

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 Disability Retirement of:

ROSEMARY LOPEZ,

Respondent,

and

CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT,

Respondent.

Case No. 2015-1130

OAH No. 2016050099

PROPOSED DECISION

This matter was heard before Heather M. Rowan, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on October 27, 2016, in Los Angeles, California.

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

Rosemary Lopez (respondent) represented herself.

There was no appearance by or on behalf of the Chaffey Joint Union High School District (District). The District was duly served with Notice of Hearing. The matter proceeded as a default against the District, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on October 27, 2016.

ISSUE

Did respondent make a mistake as a result of inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160, which would entitle her

to submit a disability retirement application to retroactively change her retirement status from service retirement to disability retirement?

FACTUAL FINDINGS

1. Respondent was employed by the District as a Clerical Specialist II. By virtue of her employment, respondent was a local miscellaneous member of CalPERS subject to Government Code section 21150.

2. Respondent separated from the District on November 25, 2009. On July 16, 2012, respondent inquired at a CalPERS field office about disability retirement benefits. She was given a copy of the Disability Retirement Election Application Guide (Guide) and was told that the required documentation must be submitted within 30 days of when she submits the application. Effective May 1, 2013, respondent service retired and has been receiving her retirement allowance from that date.

3. On May 10, 2013, respondent signed an application for service pending disability retirement (First Application). Respondent claimed disability based on back, neck, hands, carpal tunnel, diabetic, fibromyalgia, migraines, costochondritis, degenerative disk, plantar fasciitis, and irritable bowel syndrome conditions. On August 8, 2013, CalPERS sent respondent a letter requesting a physician's report to substantiate the disability claim and stating that if CalPERS did not receive the report within 30 days, the application would be canceled. On September 3, 2013, respondent informed CalPERS that she was working with her doctor to get the report. CalPERS granted respondent until September 30, 2013, to produce the report. Respondent failed to produce the report. As a result, on October 14, 2013, CalPERS cancelled the First Application.

4. On February 25, 2015, respondent submitted an application requesting a change in retirement status from service retirement to disability retirement (Second Application). She claimed disability on the basis of costochondritis, sinus tarsi, fibromyalgia, carpal tunnel, over-active bladder, plantar fasciitis, sinusitis, chronic migraines, and hyperlipidemia conditions. On March 9, 2015, and April 1, 2015, CalPERS sent respondent, via certified mail, a questionnaire regarding, among other topics, the reason she did not submit the required report with her First Application, which caused its cancellation. CalPERS did not receive a response to either questionnaire. On April 3, 2015, CalPERS received documentation from respondent's doctor regarding her health history. On April 24, 2015, respondent's Second Application was cancelled due to failure to timely submit a response to the late application remedy questionnaire.

5. On April 30, 2015, respondent submitted another application requesting a change in retirement status from service retirement to disability retirement (Third Application). The Third Application was a re-submittal of the Second Application, but included the required doctor's reports, which respondent hand-delivered to the CalPERS field office along with her application. On May 20, 2015, CalPERS again sent respondent a

questionnaire regarding her failure to provide a doctor's report with her First Application, among other matters. Respondent replied to this questionnaire stating that she had mailed the doctor's report, but CalPERS did not receive them. On August 24, 2015, CalPERS denied respondent's Third Application for a change in retirement status.

6. Respondent was advised of her right to pursue an administrative hearing. Respondent submitted a timely request for appeal. On April 29, 2016, Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues in his official capacity.¹ Thereafter, the matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

Respondent's Testimony

7. In July, 2012, when respondent went to CalPERS to obtain information about service retirement and disability retirement, she had been on temporary disability from the District due to physical and mental ailments. Her last day of paid service with the District was November 23, 2009. Because she did not achieve what the District termed "maximum medical improvement," the District placed her on a 39-month rehire list, but she was not re-hired in that time. She believes that the District "should have filed something" or told her to file for disability retirement with CalPERS at the time the District put her on medical leave. She applied for service retirement pending disability with CalPERS, and believed she would be able to later change her status to disability retirement. When she submitted her First Application in 2013, her doctor was not willing to deem her disabled based on her 2009 condition because respondent was under a different doctor's care at the time. After making several requests, and obtaining an extension on the 30-day period from CalPERS, respondent decided she "could not force Kaiser" to create the report and she "gave up."

8. In 2015, when respondent filed her Second Application, her medical conditions had worsened and she was under a new doctor's care. She mailed the Second Application and followed that with her medical report. CalPERS did not receive the doctor's report. Respondent testified that the documents must have been lost in the mail. She called CalPERS and was told to re-submit the application. Respondent filed the Third Application, with the medical report. She does not remember receiving the late remedy questionnaires in March and April of 2015. During this time period, respondent was undergoing cancer treatment, was not mentally competent, and understands that a lot of her paperwork or mail was not addressed.

¹ At hearing, complainant moved to amend the Statement of Issues to include a reference to Government Code section 20340, subdivision (a). The motion was granted.

Discussion

9. Respondent did not establish that she is entitled to relief based on an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect. Under the governing statute, an “error or omission” is not correctable if the member does not make the inquiry that would be made by a reasonable person in like or similar circumstances. (Gov. Code § 20160, subd. (a).)

10. The parties do not dispute the basic facts in this matter. Respondent was informed of the 30-day deadline and was given the Guide to assist in her disability retirement application. Respondent testified that she did not understand the deadlines and that she was too ill at times to pursue her application or respond to CalPERS’s requests for further information. Additionally, after CalPERS cancelled her First Application for failing to submit a doctor’s report, respondent waited nearly a year and a half before she submitted her Second Application.

11. Respondent’s First Application was timely. She filed it within four months of her final separation with the District. That application did not contain the medical report, and even though CalPERS extended the 30-day period for her to submit the medical report, no report was submitted. She did not understand the timeline that CalPERS described to her and that was in the Guide. Nearly a year and a half later, respondent filed her Second Application. She did not respond to two requests from CalPERS regarding why she did not submit the medical report. When her Second Application was canceled, she applied a third time. CalPERS again sent her the questionnaire and respondent replied. Even so, respondent did not make any inquiry to discover and respond to her mistake within six months, as required.

LEGAL CONCLUSIONS

1. “As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence. . . .” (*McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; Evid. Code, § 500.) In this matter, respondent bears the burden of proof. In addition, as the party seeking correction of an error or omission, respondent has the burden to establish the right to correction. (Gov. Code § 20160, subd. (d).)

2. Government Code section 21453, in relevant part, provides:

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, but is not limited to, change from service to disability retirement, from disability retirement to service retirement, from nonindustrial disability retirement to industrial disability retirement, or from industrial to nonindustrial disability retirement.

3. Government Code section 20160, in relevant part, 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.

4. As set forth in the Factual Findings 2 through 3 and 10 through 12, and the Legal Conclusions as a whole, respondent was properly notified that there was a 30-day period after she received her first service retirement payment in which to file her First Application and doctor’s report. When respondent could not acquire the doctor’s report, CalPERS granted her additional time to do so. Respondent did not produce the doctor’s report, which cancelled her First Application. It was another year and half before respondent attempted to file for service disability. This was beyond the 30-day time period in Government Code section 21453, and is not correctable under Government Code 20160.

5. Respondent did not carry her burden of establishing that her mistake was due to “inadvertence, mistake, surprise, or excusable neglect” correctable by Government Code section 20160, which would entitle her to submit a disability retirement application and retroactively change her retirement status from service retirement to disability retirement. Therefore, her appeal must be denied.

ORDER

Respondent’s appeal is denied.

DATED: November 18, 2016

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Heather M. Rowan
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HEATHER M. ROWAN
Administrative Law Judge
Office of Administrative Hearings