerty to have complied.

For all the foregoing reasons, Fogerty objects to the ALJ's Proposed Decision and respectfully requests the Board grant his appeal and CalPERS proceed with the processing of his industrial disability retirement application.

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

A handwritten signature in black ink, appearing to be 'S. O'Mara', written over a horizontal line.

Scott A. O'Mara
Attorney at Law

SAO/jb

