

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Jeffrey G. Lashmet (Respondent) worked as a Fire Captain for Respondent City of El Cajon (City). By virtue of his employment, Respondent was a local safety member of CalPERS.

Respondent applied for service retirement on March 28, 2017. Respondent was retired for service effective May 20, 2017.

Three years later, Respondent applied for industrial disability retirement on May 29, 2020 based on his diagnosis of prostate cancer. Respondent requested an industrial disability retirement date of May 19, 2017.

CalPERS sent Respondent a questionnaire, on June 3, 2020, noting that in general, a member who has service retired cannot change his or her retirement status unless there is a correctable error as defined under Government Code section 20160. CalPERS requested Respondent provide additional information regarding his claimed disability.

In response to the question of whether Respondent was under medical care for his disability at the time of service retirement, Respondent wrote that he had prostate cancer at the time he retired, but he was not diagnosed until a biopsy in November 2017 confirmed the cancer.

In response to further questions, Respondent indicated he did not advise the City of his disability or contact CalPERS because he did not know he had cancer at the time he service retired.

Based on the information received from Respondent and the City, CalPERS determined that Respondent did not make a correctable mistake that would allow him to change his service retirement to an industrial disability retirement.

CalPERS notified Respondent of its determination and his right to appeal by letter dated July 30, 2020. 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 May 12, 2021. Respondent represented himself at the hearing. The City Attorney represented the City 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 the hearing, CalPERS presented the testimony of program staff as well as documentary evidence, including a Customer Touch Point report. Touch Point is CalPERS' computerized system for documenting action taken involving a member's account. All phone calls and correspondence from members to CalPERS are documented in the Touch Point system. A Touch Point report for Respondent was received as evidence.

The Touch Point notes indicate that after Respondent's service retirement, he contacted CalPERS at least three separate times to inquire about disability retirement between 2017 and 2020. CalPERS mailed Respondent the "Guide to Completing Your CalPERS Disability Retirement Election Application" (PUB-35) at least three times; responded to Respondent's telephone calls regarding disability retirement numerous more times in those years; and counseled Respondent in-person regarding disability retirement at least once.

The PUB-35 is a comprehensive booklet provided by CalPERS to members who indicate interest in filing for disability retirement. It explains how to file for disability retirement and includes all necessary forms to apply. The record shows that on December 12, 2017, Respondent called CalPERS and was sent a copy of PUB 35. Thereafter, on January 5, 2018, Respondent visited CalPERS' Regional Office and again was provided a copy of PUB 35 plus information regarding filing a disability retirement application. He was informed that the City made the determination of whether or not he was disabled, not CalPERS. Later, on August 23, 2018, Respondent again visited CalPERS' Regional Office, was given counseling and received another copy of PUB 35. Respondent called several more times with questions about disability retirement between 2019 and 2020. Notwithstanding all of the information Respondent received over the years, he waited until May 29, 2020 to apply for disability retirement.

Respondent testified on his own behalf. Respondent's testimony was consistent with his responses to the questionnaire and his appeal letter. He believes CalPERS should have provided more guidance and assistance in helping him change his retirement status from service to disability retirement. Respondent testified that he was diagnosed with cancer in November 2017. According to his workers' compensation physician, his cancer was caused by his job and was present, yet undiagnosed, while he was working as a Fire Captain. Respondent testified that he was provided erroneous information by CalPERS and his workers' compensation attorney after he was diagnosed with cancer, because he was led to believe that he needed to have a settled workers' compensation claim before he was eligible to submit an industrial disability retirement application. There is no evidence in the record, including from the Touch Point reports, which supports Respondent's claims.

Respondent argued at the hearing that he should be eligible for industrial disability retirement because his cancer was caused by his job as a Fire Captain.

Alternatively, Respondent argued that his mistake was to have retired too early. When questioned about his decision to service retire, Respondent stated he had worked for

the City for 37 years, his wife was urging him to retire, and he was not getting along with the new management in the fire department. He admitted he was not physically incapacitated in May 2017, at the time he retired.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ correctly noted that under Government Code sections 21154 and 21252, a disability retirement application must be made while the member is in service or while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application. The ALJ determined that even if Respondent could show he was incapacitated to perform the duties of a Fire Captain in November 2017, when he was diagnosed with prostate cancer, he could not show incapacitation beginning on the date he separated from employment (May 19, 2017). In fact, Respondent testified that his decision to service retire was not health-related, but rather, due to other factors. Thus, even if Section 20160 were utilized to correct his failure to file in November 2017 after he was diagnosed, he would still be ineligible under section 21154.

The ALJ found that Respondent did not make a correctable mistake that would permit him to change his service retirement to an industrial disability retirement.

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

September 15, 2021

Austa Wakily
Senior Attorney