

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

GLORIA LOPEZ,

Respondent,

and

LOS ANGELES COUNTY
OFFICE OF EDUCATION,

Respondent.

Case No. 2013-0206

OAH No. 2014070059

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on January 16, 2015.

Cynthia Rodriguez, Senior Staff Attorney, represented Petitioner Anthony Suine (Complainant), Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Thomas J. Wicke, Attorney at Law, represented Gloria Lopez (Respondent).

Los Angeles County Office of Education (Respondent County) made no appearance.

Respondent filed a Disability Retirement Election Application (First Application) on April 21, 2010. On August 9, 2010, CalPERS requested additional information with respect to the application. Respondent did not reply by the 30-day deadline, and CalPERS cancelled the application on September 29, 2010. Respondent filed a second application for disability retirement on November 28, 2011 (Second Application). On November 6, 2012, CalPERS approved the second application, effective November 1, 2012. CalPERS denied Respondent's request for an effective date of disability of March 26, 2008, her last date on Respondent County's payroll. Respondent argues that her failure to file a timely application to ensure that her disability retirement effective date coincided with the date of her employment separation from Respondent County was the result of mistake, inadvertence, or excusable neglect within

**CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM**

FILED April 17, 2015

the meaning of Government Code¹ section 20160. CalPERS argues that Respondent did not comply with the requirements of section 20160 and that it correctly established the effective date of Respondent's disability retirement.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument. Both parties filed initial closing arguments on February 27, 2015. Complainant filed a reply closing argument on March 18, 2015, and Respondent filed a reply closing argument on March 23, 2015. The matter was submitted for decision on March 23, 2015.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.
2. Respondent was employed by Respondent County as a Job Search Assistant, assisting and supporting students to obtain employment. By virtue of her employment, Respondent is a Local Miscellaneous member of CalPERS.
3. Respondent started working for Respondent County in September 1988. On October 20, 2005, Respondent suffered injuries to her neck, shoulders, and back as the door to an elevator at work closed and struck her. She received chiropractic treatment, and continued to work with restrictions. In January 2006, the same elevator door again closed on her, striking her on both sides of her body and injuring her neck, shoulders and low back. She received additional treatment from the same chiropractor, and continued to work with restrictions against heavy lifting and repetitive bending.
4. Respondent last worked for Respondent County in June 2007. She obtained family and medical leave effective December 21, 2007 through March 24, 2008. Her separation date was March 26, 2008. After June 2007, Respondent continued to receive treatment from her primary care physician, Michael Kwok, M.D., but her primary orthopedic care during the pertinent period was provided by Ralph Steiger, M.D. (Steiger).
5. Respondent filed workers' compensation claims following her injuries, and was evaluated and treated by physicians, including Dr. Steiger, in connection with the claims. Dr. Steiger conducted an initial orthopedic evaluation on January 31, 2008. He ordered diagnostic tests and treatment for Respondent's neck, extremities, and back. Dr. Steiger examined Respondent on May 20, May 27, and June 17, 2008, January 20, March 10, April 7, and May 5, 2009, and February 10, April 1, July 20, and September 28, 2010. In his May 5, 2009 report, Dr. Steiger set forth 13 separate diagnoses involving Respondent's neck, shoulders, back, and wrists, and concluded that she was disabled in accordance with workers' compensation guidelines.

¹ All further statutory references are to the Government Code.

6. On March 6, 2009, orthopedist Albert Simpkins, Jr., M.D. (Simpkins), acting as an Agreed Medical Evaluator, performed an evaluation of Respondent in the pending workers' compensation matters. Dr. Simpkins diagnosed chronic cervical sprain/strain superimposed upon one millimeter (mm) disc protrusions at C5-6 and C6-7 per Magnetic Resonance Imaging (MRI) and chronic lumbosacral sprain/strain superimposed upon 3 mm disc protrusion at L3-4 per MRI. Dr. Simpkins concluded that Respondent had reached the point of maximum improvement from her injuries and that she would not be able to return to work unless her employer provided accommodations for work restrictions on lifting, pushing, pulling, bending, stooping, and twisting.

7. a. On May 16, 2008, Respondent went to the CalPERS Glendale Regional Office (GRO) and discussed the possibility of filing a disability retirement application with analyst Michael Segal (Segal). Segal informed Respondent that she had nine months after the employment separation date to file a disability retirement application and gave her an application form.

b. Respondent described what she believed to be "complicated" circumstances affecting her decision to file for disability retirement. She had issues in her personal life at home. Her workers' compensation case had not concluded, and she was not sure if her retirement would be on the basis of a disability. She also did not want to leave her job, and was concerned that filing an application for disability retirement would terminate her employment.

8. Respondent called CalPERS on May 22, 2008, and received general information about service retirement, disability retirement, and her options at separation.

9. During the period that she was undergoing treatment by Dr. Steiger, Respondent was not offered employment by Respondent County accommodating her work restrictions.

10. On April 21, 2010, Respondent filed the First Application, seeking disability retirement on the basis of her injuries.

11. a. By letter dated August 9, 2010, CalPERS requested Respondent to review an enclosed Physical Requirements of Position/Occupational Title Form completed by her employer, and, if she agreed with the information on the form, to sign and return it. If she disagreed with the information provided by her employer, Respondent could submit her own form. The letter informed Respondent that if she did not provide any information, CalPERS will process the application with the information provided by the employer. However, the letter also contained the following warning: **"Cooperation in providing the requested information is essential to CalPERS' efforts to reach a determination, however, we cannot proceed without it and will cancel the disability retirement application if we do not receive a written response within 30 days of the date of this letter. A cancellation notice will be forwarded upon expiration of the 30 days. . . ."** (Exh. 4, at p. 1; emphasis in original.)

b. The letter was sent to Respondent's address at the time, in Rowland Heights, and a postal return receipt indicates that the letter was accepted. Respondent did not recognize the signature of the person who accepted the letter, and does not recall reading the August 9, 2010 letter. She acknowledged that the letter was sent to her address at the time. In these circumstances, Complainant established that Respondent was sent and received the August 9, 2010 letter.

12. August 2010 was a difficult time for Respondent, as she was separating from her husband and was in the process of losing her home. She moved out of her Rowland Heights home in September 2010. She was homeless for about one month, until she and one of her sons moved to an unidentified location in Orange County.

13. Respondent did not provide a response to CalPERS' August 9, 2010 letter.

14. a. On September 29, 2010, CalPERS sent Respondent a letter, which stated: "[B]ased upon our previous notification, this letter is to advise you that we have cancelled your disability retirement application. [¶] Any future request will require a new application. . . ." (Exh. 5.)

b. By the time this letter was sent, Respondent was no longer residing at the Rowland Heights address, and did not receive the letter.

15. On February 14, 2011, Respondent entered into a settlement agreement with Respondent County, resolving her pending workers' compensation matters.

16. In October 2011, Respondent went to the GRO and learned that the First Application had been cancelled.

17. a. On November 28, 2011, Respondent filed the Second Application, seeking disability retirement on the basis of the injuries suffered after the elevator doors closed on her. On page one of the application, where information about the retirement date was requested, the date "3/26/08" was crossed out, with Respondent's initials next to the strike, and the date "11/1/11" was written in. (Exh. 6, at p. 1.) At the hearing, Respondent explained that she did so at the request of someone in the GRO. On page seven of the Second Application, the "Last Day on Payroll" was listed as "3/26/08." (Exh. 6, at p. 1.)

b. Respondent submitted a handwritten note with her application, which stated: "I'm writing this hardship letter so you may consider to retro my pay to last date of payroll on March 26, 2008 or the date that would [apply] to me. The last letter was not received because during the time of the last [application] I lost my home and [was] no longer at that address. Too much was going on and I had to look for [a] place to move, seeing the doctors, and trying to keep my home. Please notify me of your decision. . . ." (Exh. A9, at p. 11.)

18. Respondent explained that she filed the Second Application because she felt she needed to retire. Her funds were running out and her employer had not offered her a position with the accommodations that the doctors were suggesting.

19. By letter dated November 6, 2012, CalPERS informed Respondent that it had approved the Second Application, effective November 1, 2012, based on her orthopedic (neck, back, shoulders, and wrists) condition.

20. By separate letter dated November 6, 2012, CalPERS denied Respondent's request for an earlier effective date to her disability retirement, the March 26, 2008 date of separation. CalPERS concluded that Respondent had not made a mistake correctable under section 20160. Respondent filed a timely appeal, which was received by CalPERS on December 6, 2012.

21. In her appeal letter, Respondent explained that she received a letter from her employer in May 2008 informing her that her termination date was in March 2008. Respondent wrote that she did know at that time if she would be determined to be disabled. She also wrote that she spoke to CalPERS and was told that she could file for both service retirement and disability and then wait for a determination about which retirement it would be.

22. At the hearing, Respondent explained that she had not filed a disability application in May 2008 because she through she was still employed by Respondent County and was waiting for a final hearing in her workers' compensation matter to know if she would be able to return to work.

LEGAL CONCLUSIONS

1. Section 21252 provides, in pertinent part: "(a) 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. . . ." CalPERS correctly calculated November 1, 2011, as the effective date of Respondent's retirement pursuant to section 21252.

2. Respondent relies on section 20160 in her argument that an earlier effective date applies. The statute provides:

“(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.

“(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

“(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

“(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).

“(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

“(1) That the correction cannot be performed in a retroactive manner.

“(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

“(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

3. Respondent argues she can obtain relief pursuant to section 20160 because her failure to file a timely application constitutes mistake, inadvertence, surprise, or excusable neglect in the existing circumstances. She argues that CalPERS failed to inform her about the effective date of her retirement applications, that it improperly cancelled the First Application, that Respondent was justified in her belief that she could return to work if her employer accepted the doctors’ recommended restrictions, and that it was not unreasonable for her to wait to contact CalPERS since she had been told that the process would take a long time.

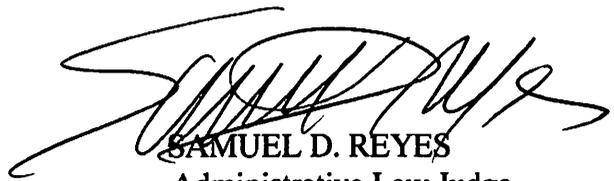
Respondent’s arguments are not persuasive, and she did not establish the basis for relief pursuant to section 20160. She learned in May 2008 that her employment had been terminated in March 2008. On May 16, 2008, she learned that she had to file a disability retirement application within nine months of the date of separation. She did not take any action for almost one year, when she filed the First Application on April 21, 2010, and did not provide a reasonable explanation for her failure to act sooner. Waiting to return to work with accommodations is not a reasonable explanation because she had already been informed that her employment had been terminated, which was confirmed over subsequent months when no offer of reemployment was forthcoming. Even after the filing of the First Application, Respondent failed to take reasonable steps to inform CalPERS about her new address, and did not make any inquiries about the status of her application for 18 months after filing the application, an unreasonably long period.

4. By reason of the foregoing factual findings and legal conclusions, Respondent did not establish that she committed an error or omission that 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, to warrant a retroactive effective date to her disability retirement. The effective date of her disability retirement shall remain November 1, 2011, as calculated by CalPERS.

ORDER

Respondent’s appeal is denied.

DATED: 4/6/15


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings