

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Appeals before the Board are conducted pursuant to the provisions of the Administrative Procedure Act (APA), Government Code, section 11370, et seq. Section 11521 (Reconsideration) provides, in relevant part, as follows:

"The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge." (Emphasis added.)

The hearing in this matter occurred on October 10, 2013. The Proposed Decision, denying Respondent George Puga's appeal, was issued on November 8, 2013. The Board voted to adopt the Proposed Decision on December 18, 2013. Respondent submitted a Petition for Reconsideration on January 15, 2014.

Respondent George Puga (Respondent) was employed as a Water Technician by the City of Pomona (City). The City contracted with CalPERS to provide retirement benefits to the City's employees. Accordingly, Respondent was a local miscellaneous member of CalPERS.

Respondent experienced low back pain and last worked for the City in April 2000, although he remained on the City's payroll as an active employee. On August 7, 2003, Respondent submitted an application for disability retirement on the basis of an orthopedic (low back) condition. Previously, Respondent had been advised by the City, in a letter dated December 4, 2002, that, because of his low back condition, he had been effectively separated from his employment with the City, effective November 5, 2002. In this letter, Respondent was also advised regarding his right to apply for a CalPERS disability retirement.

By letter dated November 15, 2004, CalPERS notified Respondent that his application for disability retirement had been approved. Staff approved Respondent's disability retirement effective August 2003, the first date in the month in which his application for disability retirement had been received. Respondent has been receiving a disability retirement benefit since August, 2003. Respondent disagreed with staff's determination of the effective date of his disability retirement and requested an earlier effective date; April 26, 2000. Staff reviewed the facts pertaining to Respondent's case and the applicable Government Code provisions. Staff advised Respondent that they had found no grounds upon which to grant Respondent's request for an earlier effective retirement date and informed Respondent of his right to appeal this determination. Respondent appealed staff's determination and a hearing was held on October 10, 2013.

Government Code section 21252 (Effective Date of Retirement) provides, in relevant part, as follows:

“A member’s written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. The effective date of a written application for retirement submitted to the board more than nine months after the member’s discontinuance of state service shall be the first day of the month in which the member’s application is received at an office of the board or by an employee of this system designated by the board.”

Respondent testified at the hearing. Respondent admitted that in November and December 2002 – when he was separated from service and advised of his right to file for disability retirement, respectively – he was represented by an attorney regarding his claim for workers’ compensation benefits. Documentary evidence included a letter from Respondent’s then-attorney, acknowledging that he discussed with Respondent, Respondent’s right to submit an application for disability retirement. Respondent admitted that he knew, as of December 2002, that he could submit an application for disability retirement. Respondent admitted that he knew, as of December 2002, that he had nine months within which to submit an application for disability retirement.

Respondent had the burden to demonstrate why he did not submit an application for disability retirement in a timely manner. Respondent testified that while he wanted to “file his application right away,” he had difficulty obtaining copies of medical records. Respondent failed to explain how or why any difficulty in obtaining copies of medical records prevented or delayed him from submitting an application for disability retirement. Accordingly, the Administrative Law Judge (ALJ) found that “Respondent failed to provide a valid reason why his application was late.”

In his Petition for Reconsideration, Respondent returns to the unsupported claim that his delay in submitting an application for disability retirement was due to “the difficulty in obtaining documents and medical records....” First, the act of submitting an application for disability retirement did not require Respondent to have collected and copied all applicable medical records. The disability application is a form, requiring a CalPERS member to complete with relevant, applicable information. But in order to file the completed form with staff it is not necessary to have collected and copied all applicable supporting documents.

Second, while Respondent asserts that, at the time of his hearing on his appeal (October 10, 2013), he “was unable to present [to the ALJ] the list of names of doctors [he] was referred to”, there is no new, reliable, credible evidence to support such

assertion. Respondent has known since May 2013 that a hearing was scheduled for October 2013. Respondent fails to explain why for four months (May 2013 to October 2013), he could not come up with evidence to support his claim of "difficulty" in obtaining medical records.

Third, Respondent's referral to dates of doctor's visits, from May 1999 through November 2001, provides no evidence to explain or excuse Respondent's failure to present evidence in support of his appeal. The ALJ's finding that "Respondent failed to provide a valid reason why his application was late," is not changed in any way by Respondent simply referring to six doctor's visits in 1999.

Government Code section 20160 governs requests by CalPERS members to correct a claimed error. It provides, in relevant part:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part. 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.

.....

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

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After considering Respondent's testimony, the ALJ concluded, "It was not established that he [Respondent] made any error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect as those terms are used in section 473 of the Code of Civil Procedure."

Respondent has failed to demonstrate why the Board should reconsider its decision to adopt the ALJ's Proposed Decision.

The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

February 20, 2014



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