

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Ernest C. Shepherd worked for the California Department of Corrections and Rehabilitation, California Correctional Institution—Tehachapi (CDCR) as an Electrician II. By virtue of his employment, Respondent is a state safety member of CalPERS pursuant to California Government Code section 21115.

Respondent submitted a retirement application on February 8, 2011, and retired for service effective February 5, 2011. More than 7 years later, on August 24, 2018, Respondent applied for industrial disability retirement (IDR). CalPERS determined that Respondent's IDR application was not timely. CalPERS further advised Respondent that unless his approximate 7-year delay in applying for IDR was the result of an error or excusable neglect that CalPERS could remedy by law, his IDR application must be denied. After reviewing the information Respondent provided, CalPERS determined that it could not remedy Respondent's delay, and CalPERS upheld the denial of his IDR application.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on March 11, 2020. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

At hearing, Respondent testified on his own behalf and submitted documents as evidence. Respondent testified that his disability occurred on or about June 8, 2008, when he fell while working in a plumbing chase and waste water facility. Respondent claimed that he contracted Hepatitis C from being in close contact with the sewage system. Respondent also testified that he had liver cancer, a liver transplant, and other conditions. Additional testimony and medical records revealed that Respondent's other medical conditions included the need for a bone marrow transplant, several hernia surgeries, and related conditions.

After he retired from state service, Respondent obtained work doing electrical planning and cost estimating for the federal government. Respondent testified at hearing that he plans to retire soon from his job in federal service, claiming that his physical limitations prevent him from working in that position as well. Respondent filed a workers' compensation claim in 2008 and was represented by counsel throughout that process.

Relative to CalPERS, the evidence offered at hearing demonstrated that Respondent had been pursuing his workers' compensation claim for approximately two years by the time he applied for service retirement in 2011 and had been treating his purported disability for two years as well. In October 2014, almost four years after retiring for service, Respondent called CalPERS and asked about disability retirement. CalPERS' staff answered his questions and sent him a publication. Respondent called and received IDR information and documentation from CalPERS again in February 2016, March 2016 and August 2016. Respondent did not apply for disability retirement, however until August 2018.

In response, CalPERS advised Respondent that he could not change his retirement status from service to disability after he had already retired for service. A letter from CalPERS offered into evidence at hearing explained that an exception could be made where there was an error or omission that resulted from inadvertence, surprise, mistake, or excusable neglect. (Cal. Gov. Code §20160.) CalPERS also advised that if Respondent failed to make an inquiry that a reasonable person would have made under the circumstances, CalPERS would not be able to correct the error or omission. Respondent advised CalPERS in response that even though he was receiving medical care when he retired, his doctors told him to work as long as he could. Respondent also noted that he did not tell his employer that he needed to retire for disability. The letter also suggested Respondent knew about the ability to apply for IDR back in 2006 or 2007, several years before he actually applied for service retirement.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent's evidence demonstrated he had dealt with significant medical issues. They did not however, support the argument that Respondent's medical condition "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." For these reasons, the ALJ affirmed CalPERS' determination that "grounds do not exist to find that there has been excusable error or omission on Respondent's part," and denied Respondent's appeal.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

September 16, 2020

Kevin Kreutz
Senior Attorney