

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent Carl Thomas (Respondent Thomas) applied for service retirement on September 20, 2010, and has been receiving service retirement benefits since November 2, 2010. Thereafter, on October 19, 2011, Respondent Thomas filed an application for industrial disability retirement. CalPERS determined that Respondent Thomas failed to demonstrate that the delay in filing for industrial disability retirement was a correctable error or omission as a result of inadvertence, mistake, surprise or excusable neglect after considering two letters of explanation that contained insufficient and differing rationale for the late application. Respondent Thomas appealed CalPERS' determination. A multi-day hearing was conducted and a Proposed Decision denying the appeal was issued on July 8, 2015. The Board adopted the Proposed Decision, as its own, on August 19, 2015. Respondent Thomas submitted a Petition for Reconsideration on September 23, 2015.

Respondent Thomas' Petition for Reconsideration argues that under Government Code section 21154(d), applications for disability retirement are timely if made "while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion." The Petition also includes exhibits that pertain to the medical condition of Respondent Thomas. For the reasons explained below, staff argues that the Petition should be denied.

Government Code section 21154 is irrelevant to this matter. Respondent Thomas applied for service retirement in September 2010, and has been receiving service retirement benefits since November 2010. He did not submit an application for industrial disability retirement until October 2011. Thus, when Respondent Thomas submitted his industrial disability retirement, he was attempting to change his retirement status from service to industrial disability. Government Code section 21453 controls under these circumstances.

Government Code section 21453 states, in relevant part, "An election, revocation, or change of election shall be made within 30 calendar days after the making of the first payment on account of any retirement allowance, or in the event of a change of retirement status after retirement, within 30 calendar days after the making of the first payment on account of any retirement allowance following the change in retirement status. 'Change in retirement status' includes...change from service to disability retirement..."

The material facts regarding this argument have never been at issue. Respondent Thomas applied for service retirement and was receiving benefits by November 2010. Almost a year passed before he applied for industrial disability retirement, long past the 30-day deadline contained in section 21453.

Counsel for Respondent Thomas correctly points out that the court made no determination regarding section 21154 and did not cite it on the record. There is good reason for that. Namely, section 21154 was not at issue because it is clearly irrelevant. In the Petition, counsel included testimony given at the hearing by CalPERS staff that was cherry-picked and used out of context to give the illusion that section 21154 applied to Respondent Thomas and that if continuous disability could be proven, an untimely application could be filed. However, the statute is clear. Section 21453 provides a 30-day deadline from the time the first warrant is issued to change from a service retirement to industrial disability retirement.

Also irrelevant, are Respondent Thomas' medical documents attached to the Petition. Respondent Thomas' alleged medical conditions were never at issue because CalPERS made no determinations regarding his medical status as his industrial disability application was rejected due to timeliness.

The issue at the hearing was whether Respondent Thomas met the requirements contained in Government Code section 20160 to permit a late-filed industrial disability retirement application. That issue has been resolved. Respondent Thomas' new argument for reconsideration purposes is not based on new or previously unconsidered evidence. Section 21154 was not cited in the Proposed Decision because it was not relevant at the hearing; and, it is not relevant now.

For all the reasons stated above, staff argues that the Board deny the Petition for Reconsideration and uphold its Decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. Respondent Thomas may file a writ petition in superior court seeking to overturn the decision of the Board.

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