

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for an
Earlier Effective Date of Retirement of:

Case No. 2015-0039

PATRICK J. CAMPBELL,

OAH No. 2015031292

Respondent,

and

DEPARTMENT OF FORESTRY AND
FIRE PROTECTION,

Employer.

PROPOSED DECISION

Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on October 29, 2015.

Wesley E. Kennedy, Senior Staff Attorney, represented Diane Alsup, Interim Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Jane H. Oatman, Esq., of Faunce, Singer & Oatman, a professional corporation, represented respondent, Patrick J. Campbell. Mr. Campbell was present throughout the hearing.

No one appeared on behalf of the Department of Forestry and Fire Protection.

ISSUE

Should Mr. Campbell's effective date for disability retirement should be changed from July 1, 2014, to November 30, 2011, because, Mr. Campbell's failure to file his disability application within nine months of the date he became disabled, October 23, 2011, was correctable, within the meaning of Government Code section 20160?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Nov. 16, 2015
Arthur J. and

FACTUAL FINDINGS

Jurisdictional Findings

1. At all relevant times Mr. Campbell was employed by the Department of Forestry and Fire Protection as a Firefighter. By virtue of his employment, Mr. Campbell is a safety member of CalPERS and is subject to Government Code section 21151. Mr. Campbell's last day of paid employment was November 30, 2011.
2. On June 25, 2014, Mr. Campbell signed, and thereafter submitted to CalPERS, an application for industrial disability retirement on the basis of an orthopedic (right shoulder) condition. In the application, Mr. Campbell requested an earlier retirement date.
3. On November 25, 2014, CalPERS notified Mr. Campbell that his application for disability retirement was approved; however, his request for an earlier retirement date was denied.
4. Mr. Campbell timely appealed CalPERS decision to deny his request for an earlier retirement date, and the instant hearing ensued.

Mr. Campbell's Injury

5. On October 23, 2011, Mr. Campbell was working in his capacity as a firefighter with Department of Forestry and Fire Protection. He was walking the perimeter of a wildland fire and lost his balance. Mr. Campbell grabbed a boulder for support. The boulder moved and Mr. Campbell fell to the ground. As a result of the trip and fall, Mr. Campbell injured his right shoulder and began a series of medical consultations and underwent three surgeries.

Summary of Mr. Campbell's Medical/Surgical Treatments and Information he Received Concerning his Disability Status

6. On October 28, 2011, Mr. Campbell was medically evaluated at Southern California Occupational Health Services. He was diagnosed with a right shoulder dislocation and probable rotator cuff tear. His work status was "off work 10/28/11 thru 11/4/11."
7. On November 4, 2011, Mr. Campbell returned to Southern California Occupational Health Services. Mr. Campbell's diagnoses remained the same and he was scheduled for an Orthopedic/Neurologic consultation and an MRI. He was told to remain off work from November 4, 2011 thru November 9, 2011.
8. Mr. Campbell underwent an Orthopedic/Neurologic consultation on November 9, 2011. As a result of the examination, an MRI was ordered and Mr. Campbell was advised that he was "Temporarily totally disabled."

9. On December 21, 2011, surgery was recommended based on a review of the MRI studies. Mr. Campbell's work status remained "Temporarily totally disabled."

10. A February 1, 2012, progress note stated, in part: "He [Mr. Campbell] was approved for right shoulder arthroscopy. He is currently on a cancellation list for an earlier surgery date." Mr. Campbell remained on the work status of "Temporarily totally disabled." The information Mr. Campbell was receiving from the doctors led him to believe that after he recovered from surgery he would be able to return to work.

11. On March 20, 2012, Mr. Campbell underwent surgery.

12. A May 4, 2012, report, concerning Mr. Campbell's post operation status, revealed that his work status remained as "Temporarily totally disabled."

13. On June 6, 2012, Mr. Campbell's work status improved from temporarily disabled to "Perform modified duty no lifting more than 5 pounds and no activity above the right shoulder." Mr. Campbell's employer could not accommodate the modified duty restrictions so, Mr. Campbell remained off duty. However, based on discussions with the doctors, Mr. Campbell expected to be able to return to work in the near future.

14. Mr. Campbell had medical appointments on July 10, 2012, July 30, 2012, August 22, 2012, September 19, 2012, and October 30, 2012. On each of the visits Mr. Campbell's work status was noted as "modified duty." However, because his employer could not accommodate Mr. Campbell's modified duty status he remained off work. During the October 30, 2012, medical consultation, the doctor recommended a "repeat diagnostic right shoulder arthroscopy" to see if they could improve Mr. Campbell's condition so that he could return to work. Mr. Campbell agreed to a second surgery and, on November 2, 2012, a second surgery was ordered by the doctor.

15. Because a second surgery was ordered and Mr. Campbell did not know what the outcome would be, he contacted CalPERS on November 30, 2012, and asked about disability retirement. A CalPERS representative directed Mr. Campbell to the CalPERS web page and told him he could get forms and information there. Mr. Campbell did not intend to apply for disability retirement because he expected, based on discussions with doctors and his improvement to modified duty status, to be able to return to work. He merely wanted to know where to find disability retirement information in case the second surgery resulted in a permanent disability.

16. Mr. Campbell met with his doctors on the following dates: December 12, 2012; January 23, 2013; March 5, 2013; April 17, 2013; and April 19, 2013. At each meeting Mr. Campbell was led to believe that he would eventually be able to return to work and the doctors told him that although he was still restricted and was on modified duty status, the expectation was that after the second surgery, he could return to full duty as a firefighter.

17. On May 21, 2013, Mr. Campbell underwent a second surgery. From the date of surgery, until August 8, 2013, Mr. Campbell's work status was "Temporarily totally disabled." Mr. Campbell was recovering from surgery and he, and his doctors were confident that Mr. Campbell would fully recover from his surgery and be able to return to work.

18. Mr. Campbell seemed to be recovering well. The doctor's August 8, 2013, progress note stated the Mr. Campbell's work status had improved from temporarily totally disabled to working with restrictions. In pertinent part, the progress note stated: "Work restrictions should include no repetitive activity above right shoulder. No lifting more than 15 pounds above the shoulder and no pushing or pulling greater than 40 pounds with right upper extremity." Again, it appeared to Mr. Campbell and his doctors that Mr. Campbell was improving. When modified duty was ordered in the past, Mr. Campbell's work restrictions were: "no lifting more than 5 pounds and no activity above the right shoulder." Accordingly, it appeared that Mr. Campbell's condition after the second surgery was already improved over his condition from the date of his first surgery until the second surgery. This information reinforced Mr. Campbell's expectations that he would recover to the point where he could return to work as a firefighter.

19. Mr. Campbell did not recover as expected; so, a third surgery was scheduled. After the third surgery was scheduled, Mr. Campbell again contacted CalPERS and asked about disability retirement information. Mr. Campbell wanted to be prepared if the third surgery resulted in permanent disability. The third surgery occurred on December 28, 2013. Mr. Campbell came out of that surgery "the best I've felt" since the injury occurred. Mr. Campbell still expected to recover to the point where he could return to work. In fact, the doctor who performed the third surgery told Mr. Campbell that he had a patient who had a similar injury in the past. That patient was a swimmer. He underwent the same surgery as Mr. Campbell, and was back in the pool shortly thereafter.

20. Unfortunately, Mr. Campbell was not able to recover to the point where he could return to work. Mr. Campbell had a Workers' Compensation claim being processed as a result of his October 23, 2011, accident. It was not until May 29, 2014, that a Permanent and Stationary report in the Workers' Compensation claim notified Mr. Campbell of the following: "WORK STATUS, can this patient return to his/her usual occupation? No. The patient will not be able to return to the pre-injury regular and customary job." Mr. Campbell had reached maximum medical improvement and he now knew that he could not return to work. Mr. Campbell's doctor completed the required Physician Report on June 16, 2014; and, on June 25, 2014, Mr. Campbell submitted his application for disability retirement to CalPERS. In the disability retirement application Mr. Campbell asked that his retirement date be retroactive be based upon "expiration of benefits."

CalPERS Position

21. By letter, dated November 25, 2014, CalPERS notified Mr. Campbell that it was denying his request for an earlier retirement date because the records of his contacts with

CalPERS revealed that Mr. Campbell had contacted CalPERS on November 30, 2012, September 4, 2013, and October 22, 2013, about disability retirement information. Based on those contacts CalPERS concluded that Mr. Campbell's failure to file an application for disability retirement within nine months of his last date of paid service was not a correctable mistake, as defined by Government Code section 20160. That conclusion was based on the assumption that Mr. Campbell's contacts with CalPERS gave him "knowledge of the application process."

Summary of Mr. Campbell's Testimony

22. Mr. Campbell credibly testified that CalPERS's assumption that he had "knowledge of the application process" because of his contacts with CalPERS prior to his being informed on May 29, 2014, that he was permanently disabled, was wrong. Prior to May 29, 2014, Mr. Campbell underwent three surgeries in attempts to get him back to work without prohibitive limitations. At times, when he was told another surgery was needed, Mr. Campbell became concerned and contacted CalPERS to get information that he may need if the surgeries were not successful. After both the first and second surgeries Mr. Campbell remained on modified duty and was told he had the potential of recovering to the point where he could return to work without prohibitive restrictions. Consequently, Mr. Campbell did not review any of the CalPERS retirement information in any detail. After all, he was not planning on retiring if he could get back to work and, he was given every expectation that he would be able to do so. When he finally found out that he could not return to work because of his physical restrictions, he filed his application for disability retirement. If he had been told on November 1, 2011, that he would never be able to return to work he would have immediately filed for disability back then.

LEGAL CONCLUSIONS

1. Government Code section 21252, subdivision (a) provides:

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 the system designated by the board.

2. Government Code section 20160, subdivision (a) provides:

... the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member ... provided that all of the following 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

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

Failure by the member . . . 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.

3. Based on the language contained in CalPERS' denial of Mr. Campbell's request for an earlier retirement date, the issue to be decided here is: Should Mr. Campbell's effective date for disability retirement be changed from July 1, 2014, to November 30, 2011; because, Mr. Campbell's failure to file his disability application within nine months of the date he became disabled, October 23, 2011, was correctable, within the meaning of Government Code section 20160?

Analysis

4. Mr. Campbell discovered his error on May 29, 2014, and filed his application for disability retirement, containing his request for correction (an earlier disability retirement date) on July 9, 2014, after all the forms requested by CalPERS had been completed by the other entities required to provide information. The evidence revealed that he filed his claim/request to correct his error within a reasonable time after he discovered the right to make the correction.

5. Mr. Campbell's error was the result of mistake, inadvertence, surprise, or excusable neglect.

6. The correction will not provide Mr. Campbell with a status, right, or obligation not otherwise available under this part.

7. Mr. Campbell acted as an ordinary, reasonable person would act in the same or similar circumstances. He diligently pursued treatment, complied with his doctors' orders, and reasonably relied on their representations that he would eventually be able to return to work.

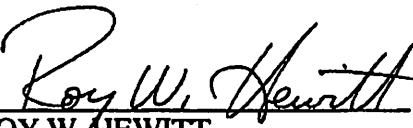
8. CalPERS was incorrect in its assumption that because Mr. Campbell had contacts with CalPERS and asked about disability retirement information he knew about the nine-month rule.

9. Mr. Campbell made an error by believing that he was not disabled to the point where he should have filed an application for disability retirement within nine months of November 30, 2011, the date he discontinued state service. As set forth in the Factual Findings and the Legal Conclusions, above, Mr. Campbell's error was an excusable error because it meets all of the requirements of an excusable error, as defined in Government Code section 20160. Accordingly, Mr. Campbell's appeal shall be granted and his disability benefits shall be deemed to have commenced on November 30, 2011, the last day for which salary was payable.

ORDER

Mr. Campbell's appeal is granted. His disability retirement benefits shall be deemed to have commenced on November 30, 2011.

Dated: November 13, 2015.



ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings