

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Statement of Issues against:**

**EDDIE A. MCDONALD, Respondent**

**Agency Case No. 2019-0141**

**OAH No. 2019060263**

**PROPOSED DECISION**

David Rosenman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on November 4, 2019, in Los Angeles, California.

Complainant Robert Jarzombek was represented by Charles H. Glauberman, Senior Attorney, California Public Employees' Retirement System (CalPERS). Respondent Eddie McDonald was present and was represented by Paige R. Parrish, Attorney at Law.

Oral and documentary evidence was received. A request for protective order was granted on the record, and privileged or confidential information in some exhibits was redacted. The record was closed and the matter was submitted for decision on November 4, 2019.

## **ISSUE**

Whether respondent may enroll his son Brock in his health/medical plan<sup>1</sup> as a disabled dependent.

## **SUMMARY**

In 2000, respondent elected to cancel his medical benefits for himself and his family, including his disabled son Brock. Medical coverage was being provided through Mrs. McDonald's employer. In 2009, at a retirement counseling appointment with a CalPERS employee, respondent asked about adding medical coverage, as the family would not be covered after Mrs. McDonald retired. Respondent referred to his disabled son, and was told medical coverage could be added during any open enrollment period. When respondent applied for family medical coverage during open enrollment in September 2018, the application was granted for respondent and his wife, but denied as to Brock. Under the totality of the circumstances, medical coverage will be extended to Brock.

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<sup>1</sup> The Statement of Issues and several exhibits often refer to health benefits generally. However, there is a difference between respondent's medical and dental benefits, as explained herein. The Issue relates to respondent's medical benefits plan.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Robert Jarzombek made and filed the Statement of Issues in his official capacity as Chief of the Health Account Management Division of CalPERS.

2. Respondent was employed by the Herman G. Stark Youth Training School, California Department of Corrections and Rehabilitation (CDCR). By virtue of this employment, respondent and his dependents were eligible for CalPERS health benefits under the Public Employees' Medical and Hospital and Care Act (PEMHCA).

3. Effective January 1, 2000, respondent cancelled his medical benefits. Dental benefits remained in place, including coverage for respondent's disabled son, Brock, with a period when Brock was removed from coverage and later retroactively re-enrolled in dental coverage, as explained in more detail below.

4. Respondent retired in December 2009.

5. In September 2018, respondent submitted a request to enroll himself and his family, and Brock as a disabled dependent, for medical coverage benefits under PEMHCA.

6. On October 4, 2018, PERS informed respondent that Brock could not be added on his medical coverage.

7. On October 30, 2018, respondent appealed the denial and requested an administrative review. The administrative review upheld the denial. On December 13,

2018, respondent requested an administrative hearing. All jurisdictional requirements have been met.

## **Background Facts and Communications**

8. In 1980 Respondent was hired by the California Youth Authority (CYA) as a youth counselor. CYA later merged into the California Department of Corrections (CDC), later the CDCR, in which respondent has held different positions, such as counselor, investigator and correctional officer at various facilities, such as Paso Robles and Forestry Camp. After budget cuts closed his workplace, he was involuntarily transferred to the Southern California Youth Reception Center in Norwalk, where he worked for about six years. He was promoted to the rank of Lieutenant, and was transferred to a facility in Chino.

9. In 2000, respondent was informed of an option, that he referred to as Coben and that CalPERS refers to as Flex Elect, whereby he would end enrollment for medical benefits for he and his family and, in return, he would receive a monthly stipend. Respondent took the Coben option, effective January 1, 2000, for several reasons, including that his wife, Christine, had good family medical benefits through her employment. Further, respondent had been told that the Coben option was a money-saving program for the CDC, and he thought he would be a good role model for other employees. Respondent received a monthly Coben stipend of about \$130. Respondent retained family dental insurance largely for the benefit of Brock, who had poor dental hygiene.

10. Before submitting his retirement papers, respondent sought retirement counseling from CalPERS. CalPERS keeps electronic notes of contacts from its

members (Customer Touch Point Report [Customer TPR], exhibit 22), which reflect that, on October 22, 2009, respondent and a CalPERS representative discussed the retirement process. An appointment was made for December 8, 2009.

11. Respondent and Mrs. McDonald met with CalPERS representative James Santiago on December 8, 2009, at which time respondent submitted his papers for service retirement, effective December 31, 2009. Respondent chose an option within Option 4, which reduced his retirement allowance but allowed, on his death, for Mrs. McDonald to get benefits and, if she died, benefits would go to Brock. The Customer TPR indicated that Mr. Santiago explained the retirement benefit to respondent [and his wife], and they understood. There is no note in the Customer TPR of any other subjects discussed. Respondent testified that they told Mr. Santiago they chose this option out of concern for their disabled son Brock, and that his chosen retirement option allowed for Brock to receive benefits, while his wife's eventual retirement options did not include such an option.

12. The Affidavit of James Santiago (exhibit 23) is signed October 31, 2019, long after various letters were exchanged that explained CalPERS reasons for denial and respondent's reasons why Brock should receive medical benefits. Mr. Santiago has no independent recollection of the meeting. He wrote that it is best practice for CalPERS counselors to leave notes on the topics discussed with members. "For instance, if a member asks me a question regarding health benefits and/or who qualifies to be a dependent, it is important that I leave notes on this." (Exhibit 23, paragraph 5.) Mr. Santiago also wrote that if the member is there to just submit an application, his notes are short, and that he followed the practices he described.

13. Respondent testified credibly that he asked Mr. Santiago if he needed to put the family back on his medical plan, and that Mr. Santiago replied that they could be added in the future during any open enrollment period. When asked at the hearing if Mr. Santiago said anything about continuous coverage for Brock before ages 23 or 26, respondent answered no. Respondent was not aware of that requirement until the CalPERS denial letter in 2018.

14. In her credible testimony, Mrs. McDonald stated that she was present at the meeting with Mr. Santiago. She and respondent asked how they would document that Brock was disabled when he might later qualify for respondent's retirement allowance.<sup>2</sup> Mr. Santiago replied that the documentation would be needed at that time in the future, and not in the present. Mrs. McDonald confirmed that they asked Mr. Santiago if respondent needed to put the family back on his medical plan, and that Mr. Santiago replied that they could be added in the future during any open enrollment period.

15. In January 2010, respondent submitted an application for family dental benefits, authorizing CalPERS to make deductions from his retirement allowance for the cost of enrollment. Family coverage was effective on February 1, 2010.

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<sup>2</sup> Although there was no direct evidence, it seems that, based on statements at the meeting, Mrs. McDonald believed that, if respondent died and she died, and Brock would become eligible to receive a portion of respondent's retirement allowance, it would be necessary to document that Brock was disabled.

16. Amelia Martinez has worked for CalPERS for about seven years. Her duties in her position as Associate Governmental Program Analyst include enrollment and processing of health and dental plan benefits. Health benefits for active employees are handled by the employer's human resources department, while CalPERS handles benefits for retirees. Ms. Martinez explained, generally, that a dependent of a health plan member could be covered up to age 23, and that a change in the law under "Obamacare" (the Patient Protection Affordable Care Act) extended that coverage up to age 26. Coverage for a disabled family member was available beyond those age limits; however, to qualify, the disabled family member must have been continuously covered before attaining age 23, and later, under the Obamacare extension, before attaining age 26.

17. Effective September 1, 2010, Brock was removed from dental coverage, listed in the CalPERS data as due to "Conversion: Dependent Delete" (exhibit 19). Ms. Martinez explained that a new data base used by CalPERS caused "glitches" such as dependents being deleted from coverage, and that corrections were needed. The note of "Conversion" indicated that Brock's dental coverage as a disabled dependent was dropped on September 1, 2010, due to this glitch. Corrections were made at CalPERS and dependents were retroactively reinstated. This occurred for Brock's dental benefits on December 11, 2013, effective January 1, 2011, as explained by Ms. Martinez while reviewing exhibit 18. Respondent was not aware of these events.

18. On November 10, 2010, CalPERS sent a letter to respondent (exhibit 12), "in regard to continuing your dependent, Brock McDonald, on your [CalPERS] sponsored health plan as a certified Disabled Dependent." (*Ibid.*) Although the reference was to health benefits, the only benefit respondent had at the time was

family dental, even though, unknown to him, Brock had been deleted due to the data glitch. According to the letter, the criteria for continued enrollment of disabled dependents was governed by California Code of Regulations, title 22 (Regulation), section 559.501, subdivision (g), and the following excerpt was included in the letter:

A family member who is a disabled child over age 23 is to be continued in enrollment only if he or she is then enrolled, provided that no such child shall continue to be enrolled unless satisfactory evidence of such disability is filed with the Board during the period commencing 60 days before and ending 60 days after the effective date of the initial enrollment or the child's 23rd birthday, whichever is pertinent.

*(Ibid.)*

The November 10, 2010 letter also noted:

Brock's CalPERS sponsored health coverage was cancelled on September 1, 2010 due to reaching age 23. For us to consider the continuation of Brock on your CalPERS health coverage as a disable[d] dependent, timely action is required by you and Brock's physician.

*(Ibid.)*

This is contrary to the testimony of Ms. Martinez that the cancellation was due to the data glitch. However, it is noted that the letter was also correct, in that Brock

had turned 23 years of age in August 2010. However, the letter did acknowledge that Brock had been continuously covered for dental benefits as a disabled dependent since before he turned 23 and, therefore, was entitled to continued coverage after his birthday.

The November 10, 2010 letter instructed respondent to complete and return a questionnaire for a disabled dependent benefit, and to have a physician complete and return a medical report form. Respondent testified that he submitted "the disability paperwork." Then he was informed that Obamacare became effective, including the age extension, and he was told that the coverage would "roll over."

19. Ms. Martinez explained that, when the forms are completed and returned, CalPERS first checks to see if the disabled dependent is under age 23, and then checks to see if medical coverage has been continuous before age 23, before processing the rest of the information. Ms. Martinez reviewed documents summarizing respondent and his family's history of medical and dental benefits and noted that, as of the November 10, 2010 letter, respondent and his family had not had medical benefits since January 1, 2000, and that dental benefits for respondent and his family had become effective as of February 1, 2000, and was continuous. The forms submitted by respondent therefore applied only to continuation of family dental coverage.

20. Respondent did not recall receiving the November 10, 2010 letter. He believed it may have been prompted because Brock's 23rd birthday was in August 2010.

21. On June 19, 2013, respondent contacted CalPERS via telephone and inquired about the health enrollment process for his disabled dependent son, Brock, who would turn 26 in August 2013, as noted in the Customer TPR. The notes include that respondent and Brock were dependent on Mrs. McDonald's health plan with the California State Teachers' Retirement System (CalSTRS) through her employer. The CalPERS representative noted that he instructed respondent to request continuation of health coverage for Brock from CalSTRS. It was also noted that Brock was not shown as enrolled for CalPERS dental coverage at that time.

22. The retroactive reinstatement of Brock's dental benefits is discussed above. Brock was recertified as a disabled dependent in September 2013 and deleted in February 2015 due to having passed his 26th birthday. It appears that CalPERS did not recognize that Brock had been continuously covered for dental benefits and was certified as a disabled dependent before reaching his 26th birthday. He was recertified as a disabled dependent in October 2018.

23. On September 19, 2018, during open enrollment, respondent submitted a form to enroll he and his family for medical coverage, including Brock as a disabled dependent. He testified that he wanted the medical coverage because his wife was considering her retirement options and her medical coverage for the family would end upon her retirement.

24. On October 4, 2018, CalPERS informed respondent that Brock could not be added to health coverage because he was over the age of 26. In an October 12, 2018 letter (exhibit 4), CalPERS denied respondent's request to add Brock as a disabled dependent on his health coverage, citing PEMCHA statutes and regulations. The reason for denial was:

Based on a review of your account history, you voluntary disenrolled from CalPERS health coverage effective January 1, 2000, also terminating Brock McDonald's health coverage as a dependent on your plan. He is now over the age 26, therefore he is ineligible to enroll as a disabled dependent. His coverage must be continuous from a date prior to him turning age 26 pursuant to CCR 599.501(g).

*(Ibid.)*

25. Respondent, through Mr. Parrish, his counsel, submitted an appeal and provided additional information in a letter dated October 30, 2018 (exhibit 5). In summary, Mr. Parrish noted that Brock had been mentally disabled since birth, and that Brock had been continuously covered by a CalPERS health plan until 2000, when respondent accepted his employer's offer to take the Coben stipend instead of continued medical coverage, but kept dental coverage. There was no disclosure or explanation at that time of the effect of discontinuing medical coverage for his disabled son. At the retirement meeting in December 2009, Mr. Santiago informed respondent that he could add his family and disabled son to a CalPERS health plan during any open enrollment period, subject to Brock qualifying as disabled. CalPERS required new forms in 2013 to determine if Brock was certified as disabled. Respondent submitted the forms, and Brock continued to receive dental coverage. In August 2018 when respondent requested that the family be enrolled for medical coverage, certification forms were again requested and submitted. Medical coverage for Brock was denied due to the lack of continuous coverage before age 23, and then age 26.

26. In his October 30, 2018 letter, Mr. Parrish raised the following factors to be considered in an administrative review.

(A) When respondent accepted the offer from the CDC, it resulted in a benefit to CDC by reducing its costs for respondent's medical coverage. However, there was no disclosure to respondent that, by discontinuing medical coverage, it would endanger future coverage for his disabled son. If informed, respondent would not have accepted the option, and his son should not be penalized.

(B) Mr. Santiago specifically told respondent that the family could re-enroll for health benefits during any open enrollment period, with no reference to any added requirement for a disabled dependent. If properly informed at that time, respondent could have enrolled the family for medical benefits at any time before Brock's 26th birthday to continue his coverage.

(C) If enrollment was denied, although Brock was presently getting medical coverage under Mrs. McDonald's CalSTRS plan, he will not be covered after Mrs. McDonald retired.

(D) Brock had been continuously covered by the CalPERS dental plan, which is a health benefit, and this should satisfy the requirement for continuous coverage under a CalPERS plan.

27. CalPERS replied by letter dated November 30, 2018 (exhibit 7), which again related that respondent cancelled family medical benefits in 2000, and that Brock was enrolled as a disabled dependent for dental benefits effective January 1, 2011. "Had Mr. McDonald been enrolled in health benefits at that time, Brock would also have been eligible for continuance as a Certified Disabled Dependent for health

benefits. Per Gov. Code [*sic*] 599.501(g) a disabled dependent must have continuous health coverage once certification has been determined." (*Ibid.*) With regard to the meeting with Mr. Santiago in December 2009, the letter notes: "After researching the notes on Mr. McDonald's account from this meeting we could not find any record of a conversation regarding disabled dependent enrollment." (*Ibid.*)

28. Mr. Parrish responded by letter dated December 13, 2018 (exhibit 8). He noted that the CalPERS letter did not address his previous references to the circumstances under which respondent chose to relinquish medical coverage and receive the Coben stipend, including that there was no disclosure of the effect on his disabled son. With respect to the meeting with Mr. Santiago, Mr. Parrish wrote that the lack of notes was not determinative, as Mr. Santiago assisted respondent by explaining retirement options and in filling out paperwork after respondent and his wife informed Mr. Santiago that they wanted to assure benefits for their disabled son. The McDonalds asked about re-enrollment in the CalPERS plan and coverage for Brock, and were informed by Mr. Santiago that re-enrollment could occur in any open enrollment period, including Brock, so long as he met the requirements of a disabled dependent. There was no mention of continuous enrollment before age 26.

29. The Statement of Issues includes that, in his December 13, 2018 letter, Mr. Parrish claimed "that a correctable mistake was made by alleging that, in 2013, a CalPERS representative informed [respondent] that [he] could re-enroll himself and his family during any open enrollment period," and that the appeal is limited to "whether a correctable mistake occurred that would allow Brock to be enrolled onto respondent's health plan as a disabled dependent." (Exhibit 1, Statement of Issues, page 14, lines 8 through 16.) The Statement of Issues is inaccurate, in that Mr. Parrish's

December 13, 2018 letter makes no mention of a claim of correctable mistake. Rather, this is CalPERS's characterization of the contentions raised by respondent. Although the subject of a correctable mistake may be considered, it is not the only issue presented by the pleadings.

30. Ms. Martinez was asked why there was no error that could be fixed. She replied that Brock, a disabled dependent, did not have continuous coverage from before he was age 26. She confirmed that Government Code section 20160 allows correction of an error or omission, but only under the circumstances and in the manner covered by the Code section. Ms. Martinez stated that she was not aware of any CalPERS policy about the subjects included in the Customer TPR of an in-person meeting with a customer, but noted that she does not physically meet with people but, rather, has telephone or email contacts.

## **LEGAL CONCLUSIONS**

1. When reviewing the denial of an application for benefits, the burden of proof is on the applicant. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits].) Here, the burden of proof is on respondent.

2. This case is governed by various sections of the Government Code, some of which are summarized or quoted below.<sup>3</sup>

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<sup>3</sup> Statutory references are to the Government Code unless otherwise indicated.

3. Various words and terms are defined in the code, including "Board" (Code section 22762), "Employee" (Code section 22772), "Family member" (Code section 22775), and "Health benefit plan (Code section 22777). If an employee or annuitant (retiree) is dissatisfied with any action related to coverage, an administrative hearing may be scheduled (Code section 22848), under the Administrative Procedure Act (Code section 22796).

4. This case is also governed by various sections of the California Code of Regulations, title 2 (Regulation), some of which are summarized or quoted below.

5. Various words and terms are defined in the Regulation section 599.500, including "Enroll" (subdivision (f)), "Cancellation" (subdivision (i)), "Eligible" (subdivision (k)), and "child" (subdivision (n)). Under subdivision (p), a "Disabled Child" means "a child, as described in Government Code section 22775 and section 599.500, subdivision (n) or (o), who at the time of attaining age 26, is incapable of self-support because of a physical or mental disability which existed continuously from a date prior to attainment of age 26 and who is enrolled pursuant to section 599.501, subdivisions (f) and (g), until termination of such incapacity."

6. Regulation section 599.501, subdivisions (f) and (g), refer to coverage of a disabled child due to enrollment in a health benefits plan. Two versions are relevant—the version before the Obamacare extension, and the version after the extension. Before the extension, the following language applied:

(f) A family member who is a disabled child over age 23 is to be enrolled at the time of the initial enrollment of the employee or annuitant.

(g) A family member who is a disabled child over age 23 is to be continued in enrollment only if he or she is then enrolled, provided that no such child shall continue to be enrolled unless satisfactory evidence of such disability is filed with the Board during the period commencing 60 days before and ending 60 days after the effective date of the initial enrollment or the child's 23rd birthday, whichever is pertinent.

After the extension, operative July 1, 2013, the following language applied:

(f) A disabled child as described in section 599.500, subdivision (p), who is age 26 or over is to be enrolled at the time of the initial enrollment of the employee or annuitant provided that satisfactory evidence of such disability is filed with the Board within 60 days of the initial enrollment.

(g) A disabled child, as described in section 599.500, subdivision (p), who attains age 26 is to be continued in enrollment if he or she is enrolled at the time he or she attains age 26, provided that satisfactory evidence of such disability is filed with the Board during the period commencing 60 days before and ending 60 days after the child's 26th birthday.

7. Under Code section 20160, corrections can be made to a retiree's account under certain conditions. Code section 20160 states, in pertinent part:

(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. [1]

(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.

8. Under Code section 20160, subdivision (a)(2) above, an error or omission is correctible if it is 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." Code of Civil Procedure 473 states, in pertinent part: "(b) The court may, upon any terms as may be just, 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." There is no further definition of these terms in the statute; however, case law has applied the terms to various situations to determine whether or not a factual scenario constitutes correctable mistake, inadvertence, surprise, or excusable neglect.

9. In *Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, a police chief elected a disability retirement rather than a service retirement under the mistaken belief that he would receive larger payments. When he discovered that he was wrong, he sought to change what would otherwise be an irrevocable election. CalPERS did not allow the change, claiming the election was irrevocable. The court examined the effect of Code section 20180 which was, at that time, the statute allowing correction of actions "because of inadvertence, oversight, mistake of fact, mistake of law, or other cause." (Code section 20180 was repealed in 1989. Code section 20160 was added in 1995.) The court interpreted Code section 20180 as

"broadly available for the correction of errors or omissions made by employees, their employers, members or beneficiaries, or the system, and resulting from inadvertence, oversight, mistake of fact, mistake of law, or other cause. In light of this interpretation, we think that an employee's inadvertent or mistaken election between disability and service retirement is embraced by the statute. We can 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. ... An employee's election of disability retirement and late recognition that he should have elected service retirement may thus be viewed as a failure to timely request service retirement." (*Id.* at p. 566.) The court also cited "the established policy requiring a liberal interpretation of pension statutes in favor of the applicant." (*Id.* at p. 565.) The court did not require that the former police chief actually research or inquire whether his belief was in fact accurate.

10. In *Button v. Board of Administration* (1981) 122 Cal.App.3d 730, a district attorney's investigator retired on a service retirement but then sought to change his election to a disability retirement when he allegedly learned that he was in fact disabled. The court held that if he was disabled when he retired, then his and CalPERS' belief that he was not disabled was a mistake of fact, and the retiree should be allowed to correct his status. Again interpreting Code section 20180, the court noted that "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," citing *Campbell v. Board of Administration* (1980) 103 Cal.App.3d 565, 571. Further, "[s]ection 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 postretirement

changes in status." (*Button v. Board of Administration, supra*, 122 Cal.App.3d at p. 737, footnote omitted.) CalPERS contended Button made a mistake of judgment and was negligent in not knowing he was disabled. Making a comparison between Button's situation and that of police chief Rodie, the court stated Button's "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 to diagnosis at the time of his retirement." (*Id.*)

11. Lastly is a teacher retirement case under the error correction provisions of Education Code section 22308, which is worded identically to Government Code section 20160. In *Welch v. State Teachers' Retirement System* (2012) 203 Cal.App.4th 1, the school teacher was physically attacked by a group of students. She inquired on the phone with an employee of the California State Teachers Retirement System (CalSTRS) as to whether she would be eligible for a disability retirement and was erroneously told that she would not be eligible because she did not have five years' service at the time of the attack. Six years later, she learned that she would have been eligible due to an exception for disability resulting from unlawful acts of bodily injury. She then applied but was denied because the application was untimely. The Court ruled that she was entitled to a hearing to determine if she was in fact disabled following the attack. (*Id.* at pp. 26-27.) The Court noted that, had CalSTRS not provided misinformation, Welch may have applied earlier and her application would have been treated as timely. (*Id.* at pp. 22-23.)

12. Respondent raises several events and time periods that resulted in the present scenario. First is his election in 2000 to accept a Coben stipend in exchange for

cancelling family medical benefits. The CDC did not inform respondent of the effect of cancellation on the ability to have CalPERS provide medical benefits for Brock in the future. Based on the omission of information covering this situation, respondent made the mistake of cancelling family medical benefits. However, respondent made no inquiry about the effect of cancellation on the ability to obtain medical coverage for Brock in the future. It cannot be concluded that, in the absence of bringing the particular circumstances of Brock's disability to the attention of the CDC, that the CDC made an error or omission. Respondent did not make an inquiry that would be made by a reasonable person under the circumstances. Therefore, this mistake cannot be corrected under Code section 20160.

13. The next events and time period to be examined are the meeting with Mr. Santiago on December 8, 2009, and respondent's retirement that same month. The specific testimony of respondent and Mrs. McDonald about the subjects of discussion are given more weight than Mr. Santiago's version, for several reasons, including that Mr. Santiago has no recollection of the meeting and relies on his notes and a policy for the notes to be inclusive of all subjects discussed. He concluded that the subjects of Brock's disability and continuing medical benefits were not discussed because he made no notes of those subjects. Mr. Santiago's credibility is negatively affected by his lack of recollection of the meeting. (See Evid. Code, §780, subdivision (c) [credibility is affected by the extent of a witness's capacity to recollect a matter].)

14. Respondent and Mrs. McDonald have specific recollection that they informed Mr. Santiago that their son Brock was disabled, and respondent inquired if he needed to put the family back on his medical plan. Respondent and Mrs. McDonald testified credibly that Mr. Santiago replied that they could apply for medical benefits

during any open enrollment period. Therefore, respondent did not add medical benefits at that time, when Brock was age 22.

15. Mr. Santiago made an omission by not providing complete information about the availability of medical benefits to a disabled child to an employee considering retirement. The failure of respondent to apply for family medical benefits at that time was a mistake. Respondent made the inquiry that was called for and reasonable under the circumstances. This mistake should be corrected by CalPERS.

16. Respondent contacted CalPERS in June 2013 to inquire about the health enrollment status and process for Brock, who would become age 23 in August 2013. The CalPERS database incorrectly indicated that Brock did not have dental coverage at that time, despite respondent having submitted the necessary documents for CalPERS to review and certify that Brock continued to be disabled. Brock was recertified as a disabled dependent for purposes of dental benefits in October 2018.

17. During open enrollment in September 2018, respondent applied for enrollment for medical coverage for his family, including Brock. Coverage was provided for respondent and Mrs. McDonald, but denied for Brock. It is this denial that has been appealed by respondent.

18. The language of Code section 20160, as informed by the case law, supports the conclusion that Brock, certified as a disabled dependent, should be enrolled in medical coverage as well. Under the totality of the circumstances, the error or omission, as result of mistake, inadvertence, surprise, or excusable neglect, of respondent in not seeking medical coverage sooner, and the error or omission, as result of mistake, inadvertence, surprise, or excusable neglect, of CalPERS in denying

the medical benefits to Brock as a disabled dependent, should be corrected so as to provide medical benefits pursuant to the application submitted by respondent in September 2018.

19. Respondent discovered that a correction was needed in October 2018, when CalPERS informed him that Brock would not be added to the medical coverage he applied for on September 19, 2018. A retroactive change to any earlier time is not supported by the law or the evidence.

## **ORDER**

The appeal of respondent Eddie McDonald of the decision by the Board of Administration, California Public Employees' Retirement System to deny enrollment of Brock McDonald for medical benefits in September 2018 is sustained, and the enrollment is granted as of September 19, 2018.

DATE: December 3, 2019

DocuSigned by:  
*David Rosenman*  
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DAVID B. ROSENMAN

Administrative Law Judge

Office of Administrative Hearings