

ATTACHMENT A

RESPONDENT'S PETITION FOR RECONSIDERATION



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Attachment A

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January 17, 2020

VIA FACSIMILE & PRIORITY EXPRESS MAIL

Board of Administration
State of California Public Employees' Retirement System
Attn: Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
PO Box 942701
Sacramento, CA 94229-2701

**Re: RESPONDENT'S AMENDED PETITION FOR
RECONSIDERATION¹
In the Matter of the Appeal of Dina Bitton
as Beneficiary of Retiree Philip S. Ryan, Deceased
Case No. 2019-0388
OAH Case No. 2019060147
CalPERS Reference No. 4525394689**

To the Board of Administration:

In this letter, Respondent Dina Bitton ("Bitton") submits her Petition for Reconsideration of the Board of Administration's December 23, 2019 Decision in the above matter.

A grave injustice will result if Bitton is denied lifetime benefits. First, the only relevant time period in this matter commenced on March 27, 2017, when Bitton's now-deceased husband (CalPERS's retiree Philip Ryan ("Ryan")) contacted CalPERS to confirm that Bitton was his lifetime beneficiary. Second, the evidence conclusively shows that the subsequent negligence of CalPERS was the sole and proximate cause of the failure to timely implement Ryan's intent that Bitton receive lifetime benefits.

On December 2, 2019, Ms. Bitton submitted her Respondent's Argument to the Board (together with exhibits admitted at the Administrative Law Hearing) asking it to decline adoption of the Proposed Decision of the Administrative Law Judge ("Proposed ALJ Decision") and instead confirm her lifetime monthly benefits and health coverage as the surviving spouse of CalPERS

¹ The amendment is to footnote 3 (formerly footnote 2) only.

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retiree Ryan. Subsequent to the submission of her Respondent's Argument, but before the Board's consideration, CalPERS (by Senior Attorney Rory J. Coffey) submitted its December 18, 2019 Staff Argument in favor of the Proposed ALJ Decision. Ms. Bitton had no opportunity to respond to the Staff Argument.

CalPERS has not disputed that Ms. Bitton's right to continuing monthly benefits and health care coverage as the surviving lifetime beneficiary of her husband (Ryan) is fundamental in nature, and that CalPERS owed a heightened duty to protect Ryan's and Bitton's interests and prevent conduct that might have induced Ryan to believe that he was not required to take further action necessary to perfect those interests.

CalPERS' Initial Failure to Warn Ryan

The relevant time period in this case commenced on March 27, 2017 when Ryan initiated an inquiry to CalPERS. At that time he sought to confirm that Bitton was his lifetime beneficiary. The CalPERS "Touch Point" notes for that date confirm that Ryan, "[C]alled to inquire what spouse will receive when he passes away. Specifically he wants to make sure she's eligible to receive a monthly benefit so he's assured the health coverage will continue for the spouse as a survivor. Please send to verified address." (CalPERS Exh. 18 at p. 10; Bitton Exh. 217 at p. 10 [same].)² The Staff Argument agreed that Ryan made this inquiry. There is no evidence that Ryan was informed by CalPERS during his March 2017 call about any forms to complete or that he was told he had to submit something in writing or do anything further at all to confirm Bitton as his lifetime beneficiary. This fact is undisputed.

It is also undisputed that Ryan's March 2017 request was immediately forwarded to a CalPERS analyst via the CalPERS "workflow" system by its call center representative. (Tr. at 23:19-25, 25:1-5, 34:1-9 and 34:21-35:6.) The fact that Ryan's intent had not been implemented and that further action was needed by him to perfect Bitton's lifetime beneficiary interest had to have been obvious to any CalPERS analyst upon review. CalPERS should have (but did not) undertaken immediate steps to warn Ryan, especially since CalPERS' witness (Mr. Ball) testified at the hearing before the Administrative Law Judge that Ryan could have carried out his intent to designate Bitton as his lifetime beneficiary without waiting for the issuance of a CalPERS' "death estimate letter." (Tr. at 59:19-61:6.) The Staff Argument does not address CalPERS' negligent failure to act.³

² References are to the excerpts of the record before the Administrative Law Judge submitted by Bitton to the Board with her December 2, 2019 Respondent's Argument.

³ The Proposed ALJ Decision assumed (without evidence) that Ryan knew that he "could have submitted the modification form without waiting for receipt of the letter" from CalPERS in response to his inquiry. (Proposed Decision at pp. 7-8.) The evidence before the Administrative Law Judge called for exactly the opposite conclusion because CalPERS Publication No. 98 ("What You Need To Know About Changing Your Beneficiary After Retirement"), admitted into evidence at the Administrative Law Hearing, stated otherwise: "Before you can made an election to add or change a payment option beneficiary, you must obtain an estimate of your new retirement allowance" (Tr. at 57:12-61:6; Bitton Exh. 223 at p. 7.) Further, in its recently published *Perspective* newsletter ("Marriage After Retirement," p. 5, Winter 2020) CalPERS

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CalPERS' Seven Month Delay

CalPERS' negligence did not end with its initial failure to alert Ryan that further action by him was needed. The Staff Argument also completely ignored the fact that CalPERS negligently delayed alerting Ryan to the fact that further action would be required on his part for approximately *seven months* – over twice the CalPERS' maximum 90-day processing time. This extreme delay was entirely the fault of CalPERS. (Tr. at 41:6-8 [processing time is *within* 90 days]; 61:22-63:9 [Ryan would have timely perfected Bitton's interest if notified within 90 days].) When it did finally contact Ryan *seven months* later, CalPERS acknowledged that the information was "important" and admitted its delay in providing it. (CalPERS Exh. 4; Bitton Exh. 208 [same].)

It is clear that after Ryan initiated contact with CalPERS in March 2017, it was CalPERS (not Ryan) that was negligent. (Tr. at 39:22-40:8.) The testimony at the hearing before the Administrative Law Judge hearing established the critical fact that had CalPERS responded within the 90-day deadline, Ryan could and would have timely complied with all of CalPERS' procedural requirements and there would have been no question about Bitton's entitlement to lifetime monthly benefits and healthcare coverage. (Tr. at 61:25-63:9.)

CalPERS' seven months delay was inexcusable. CalPERS' never informed Ryan that it was experiencing delays regarding handling of retirees' inquiries. (Tr. at 57:12-18.) The Proposed ALJ Decision wrongly elevated CalPERS' internal operating problems over the substantive rights of Ryan and Bitton.

Bitton is Entitled to Relief

Bitton is entitled to relief under Government Code section 20160(a). She should not be penalized for CalPERS' negligence. She is also entitled to relief under the doctrine of equitable estoppel which may be applied against the government when justice and right require it. For this reason, estoppel calls for consideration of the negligence of CalPERS as well as the hardship to Bitton. CalPERS' seven month silence was sufficient to establish an estoppel when (as here) it knew or should have known that Ryan's intent had not been implemented; in this case, CalPERS' seven month silence was implicit advice that no further action was required. And estoppel is more readily established where, as here, the conduct of a public entity has caused a failure to comply with a procedural pre-condition to eligibility that results in great hardship to the claimant.

Conclusion

All mitigating factors weigh in favor of relief. Ryan and Bitton were without fault. CalPERS' unreasonable and negligent initial failure to act upon receipt of Ryan's March 2017

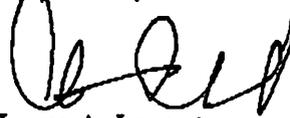
again stated that a retiree seeking to add a spouse as a lifetime beneficiary must first "obtain an estimate of [his or her] new retirement allowance." Although the CalPERS article explained that the estimate can now be obtained online, it notes that a written request can still be made if the retiree is unable to do so online. In its October 17, 2017 letter to Ryan (the letter sent over seven months after Ryan's March 27, 2017 inquiry), CalPERS did not provide an estimate of his new retirement allowance and instead referred Ryan to its "new" online process to obtain that calculation. (CalPERS Exh. 4; Bitton Exh. 208.)

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inquiry and its subsequent seven month delay were the sole and proximate causes of the harm in this case. Bitton should not bear the consequences of CalPERS' negligence and should be granted relief.

Based on the totality of the circumstances and in the interest of justice and fairness, Bitton requests that the Board of Administration reconsider its Decision, reject the Proposed ALJ Decision, and direct that Mrs. Bitton be awarded lifetime monthly benefits and health care coverage as the surviving spouse of Philip S. Ryan.

Respectfully Submitted.



James A. Lassart
Adrian G. Driscoll

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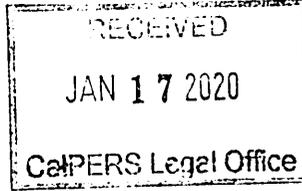
Cc: Dina Bitton
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From: Anne G. Montastier Date: January 16, 2020

Case Name: In the Matter of the Appeal of Dina Bitton
Case No. 2019-0388 Client ID: ZZ:TM.989126.1
OAH Case No. 2019060147

Re: Amended Petition for Reconsideration Pages: 5

Urgent For Review See Attached Please Reply Original to Follow

COMMENTS:

Good morning,

Attached please find a copy of Respondent Dina Bitton's Amended Petition for Reconsideration in the above referenced matter.

Very truly yours,

Anne Montastier
Legal Assistant to James A. Lassart and Adrian G. Driscoll

*If you have trouble with the transmission of this facsimile,
please call Anne G. Montastier*

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