

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. 2015-0165

DAVID C. GREWING,

OAH No. 2015050393

Respondent,

and,

CALIFORNIA DEPARTMENT OF FISH
AND WILDLIFE,

Respondent.

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on November 19, 2015, in Sacramento, California.

Christopher C. Phillips, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

David C. Grewing (respondent) represented himself.

No appearance was made by or on behalf of respondent Department of Fish and Wildlife (DFW). At the hearing, CalPERS established that DFW was properly served with the Statement of Issues and Notice of Hearing. This matter therefore proceeded as a default against DFW under Government Code section 11520.¹

Evidence was received, the record was closed, and the matter was submitted for decision on November 19, 2015.

¹ All further statutory references are to the Government Code unless otherwise specified.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED December 29, 2015

Nanette C. Brown

ISSUE

This appeal is limited to the issue of whether respondent made errors or omissions which were the result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code section 20160, which would have entitled him to an effective retirement date retroactive to June 5, 2002.

FACTUAL FINDINGS

1. Respondent was employed by DFW as a Fish and Wildlife Assistant I. By virtue of his employment, respondent was a state miscellaneous member of CalPERS subject to section 21150. Respondent had the minimum service credit necessary to qualify for retirement.

2. In 2002, respondent slipped and fell, and broke his neck.² On August 19, 2003, respondent contacted CalPERS and stated that his attorney recommended filing for disability retirement benefits. Respondent ordered disability retirement estimates, and was informed by CalPERS staff that he needed to convert from Tier 2 to Tier 1³ to be eligible for disability retirement. On October 8, 2003, respondent's employer, DFW, provided a list of options available to respondent, including filing for disability retirement.

3. On August 20, 2007, respondent contacted CalPERS to inquire about applying for disability retirement and requested forms and publications. CalPERS sent the requested information to respondent on the same date.

4. On October 21, 2010, respondent went to CalPERS' Sacramento Regional Office for a one-on-one counseling session with a CalPERS analyst. The analyst reviewed the disability retirement process, the disability retirement application, and the requirements for submitting an application with respondent. CalPERS informed respondent again that he needed to convert from Tier 2 to Tier 1 to be eligible for disability retirement.

5. On March 23, 2011, respondent filed a "Disability Retirement Election Application" dated January 31, 2011 for service pending disability retirement which listed an effective retirement date of January 1, 2011. In his application, respondent stated that his specific disability was a "broke neck [*sic*]," suffered when respondent slipped and fell in a "fish race way landing hard on the back of my neck & shoulders, head landing in drain hole neck catching concrete lip." CalPERS was still awaiting respondent's election "packet" to convert from Tier 2 to Tier 1.

² The evidence is unclear whether respondent's injury occurred while working. The evidence did not establish respondent's last day of work.

³ In general, retirement benefits are based upon formulas established by the "tier" in which the employee is placed at the time of employment.

6. On May 24, 2011, respondent went to CalPERS' Sacramento Regional Office and requested a change in his retirement date from January 1, 2011, to January 11, 2011. He also submitted his election packet to convert from Tier 2 to Tier 1. On August 23, 2011, respondent submitted a written request for an earlier retirement date of June 5, 2002.

7. On April 9, 2012, CalPERS wrote respondent informing him that his application for disability retirement had been approved effective January 11, 2011. However, CalPERS denied respondent's request for an effective retirement date of June 5, 2002, on the basis that respondent had knowledge of the application process, and did not establish that a correctable mistake was made within the meaning of Government Code section 20160.

Respondent's Testimony

8. Respondent informed CalPERS in September 2011, that he did not contact CalPERS for information regarding disability retirement before he ceased working because he was "not instructed to do so by work comp or anyone." He became aware that he could submit an application for disability retirement only after his worker's compensation claim settlement in 2008. Respondent did not file for disability retirement at that time because he asserted that he was incompetent. Other than his testimony, respondent did not present any evidence that he was incompetent at any time.

9. At hearing, respondent asserted that in 2015, he learned from CalPERS for the first time that it was possible to request disability retirement retroactive to June 5, 2002. Prior to 2015, respondent asserted that he was "misguided and mistold by several people at CalPERS" that he could not file for disability retirement. He stated that "it's my fault for believing what they told me," and that "my mistake is not being knowledgeable."

Discussion

10. Respondent's injury occurred in 2002. Respondent waited nine years, then submitted his application for disability retirement on March 23, 2011. Throughout those nine years, respondent maintained contact with CalPERS regarding his application for disability retirement. On October 8, 2003, respondent's employer, DFW, provided a list of options available to respondent, including filing for disability retirement. Respondent was aware that he could file for disability retirement in 2003. His assertion that he made a mistake by not being was knowledgeable about filing for disability retirement at an earlier date is not persuasive. Failure by a CalPERS member to make the inquiry [about when he should file for disability retirement] that would be made by a person in like or similar circumstances does not constitute an "error or omission" correctable under Government Code section 20160. (Gov. Code, § 20160, subd. (a)(3).)

LEGAL CONCLUSIONS

Applicable Statutes

1. Section 20026 provides in pertinent part, that “disability” and “incapacity or performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the CalPERS board.

2. Section 21150, subdivision (a) provides in pertinent part, that a member incapacitated for the performance of duty shall be retired for disability if he is credited with five years of state service, regardless of age.

3. Section 21154 provides in pertinent part, that the application shall be made only while the member is in state service, or within four months after the discontinuance of the state service of the member, or 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.

4. Section 21156 provides in pertinent part, that the CalPERS board shall immediately retire a member for disability if the medical examination and other available information show to the satisfaction of the board that the member is incapacitated physically or mentally.

5. Section 20160 provides criteria for corrections of errors or omissions of CalPERS members. Subdivision (a) provides that CalPERS may correct errors or omissions of its members if *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.

6. Section 20160, subdivision (b), provides, in part, that CalPERS shall correct all actions taken as a result of errors or omissions of the CalPERS system.

7. Section 20160, subdivision (c), provides, in part, that the duty and power of CalPERS to correct mistakes shall terminate upon expiration of obligations of the system to the party seeking correction of the error or omission.

8. Section 20160, subdivision (d), provides that the party seeking correction or an error or omission has the burden of presenting documentation or other evidence establishing the right to correction.

9. Section 21252, subdivision (a) provides, in pertinent part:

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.

10. Respondent had the burden to present documentation or other evidence establishing the right to correction. As set forth in Finding 10, respondent did not present evidence to meet this burden. Respondent filed his disability application nine years after his injury. Respondent did not demonstrate that his failure to timely file his disability application was the result of mistake, inadvertence, surprise, or excusable neglect warranting a correction, entitling him to an effective retirement date retroactive to June 5, 2002. His appeal of CalPERS' denial for an earlier effective date of retirement must, therefore, be denied.

ORDER

The appeal of CalPERS' denial of respondent's application for an earlier effective date of retirement filed by respondent David C. Grewing is DENIED.

DATED: December 16, 2015

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Danette C. Brown
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DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings