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 Disability Retirement of:
HENRY MORENO,
Respondent,
and
CALIFORNIA HIGHWAY PATROL,
Respondent.

Case No. 2018-1056
OAH No. 2019011069

PROPOSED DECISION

Theresa M. Brehl, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on May 13, 2019.

Charles H. Glauberman, Senior Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, California Public Employees’ Retirement System, State of California (CalPERS).

Respondent Henry Moreno did not appear.¹

Respondent California Highway Patrol did not appear.

¹ At the hearing, petitioner submitted CalPERS’s counsel’s May 7, 2019, letter to the Office of Administrative Hearings regarding communications from Mr. Moreno on February 19, 2019, and May 7, 2019, notifying CalPERS’s counsel that Mr. Moreno was not available for the May 13, 2019, hearing. (The Notice of Hearing was served on February 6, 2019.) In his May 7, 2019, letter, CalPERS’s counsel represented that Mr. Moreno had been provided contact information for the Office of Administrative Hearings to obtain information about continuances, and that CalPERS’s counsel had asked Mr. Moreno for other dates when he might be available. Mr. Moreno did not provide CalPERS’s counsel alternative dates, and Mr. Moreno did not submit a motion to continue the hearing to the Office of Administrative Hearings.
Based on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against respondents Henry Moreno and California Highway Patrol pursuant to Government Code section 11520.

This matter was submitted for decision on May 13, 2019.²

ISSUE

Did Mr. Moreno make a mistake as the result of inadvertence, mistake, surprise, or excusable neglect correctable under Government Code section 20160 that would allow CalPERS to accept his late industrial disability retirement application that was submitted while he was receiving service retirement benefits?

SUMMARY

Petitioner seeks an order affirming CalPERS’s determination that it may not accept Mr. Moreno’s untimely application for disability retirement. Mr. Moreno retired from service as a Commercial Vehicle Inspection Specialist I for California Highway Patrol effective May 1, 2013, and he has been receiving CalPERS service retirement benefits since then. On May 13, 2013, Mr. Moreno submitted a Disability Retirement Election Application to CalPERS, seeking service pending industrial disability retirement, but that application was cancelled at Mr. Moreno’s request on September 18, 2014. The disability retirement application at issue in this case was signed by Mr. Moreno on December 16, 2017, and received by CalPERS on January 18, 2018.

Mr. Moreno’s recent application was untimely pursuant to Government Code section 21154 because it was submitted over four years after Mr. Moreno began his service retirement and ceased being a CalPERS member as provided by Government Code section 20340, subdivision (a). The evidence presented did not establish that Mr. Moreno’s delay submitting his application for disability retirement was due to a mistake that may be corrected under Government Code section 20160. Accordingly, CalPERS’s determination that it may not accept Mr. Moreno’s late application is affirmed.

FACTUAL FINDINGS

Jurisdictional Background

1. Mr. Moreno worked for California Highway Patrol, most recently as a Commercial Vehicle Inspection Specialist I. By virtue of his employment, Mr. Moreno was a miscellaneous member of CalPERS under Government Code section 21150. Mr. Moreno

² Respondent’s date of birth was redacted from exhibits after submission.
retired effective May 1, 2013, and he has been receiving service retirement benefits since then.

2. On January 18, 2018, Mr. Moreno submitted a Disability Retirement Election Application to CalPERS, dated December 16, 2017, seeking disability retirement benefits. CalPERS notified Mr. Moreno in a letter, dated August 10, 2018, that it could not accept his late application seeking to change from service retirement to disability retirement and advised him of his appeal rights. Mr. Moreno timely appealed from CalPERS’s determination.

3. Petitioner signed the statement of issues in his official capacity on January 18, 2019, and this hearing ensued.

Mr. Moreno’s Communications with CalPERS and His Service and Disability Retirement Applications

4. CalPERS Staff Service Manager Emily Sandoval, who has worked for CalPERS for 29 years, testified about CalPERS’s procedures and authenticated CalPERS’s records that were received as evidence during this hearing regarding Mr. Moreno’s applications and other contacts with CalPERS.

5. On March 11, 2013, Mr. Moreno participated in a CalPERS education and training session and submitted a Retirement Allowance Estimate Request. Mr. Moreno visited CalPERS’s office on May 7, 2013, and then discussed service and disability retirement benefits with a CalPERS employee. At that time, Mr. Moreno was told that disability retirement should pay him the same benefits as service retirement. Ms. Sandoval confirmed during this hearing that the amount of a disability retirement allowance would be the same as the service retirement allowance Mr. Moreno has been receiving. On May 13, 2013, Mr. Moreno submitted a Disability Retirement Election Application, seeking service retirement pending industrial disability retirement. His application stated his disability occurred in May 2012 and described his disability as “heart disease 3 surgeries pacemaker/defribulator [sic].” He stated in this application that his ability to work was limited by “shortness of breath” and “high blood pressure,” and his doctor had not released him to return to work because of his “heart condition.” Charles Athill, M.D., Mr. Moreno’s cardiologist, was listed on the application as the treating physician. Mr. Moreno’s last day on paid status was listed on the application as April 1, 2013.

6. Mr. Moreno was service retired effective May 1, 2013, and he has been receiving service retirement benefits since then.

3 On his application, Mr. Moreno checked the “Disability Retirement” box, not the “Industrial Disability” box.

4 No evidence was presented regarding whether there were other reasons a disability retirement or industrial disability retirement may be preferable to Mr. Moreno.
7. On May 1, 2014, CalPERS sent a letter to Mr. Moreno regarding additional information needed from Mr. Moreno’s treating physician in order to assess Mr. Moreno’s eligibility for industrial disability retirement. That letter stated:

We received a Physician's Report on Disability by Dr. Charles Athill dated June 3, 2013. The Physician's Report on Disability by Dr. Athill did not describe specific job duties/work activities that you are unable to perform due to the incapacity based on reviewing your job duty statement and the Physical Requirements of Position/Occupational Title form. Also, we received only one office visit from Dr. Athill dated April 8, 2013 only. CalPERS requires copies of your medical reports including office visits, progress notes, consultative reports for the period of September 2012 to present. Lastly, the Physician's Report on Disability is no longer current. Please have Dr. Athill complete a new Physician's Report on Disability. Without a response from your physician within 30 days, your application may be cancelled. If you applied for service retirement pending disability or industrial disability retirement and the disability portion of your application is canceled, you will not be permitted to reapply for disability retirement in the future.

8. On June 3, 2014, June 12, 2014, and July 21, 2014, Mr. Moreno contacted CalPERS and was told his service retirement benefits would be higher than disability benefits. He was also told that there was no tax benefit to disability retirement as there was only a tax benefit for industrial disability, which was “not available to him.” When he spoke to a CalPERS employee on June 3, 2014, Mr. Moreno stated that he was going to check with his attorney about whether there would be any benefit to being on disability retirement, and if not, he would call to cancel the disability retirement application.

9. On August 20, 2014, Mr. Moreno sent a letter to CalPERS stating: “I Henry Moreno have chosen to stop pursuing [sic] the disability retirement. Based on the information given to me from Calpers [sic] retirement. They have indicated there is no financial benefit for me to continue pursuing. They have stated that my age is a factor.” CalPERS sent a letter to Mr. Moreno, dated September 18, 2014, stating that his August 20, 2014, letter had been received and his disability retirement application was being cancelled.

10. Mr. Moreno contacted CalPERS several times during 2017 regarding the possibility of filing a disability retirement application. On January 24, 2017, he went to CalPERS’s office and asked about service and disability retirement benefits. On July 24, 2017, he brought a copy of an Agreed Medical Examination (AME) Report, dated July 25, 2016, to CalPERS. That day, a CalPERS representative told him that more current medical reports would usually be needed. Mr. Moreno told the CalPERS representative that he had previously been told he could change from service retirement to disability retirement, and he was then given a disability retirement application form. On August 1, 2017, Mr. Moreno
contacted CalPERS and asked what he needed to do to pursue disability retirement; he was told he would need to submit an application with medical records. On September 1, 2017, Mr. Moreno called CalPERS to request a guide to completing a disability retirement application, and CalPERS sent a Disability Retirement Election Application package (Publication 35) to Mr. Moreno.

11. On January 18, 2018, Mr. Moreno submitted his second Disability Retirement Election Application, dated December 16, 2017, to CalPERS, seeking to change his retirement from service retirement to disability retirement. This application stated that his disability occurred on May 1, 2013, and described his disabling condition as: “Heart, shoulders, knees, back, neck & internal organs.” The application listed Richard Katz, M.D., cardiologist, as Mr. Moreno’s treating physician and stated: “A complete list of dates & injuries will be attached.”

**CalPERS’s Review of the Application Received on January 18, 2018**

12. After CalPERS received Mr. Moreno’s Disability Retirement Election Application on January 18, 2018, it sent letters to Mr. Moreno and his former employer, California Highway Patrol, asking them questions about Mr. Moreno’s service retirement, his claimed disability, and the reason Mr. Moreno submitted the disability retirement application in January 2018, over four years after his 2013 service retirement. The letter to the Department of California Highway Patrol was dated June 13, 2018, and the letter to Mr. Moreno was dated June 14, 2018.

13. Lieutenant Scott Moorhouse, California Highway Patrol, San Onofre Commercial Vehicle Enforcement Facility, responded to CalPERS’s questions to the California Highway Patrol by email on August 3, 2018. He responded “Unknown” to questions 1, 2, 4, and 5, which asked (emphasis in original):

1. Did the member indicate he was retiring because he was too disabled to continue working? If yes, on what date?

2. What did the member state as the reason for stopping work?

3. . .

4. Was the member given information or counseling regarding disability retirement? If yes, on what date and what information was provided to the member?

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5 No such list was offered as evidence during this hearing.
5. Would the Court of Appeal Second Appellate District [sic] object if CalPERS accepts this member’s untimely application? 
If no, why not?

Question number 3 asked: “At the time the member stopped working, was an industrial injury/illness pending or filed within the preceding three years? If so, what is the complete name and address of the workers’ compensation insurer and what is the claim number?” Lieutenant Moorhouse’s response was: “Yes SCIF See attachment.” There was no attachment submitted as evidence.

14. Mr. Moreno sent a letter, dated June 26, 2018, to respond to the questions CalPERS had posed to him. His letter stated that at the time he filed for service retirement, he had been under regular medical care with both Dr. Bestard and Dr. Athill; he saw Dr. Bestard for his knees and shoulders and Dr. Athill for his heart; Dr. Athill “performed four heart ablations and installed a pacemaker” for his heart; Dr. Bestard instructed him to stop working “around 2011. From this date I was incapacitated to perform all duties as required”; he advised his employer that he had to retire for disability in 2013; he “took in necessary paperwork which needed to be filled out by employer”; he contacted CalPERS “many different times” for information regarding disability retirement; “[s]omeone from CalPERS called me and stated that because of the slow response from my doctors CalPers [sic] requested that I take Service Retirement with the understanding that I could Reapply with no penalty . . . Once I had all files needed I Reapplied”; he became aware of his right to file for disability retirement when he “went to CalPERS [sic] Office in May 2013”; and he had a workers’ compensation claim on file since the “early 2000s.”

Mr. Moreno’s Written Explanation and Argument to CalPERS

15. Although Mr. Moreno did not appear at the hearing, he had previously provided the following information and arguments to CalPERS in his appeal letter, dated September 7, 2018:

I complied with every request that was made of me. When I originally filed my paperwork, I filed for disability retirement as I had 3 surgeries and a pacemaker. I later had a shoulder replacement surgery. When I didn’t have any more sick time and used my donated time I had to retire. All of my surgeries were work related. After about a year of trying to get my doctors

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6 It appeared that the questions in CalPERS’s letter to the California Highway Patrol may have been generated from something that was previously sent to the court of appeal regarding another employee. There was no evidence presented that Mr. Moreno ever worked for the court of appeal.

7 Mr. Moreno’s letter was offered as a jurisdictional document during this hearing. It had limited punctuation.
[sic] reports to receive the necessary paperwork needed to complete my disability retirement. I met a person from CalPERS who stated to me that I was going nowhere because of the delays. I felt I was putting a larger work load on them by constantly calling for updates. It was then that I was convinced by the employee at CalPERS that it really wasn't a big deal. I could take a service retirement and later re-apply when my doctors [sic] reports were readily available.

I took the advice of this person and reapplied. I had to have someone drive me to each doctor's office to pick up the paperwork. I even went to my employer for documents. I was driven from Torrance, San Clemente, Mission Viejo, Escondido, Poway, San Diego, and La Jolla. I hand carried all the documents and had a representative verify that I had all that was needed. I later received another letter stating that I needed more paperwork and was given 20 days to comply. Again, my friend drove me around to pick up everything and drove to Cal Pers [sic] in San Diego to make sure it was time stamped in time. I asked again if this was it and he said I think so, but if the [sic] need anything else they will send me a letter.

I really don't understand how I can be turned down when I complied with everything that was requested of me. I attempted to apply for a part time job to supplement my income but was denied because of my obvious disabilities. To date, I have had my knees replaced, have had 2 pacemakers, 3 heart ablations, both shoulders replaced twice, and in November of this year had 3 discs fused with an additional one repaired. I no longer have any feeling in either hand. I totally believed in the advice of the Cal Pers [sic] representatives and feel it is unfair justice to be able to do this to me by no fault of my own. If this request is denied, I guess I have no choice but to appeal. The sad thing is that it has no effect on CalPers [sic] of my pay from them.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. A disability retirement applicant has the burden of establishing eligibility by a preponderance of the evidence. (Evid. Code, §§ 115 and 500; See also Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.) 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).)

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 20026 provides:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

5. Pursuant to 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. 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.”

Workers’ Compensation Appeals Board Determinations Regarding Whether Disability is Industrial

8. Government Code section 21166 states:

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board, or in the case of a local safety member by the governing body of his or her employer, is industrial and the claim is disputed by the board, or in case of a local safety member by the governing body, the Workers’ Compensation Appeals Board, using the same procedure as in workers’ compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers’ Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers’ Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.
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 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.

(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 20164.8

8 Government Code section 20164 explains that CalPERS’s obligations to active and retired members continue until all obligations have been discharged and sets forth a statute of limitations not applicable here. Section 20164 does not operate to preclude application of section 20160 in this matter.
(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**

10. 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).) Although section 473 does not define these terms, there are many appellate decisions applying section 473 in a variety of different contexts, some of which define the section’s terminology. 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 consistently 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.)
In *Button v. Board of Administration* (1981) 122 Cal.App.3d 730, the First District Court of Appeal applied former Government Code section 20180 (which has since been renumbered as section 20160)\(^9\) to a retiree's request to change his service retirement to disability retirement. In *Button*, the appellate court determined Mr. Button should be allowed to correct his status because both his and his employer's belief that he was not disabled when he retired was a mistake of fact. *(Id. at p. 736.)* The *Button* court summarized the facts as follows *(id. at p. 733):*

From 1961 to 1973 appellant Robert Button worked as an investigator for the Santa Clara District Attorney's Office. In April 1973 he applied for and received a normal "time-in-service" retirement. At that time appellant was aware that, were he disabled, he could have applied for and would then have been eligible to receive "disability" retirement benefits. Although he felt "exhausted," appellant was not aware of any disability and he did not apply for or request further information concerning disability retirement. Appellant was not aware of nor was he told of any retirement policy that would prohibit him from changing his retirement status from "service" to "disability" once he was retired.

Following his retirement, appellant was self-employed as a private investigator. In January 1976 he suffered a mild heart attack, was diagnosed as having coronary artery disease (arteriosclerosis), and underwent a coronary bypass operation.

Based on his employment with the county, appellant applied for Workers' Compensation. In a 1977 decision by the Workers' Compensation Appeals Board, it was found that although appellant did not become compensably disabled until 1976, his injury was cumulative and arose out of his employment with the county.

Appellant then wrote a letter to PERS asking to convert his service retirement to a disability retirement. The Board responded that he could not change his status because the application procedures, as codified in the Government Code precluded post-retirement changes.

\(^9\) The Public Employees' Retirement Law was reorganized by several Senate and Assembly bills during the 1990s and 2000s, resulting in the amendment and renumbering of several code sections. At the time of the *Button* decision, the language currently found in Government Code section 20160 was contained in Government Code section 20180.
The *Button* court acknowledged that based on a strict reading of the applicable Government Code sections, only a CalPERS member could apply to convert his retirement to an industrial disability retirement and under Government Code section 20390, subdivision (a) (now 20340, subdivision (a)), Mr. Button ceased to be a CalPERS “member” when he retired. The court explained that while the Legislative intent was clear that “under normal circumstances retirees may not change their status,” the question before the court was “whether the existence of abnormal or unusual circumstances will permit subordination of conventional interests in favor of other policy considerations.” (*Button, supra, 122 Cal.App.3d at p. 735.)*


In *Rodie* the retiree knew when he retired that he was eligible for both disability and service benefits; he elected a disability retirement. The following year he applied for and was awarded federal Social Security disability benefits only to discover that his state benefits were then reduced correspondingly. Because there would be no such reduction if he were receiving service benefits, Mr. Rodie applied for a status change. The court held that “section 20180 is available to correct an employee’s election to retire for disability rather than service, where such election results from ‘inadvertence, oversight, mistake of fact, mistake of law, or other cause.’” [Citation.] The court stated that it could “discern no reason for treating an employee’s mistaken choice between two types of retirement to which he is entitled by reason of past services differently from any other mistake depriving him of benefits to which he is fairly entitled.” [Citation.]

The *Button* court concluded that pursuant to Government Code section 20180 (now section 20160), “inadvertence or mistake constitutes a special circumstance excusing a retired member’s earlier inaction” under the following reasoning (*Button, supra, 122 Cal.App.3d at 737-738):

Section 20180 dictates that PERS’ interests in administrative and actuarial efficiency are not of overriding importance so as to allow honest mistakes to remain uncorrected. The section equally applies to post-retirement changes in status. Although it may be argued that *Campbell, supra*, [citation], applied to members as opposed to retirees and to reclassification as opposed to status changes, section 20180 expressly applies to retired members as well as active members.
As was noted in *Campbell*, "pension statutes are to be liberally interpreted in favor of the applicant so as to effectuate, rather than defeat, their avowed purpose of providing benefits for the employee and his family’ (citations)” (103 Cal.App.3d at p. 571, 163 Cal. Rptr. 198; emphasis in original.)

Based on the element of mistake, this court concurs with the *Rodie* holding and appellant should prevail on the section 20180 issue. The facts of the instant case present a stronger case of mistake than *Rodie*. In *Rodie*, the retiree knew that he was eligible for either disability or service status yet elected to receive lesser disability benefits; whereas appellant did not initially realize he may have been eligible to apply for disability.

Respondent [CalPERS] also contends that appellant’s mistake was one of judgment, and claims that appellant was negligent in not knowing that he was disabled. Again, the instant situation is less judgmental and suggestive of negligence than in *Rodie*. If Mr. Rodie had undertaken sufficient inquiry, he could have easily avoided his error. Here, there is no evidence that appellant’s condition was amenable of his retirement.

In light of the clear legislative intent to compensate in a certain manner those employees who are disabled at the time they retire (see section 20001), and given the express language of section 20180, it is unreasonable to attribute to the Legislature an intention to preclude an otherwise eligible employee from receiving a disability pension on the sole ground that his disabling condition was not diagnosed as such at the time of retirement.

**Evaluation**

12. In this case, Mr. Moreno initially applied for service retirement pending his application for industrial disability in 2013, while he was a CalPERS member. He then retired and began receiving service retirement benefits, effective May 1, 2013. Mr. Moreno communicated with CalPERS multiple times during 2013 and 2014 regarding his eligibility for disability retirement and on June 4, 2014, he advised a CalPERS’s representative that he planned to check with his attorney regarding whether to continue his pursuit of disability retirement. On August 20, 2014, he notified CalPERS that he wanted to stop pursuing disability retirement, and CalPERS canceled his disability retirement application at his request. His later Disability Retirement Election Application, submitted to CalPERS on January 18, 2018, was untimely because it was made after he ceased being a CalPERS member by virtue of his retirement as provided by Government Code section 20340 and after the deadlines to apply as prescribed by Government Code section 21154. There was
insufficient evidence presented to support a finding that Mr. Moreno’s application may have been timely under Government Code section 21154, subdivision (d), based on being “physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion.”

13. Because Mr. Moreno’s January 18, 2018, disability retirement application was untimely, CalPERS may not accept it unless the provisions of Government Code section 20160, allowing CalPERS to correct errors or omissions, are met. Section 20160 contains two basic requirements before a correction may be made: (1) the correction must have been requested within a reasonable amount of time after discovery of the error or omission, not to exceed six months after such discovery (subdivision (a)(1)), and (2) the error or omission must have resulted from “mistake, inadvertence, surprise, or excusable neglect” (subdivision (a)(2)).

14. Based on Mr. Moreno’s multiple communications with CalPERS, as well as his May 13, 2013, application for industrial disability, Mr. Moreno has believed that he may be eligible for disability retirement since 2013. Mr. Moreno argued in his appeal letter that someone at CalPERS told him during 2013 and/or 2014 that he could cancel his disability retirement application and then reapply for disability retirement after he gathered all the medical information necessary from his medical providers. However, even assuming that communication occurred, it would not explain why Mr. Moreno then waited over three years after he canceled his first disability application in August 2014, to reapply in January 2018. The evidence presented in this case did not support a finding that Mr. Moreno submitted his 2018 application within a reasonable amount of time after he discovered an error or omission, or that the untimeliness of his 2018 application was the result of a mistake, inadvertence, surprise, or excusable neglect that could be remedied under Government Code section 20160. Accordingly, Mr. Moreno’s appeal from CalPERS’s decision that it cannot accept his untimely application is denied.

ORDER

Henry Moreno’s appeal from CalPERS’s determination that it cannot accept his application for disability retirement is denied. CalPERS’s determination that it cannot accept Mr. Moreno’s January 18, 2018, disability retirement application is affirmed.

DATED: May 31, 2019

[Signature]

THERESA M. BREHL
Administrative Law Judge
Office of Administrative Hearings