ATTACHMENT A

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

In the Matter of Accepting the Late
Application for Industrial Disability
Retirement of:

SUSAN L. CHASE,
Respondent,

and

CALIFORNIA DEPARTMENT OF
PARKS AND RECREATION,
Respondent.

Case No. 2018-1217
OAH No. 2019010514

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings,
State of California, heard this matter in San Diego, California, on April 15, 2019.

Rory J. Coffey, Senior Staff Attorney, represented complainant Anthony Suine,
Chief, Benefit Services Division, California Public Employees' Retirement System, State of
California (CalPERS).

Susan L. Chase, respondent, represented herself.

The California Department of Parks and Recreation (Department) did not appear at
this hearing.

The matter was submitted on April 15, 2019.

ISSUE

Did Ms. Chase make a mistake correctable under Government Code section 20160
that would allow CalPERS to accept her late industrial disability retirement application?
SUMMARY

Ms. Chase failed to prove by a preponderance of the evidence that she made an error due to “mistake, inadvertence, surprise, or excusable neglect” under Government Code section 20160 when she cancelled her March 1, 2011, application for service retirement on May 24, 2011.

FACTUAL FINDINGS

Jurisdictional Background and IDR Applications

1. Ms. Chase was employed with the California Department of Parks and Recreation as a park ranger. By virtue of her employment, Ms. Chase is a state safety member of CalPERS. On September 28, 2010, Ms. Chase submitted an application for service retirement with an effective retirement date of December 31, 2010. Before she submitted her application, as detailed below, Ms. Chase discussed with CalPERS representatives applying for disability retirement. Ms. Chase retired with 21.025 years of service, received her first retirement warrant on February 1, 2011, and has been receiving her retirement allowance from that date.

2. On March 1, 2011, Ms. Chase submitted a Disability Retirement Election Application to CalPERS, seeking industrial disability retirement (IDR) with an effective date of December 31, 2010. Ms. Chase stated as the medical basis for her disability that she suffered from symptoms, including loss of balance and peripheral neuropathy, “from Lyme Disease contracted on the job.” She identified the date of her disability injury as January 14, 2008.

In a letter dated May 24, 2011, Ms. Chase withdrew her IDR application. She stated in her letter that “[s]ince I have submitted the application I have slowly been getting better through treatment and physical training.” She added that “[w]hile I still have some lingering health problems, I am no longer impacted to a point that would prevent me from working again as a peace officer or in another capacity.” In a letter dated June 3, 2011, CalPERS notified Ms. Chase that her IDR application was cancelled.

On February 26, 2018, Ms. Chase submitted a second IDR application dated February 21, 2018, with a requested effective retirement date of December 30, 2010. Ms. Chase again claimed Lyme disease as the basis of her disability and that her disability occurred on January 14, 2008.

On June 15, 2018, CalPERS cancelled Ms. Chase’s second IDR application because she did not submit medical records substantiating her continuing disability from December 29, 2010, to the date of her second IDR application. She was advised she could submit a

1 All subsequent references are to the Government Code unless otherwise stated.
new application with medical records finding her continuously disabled from 2011 to the
date of her second application for IDR.

On July 9, 2018, Ms. Chase submitted a third Disability Retirement Election
application dated July 6, 2018, with a requested effective date of December 30, 2010. In this
application she checked the box marked “Service Pending Industrial Disability Retirement”
as the type of application. Ms. Chase again claimed Lyme disease as the basis of her IDR
application. She stated her disability began on January 14, 2008.

3. In a letter dated October 3, 2018, complainant denied Ms. Chase’s request to
change from service retirement to industrial disability retirement. Complainant asserted in
this letter that because Ms. Chase had knowledge of the application process she was unable
to show that she made a correctable mistake. In support of its decision complainant cited the
following factors:

- On November 18, 2010, Ms. Chase spoke with a CalPERS representative about a
disability retirement and CalPERS sent her a disability retirement application.

- On December 15, 2010, CalPERS sent Ms. Chase another disability retirement
application.

- After she service retired on December 31, 2010, she applied on March 1, 2011, for
a service retirement pending IDR.

- On May 25, 2011, Ms. Chase stated she wished to cancel her IDR application and
on June 3, 2011, CalPERS cancelled her IDR application.

- On November 1, 2017, Ms. Chase called CalPERS about applying for IDR and she
was sent another application. She then submitted an application on February 26,
2018.

At the hearing Ms. Chase did not dispute that CalPERS communicated with her as
stated in this letter. She timely submitted a written appeal of complainant’s decision.

4. Complainant signed the statement of issues in his official capacity on January
10, 2019, and this hearing ensued.

Ms. Chase’s Testimony and Evidence

5. Ms. Chase stated that at the time she retired she believed she was not able to
work due to her medical condition. In 2011 she talked to another park ranger whose
application for IDR was approved and he advised her to get an attorney. Ms. Chase
acknowledged that she knew she could apply for IDR as an option at that time. However,
she was distressed that she was no longer able to work, and about three months after she
retired, she submitted her first IDR application. Ms. Chase cancelled that IDR application in
the hope that she could work in a part-time seasonal capacity for the Department and applied
for a seasonal position with the Department. When she was not hired for that position, she
did not submit a new IDR application because she was depressed. She did not realize how
bad the symptoms could get and she could not predict when she would get flare-ups. After
some effort, in March of 2019, Ms. Chase found a new rheumatologist, Dr. Budianu, in San
Diego who has been treating her.

In support of her request to be allowed to again submit an IDR application, Ms. Chase
submitted a letter dated February 5, 2019, from her therapist, Raymond Siddons, M.A.,
LMFT. Mr. Siddons stated he had provided psychotherapy to Ms. Chase for several years
before she moved from the area, Ms. Chase's symptoms worsened and she struggled to find
doctors to treat Lyme disease and its complicated symptoms. Mr. Siddons asked that Ms.
Chase be provided "better benefits" due to her disability.

In addition to this letter, Ms. Chase submitted information about Lyme disease and its
symptoms and medical information relating to her medical condition. In a summary of her
March 18, 2019 visit with her doctor, Julie-Ann Papatheofanis, M.D., her diagnoses were
identified as follows: Psoriasis, Polyarthralgia, Primary osteoarthritis of both hands,
Migraine without status migrainosus, not intractable, unspecified migraine type, and
Insomnia due to medical condition.

The Parties' Arguments

6. Ms. Chase asserts that her failure to apply for IDR in 2011 was excusable or
inadvertent because she did not know the nature and extent of the symptoms she had due to
Lyme disease, which she discovered between 2011 and 2018, and because when she found a
specialist to treat her symptoms she reapplied for IDR.

7. Complainant argues that Ms. Chase's cancellation of her IDR in 2011 cannot
be viewed as an excusable or inadvertent mistake under Section 20160. Ms. Chase made the
deliberate decision to pursue part time work with the Department and her choice to do this
does not allow for a remedy eight years later. Notably, in 2011 Ms. Chase knew she could
not perform her duties due to her medical condition. The fact that her symptoms worsened
over the years does not change the fact that she knew she could not work in 2011.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. A CalPERS active or retired member seeking correction of an error or
omission pursuant to Government Code section 20160 "has the burden of presenting
documentation or other evidence to the board establishing the right to correction." (Gov.
Code, § 20160, subd. (d).) An applicant for industrial disability retirement has the burden of

2. “‘Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations.]” (Glage v. Hawes Firearms Company (1990) 226 Cal.App.3d 314, 324-325.) “The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant.” (Ibid., italics emphasis in original.) “If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation].” (People v. Mabini (2001) 92 Cal.App.4th 654, 663.)

Purpose of Disability Retirement

3. The Public Employees’ Retirement Law is set forth in Government Code section 20000 et seq. The general purpose of the public retirement system is “to prevent hardship to state employees who because of age or disability are replaced by more capable employees. The pension system serves as an inducement to enter and continue in state service [citation], and the provisions for disability retirement are also designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so.” (Quintana v. Board of Administration (1976) 54 Cal.App.3d 1018, 1021.)

Statutory Authority Related to Disability Retirement

4. Government Code section 21151, subdivision (a), states, “Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.”

5. Under Government Code section 21152 an application for disability retirement may be made by the employing office, department, or contracting agency; the member; or any person on his or her behalf.

6. Government Code section 21154 provides:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) 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.² On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

7. Government Code section 20340, subdivision (a), provides that a person ceases being a “member”... “[u]pon retirement, except while participating in reduced worktime for partial service retirement.”

Statute Allowing CalPERS to Correct Errors or Omissions

8. Government Code section 20160 outlines circumstances when CalPERS may correct an active or retired member’s errors or omissions as follows:

(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 [sic] used in Section 473 of the Code of Civil Procedure.

² CalPERS on June 15, 2018, cancelled Ms. Chase’s second IDR application because she did not submit medical records substantiating her continuing disability from December 29, 2010, to the date of her IDR application. CalPERS advised respondent that she could submit a new application with medical records to document her continuous disability from 2011 to the date of her application for IDR. No evidence was offered that she submitted this documentation.
(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.

**Code of Civil Procedure Section 473**

9. Code of Civil Procedure section 473, cited in Government Code section 20160, subdivision (a)(2), allows a court to "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Pro. § 473, subd. (b).) Section 473 does not define these terms and there are legions of appellate decisions applying section 473 in different contexts. For instance, "neglect" has been found to be "excusable if a reasonably prudent person under similar circumstances might have made the same error." (Austin v. Los Angeles Unified School District (2016) 244 Cal.App.4th 918, 929.) The California Supreme Court has stated that section 473 should be "liberally construed" due to the public policy favoring determination of matters on the merits. (Riskin v. Towers (1944) 24 Cal.2d 274, 279; Zamora v. Clayborn Contracting Group, Inc. (2002) 28 Cal.4th 249, 256; Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC (2015) 61 Cal.4th 830, 838.)

**Evaluation and Disposition**

10. Ms. Chase failed to prove by a preponderance of the evidence that her cancellation of her IDR application on May 24, 2011, was due to mistake, inadvertence, surprise or excusable neglect. This conclusion is reached for this reason: In 2011 Ms. Chase believed she was unable to perform her job duties due to Lyme disease. Indeed, on March 1, 2011, after she service retired, she applied for IDR. Nonetheless, she cancelled this application in the hope that she could obtain part-time work with the Department, which she was not able to obtain. Because she believed she could not work in 2011, the fact that her symptoms from this condition have unfortunately worsened since that time is not a basis to find that her decision to cancel her IDR application on May 24, 2011, was due to mistake, inadvertence, surprise or excusable neglect under Section 20160.

**ORDER**

Susan L. Chase’s appeal from CalPERS’s determination that it cannot accept her July 9, 2018, Disability Retirement Election Application to allow her to change her service retirement to industrial disability retirement is denied. CalPERS’s determination in this regard is affirmed.

DATED: May 7, 2019

ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings