ATTACHMENT A

THE PROPOSED DECISION

Attachment A

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

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

ERNEST C. SHEPHERD, Respondent

and

CALIFORNIA CORRECTIONAL INSTITUTION-TEHACHAPI, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION

Case No. 2019-0437

OAH No. 2019090763

PROPOSED DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on March 11, 2020, in Bakersfield, California.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED July 21 20 20

Complainant California Public Employment Retirement System (CalPERS) was represented by Kevin Kreutz, Senior Attorney. Ernest C. Shepherd (Respondent) was present and represented himself. There was no appearance by the California Department of Corrections and Rehabilitation (Department), despite proper notice.

Evidence was received and argument was heard. The record was held open so that Respondent could copy records he moved into evidence. The parties agreed that Respondent would give the documents to Mr. Kreutz, who would copy them and file them with OAH. The record was held open until March 30, 2020, to do so, and for Mr. Kreutz to comment on the exhibits.

On April 2, 2020, Mr. Kreutz filed 353 pages of the Respondent's documents with OAH, along with a letter noting that there were another 1,300 pages of documents, apparently from the CalPERS file. Mr. Kreutz informed the ALJ and Respondent that he had ordered a transcript, and he commented that the medical records that he had filed with OAH, exhibits A through C, and part of exhibit D, appeared to be administrative hearsay.

Mr. Kreutz sought further input from the ALJ, and noted that Respondent should be allowed to comment as well. At this time the Covid-19 pandemic was in full swing, and OAH effectively closed.

Thereafter, on May 2, 2020, the ALJ ordered the record re-opened so that the balance of Respondent's exhibits could be filed, and so that Complainant and Respondent could file comment on the evidence. The parties were given until June 19, 2020 to comply with the order.

Complainant filed some documents, and further submitted a DVD identified as containing "Re-opening Documents," containing the balance of Respondent's exhibits,

the balance of exhibit D. That DVD is received as exhibit 13. Mr. Kreutz accompanied the DVD with a letter dated June 8, 2020, which argues the case. That letter is identified as exhibit 14.

Respondent's exhibits A through D are received in evidence. Respondent's written argument is identified as exhibit E.

In his June 8, 2020 letter, Mr. Kreutz noted that Respondent's exhibits contained medical records that should be sealed. Exhibit A through D, and 13, will be sealed by a protective order that will issue separately from this Proposed Decision.

The matter is deemed submitted for decision on June 18, 2020.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant brought this action in its official capacity.

2. Respondent was employed by the Department at its facility known as the California Correctional Institution-Tehachapi, as an Electrician II. By that employment, Respondent was a safety member of CalPERS subject to Government Code section 21115.[1]

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[1] All further statutory citations are to the Government Code unless otherwise noted.

3. On February 8, 2011, Respondent signed an application for service retirement, and he retired for service effective February 5, 2011.

4. Thereafter, Respondent submitted an application for industrial disability retirement (the Application), requesting such retirement effective February 4, 2011. The Application was received by CalPERS on August 24, 2018, over seven years after Respondent's service retirement.

5. After various reviews and some correspondence between Respondent and CalPERS staff, CalPERS determined that the Application was untimely. CalPERS also considered if the Application could be received under the rule that could allow for a late submission, on the theory that the late filing resulted from some mistake or excusable neglect. However, CalPERS determined that the grounds for the exception could not be established. The exception mentioned is governed by section 20160.

6. CalPERS informed Respondent of its determination, and it informed him of his appeal rights. Respondent requested an appeal in a timely manner, and this proceeding ensued.

7. The Department, despite notice, did not appear at the hearing in this matter.

8. All jurisdictional requirements have been met. The main issue is whether the Application could be accepted because Respondent's late filing was delayed by mistake or excusable neglect.

Respondent's Employment and Disability History

9. Respondent began working for the Department in December 1996. His job forced him to work in and around the prison sewage system. According to the

Application, Respondent's disability occurred on June 8, 2008. In the Application, and at the hearing, Respondent attributed his disability to working in plumbing chases and the waste water facility, apparently falling in both locations. He described his disability as "HepC," or Hepatitis type-C, contracted by close contact with the sewage system. In Respondent's application, he also stated he had liver cancer, and had to have a liver transplant, and "LT wrist." (Respondent testified that the liver transplant occurred in the fall of 2015.) Where the Application asked for "other information you would like to provide," Respondent wrote "I have been thru (sic) hell and back." (Ex. 10, p. 2.)

10. The evidence establishes that Respondent's ailments have been hellish indeed. Respondent's bone marrow essentially died, and he had to have a bone-marrow transplant. He had to have several hernia surgeries. The various drug regimens that were imposed on him due to his ailments had serious side effects, including the damage to his bone marrow. To add to his problems, he was being treated by physicians at Cedars-Sinai Hospital in Los Angeles, while living in the Tehachapi area, a commute of over 100 miles each way, with much of that commute likely to be in high density traffic. Respondent was required to make the trip approximately one time per week. During the hearing, he made clear that he was able to get through his illnesses and treatments only with the help of his devoted wife.

11. After leaving the Department, Respondent was able to find employment with the federal government. He cannot work as an electrician in the usual sense, i.e., he cannot install electric components, pull wire, and so forth, in part because his mobility is limited. Instead, he works in an office, planning electrical work and doing cost estimates. He will be retiring from that position soon, because his physical limitations are impinging on his ability to do his job.

12. Respondent filed a workers' compensation claim in 2008, and was represented by an attorney in that matter. He receives some benefits as a result of the workers' compensation claim.

Respondent's Communications with CalPERS Prior to the Application

13. At the time that he applied for service retirement, Respondent had been pursuing his workers' compensation claim for at least two years, and he had been treating his disability for at least two years before he made his service retirement application. (See ex. 12, p. 1, response to question 1.)

14. On October 14, 2014, nearly four years after his service retirement, Respondent called CalPERS and inquired about disability retirement. A staff person answered questions about disability retirement, and sent Respondent a CalPERS publication pertaining to industrial disability retirement.

15. On February 22, 2016, and on March 1, 2016, Respondent again contacted CalPERS and spoke to CalPERS staff about disability retirement. Staff ordered the disability retirement election application publication for Respondent and the staff person explained aspects of applying for disability retirement.

16. On August 12, 2016, Respondent again spoke to CalPERS staff about retirement issues, including disability retirement. It appears from the records that he went to a CalPERS office; it is clear that he spoke to Wendy Cabrera.[2] In a note about disability retirement, Cabrera stated that the member—Respondent—was service

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[2] One of the notes states that Respondent submitted a post retirement lump sum designation, and that Cabrera "made mbr copies." (Ex. 9, p. 8.)

retired by "now wants to submit for IDR." Her notes indicate she discussed the application, informed him that CalPERS would want proof of his illness or injury from when he was working, while retired, and at the time of application. The note ends with the statement that "Mbr will also include written statement stating why it was not submitted back when he retired." (Ex. 9, p. 8.)

17. Respondent was in communication with CalPERS staff on several occasions after the August 12, 2016 meeting, about various aspects of his retirement, though disability retirement wasn't the topic. Thus, he had telephone contact on September 14 and 19, 2016, and on January 3, 2017. Between August 12, 2016 and January 3, 2017, the notes indicate that staff was processing Respondent's requests not related to disability, that documents were mailed to Respondent, and he mailed them back to CalPERS. (Ex. 9, p. 6, at November 7, 2016 and December 20, 2016 entries.) However, no disability retirement application was made until August 2018, as noted in Factual Finding 4.

Post Application Communication

18. On September 20, 2018, CalPERS wrote Respondent and informed him that as a general rule, one could not change their retirement status from service retirement to disability retirement after they had retired. The letter (exhibit 11) also explained that an exception could be made where there was an error or omission that resulted from inadvertence, mistake, surprise, or excusable neglect. CalPERS also explained that where a member didn't make an inquiry that a reasonable person would make, they could not avail themselves of the exception.

19. The September 2018 letter sought information from Respondent regarding his circumstances at the time he left the Department. A number of questions

were posed in the letter, such as "what specific disability prevented you from performing your duties from 2/3/11 to the present?" or if a physician instructed him to stop working because of permanent disability. (Ex. 11, p. 1.) Other questions pertained to whether Respondent filed a workers' compensation claim, and when he first knew about industrial disability retirement or when he could submit a claim.

20. Respondent provided a response to the September 20, 2018 letter by making a photocopy and writing a response after the typed questions. Thus, he wrote that he had been under medical care when he retired. To the question regarding whether a doctor had determined he was incapacitated, he responded "yes & no." (Ex. 12, p. 1.) He amplified the answer by writing that his doctors told him to work as long as he could. (*Id.*) He wrote that he did not advise his employer that he had to retire because of disability and he wrote that he did not know about CalPERS's policies about the retirement system, and that he did not know about disability retirement in 2011. He wrote that he learned about the rule of section 20160 (potentially excusing late filing) when a friend told him about it. (*Id.*, p. 2.) But one response indicated Respondent may have known about disability retirement in 2006 or 2007. (*Id.*, p. 3.)

Respondent's Documentary Evidence

21. Respondent's documentary evidence indicates that he has been a very sick man, as indicated in Factual Findings 9 and 10. However, they do not support the contention that his illness was so debilitating to his mental processes that he could not understand his rights, or act upon them, especially for a period of years. The medical records do not explain the inaction following Respondent's communications with CalPERS, described in Factual Findings 13 through 17.

LEGAL CONCLUSIONS

1. Jurisdiction to proceed in this matter pursuant to California Code of Regulations, title 2, sections 555.1, 555.2, and 555.4 was established, based on Factual Findings 1 through 8.

2. Under Code section 20160, CalPERS may, in its discretion, correct the errors or omissions of a member or beneficiary, on a showing that the error or omission was the result of mistake, inadvertence, surprise or excusable neglect. Other requirements to obtain this relief are set out in the statute, such as the requirement that the request to correct the error is made within a reasonable time after discovery of the need for correction. The failure of a member to make reasonable inquiry does not establish an error or omission correctable under section 20160.

3. CalPERS is correct in its assertion that grounds do not exist to find that there has been excusable error or omission on Respondent's part. The evidence establishes that Respondent retired while he was very ill. He first inquired about disability retirement nearly four years after he retired. (Factual Findings 4, 14.) He did not submit an application at that time. He inquired again in 2016, five years after he retired, and he again received information from CalPERS. (Factual Finding 15.) But, he did not apply until another two years had passed.

4. The Application was submitted over seven and one-half years after Respondent sought service retirement, and that delay cannot be excused based upon this record. Unfortunately, Respondent's Application must be denied.

ORDER

The Appeal of Ernest C. Shepherd from CalPERS refusal to accept his Application for Disability Retirement is denied.

DATE: July 20, 2020

DocuSigned by:
Joseph D. Montoya
JOSEPH D. MONTOYA
Administrative Law Judge
Office of Administrative Hearings