

ATTACHMENT A

THE PROPOSED DECISION

**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 Disability Retirement of:**

LINDA CHRISTINE GEORGE,

Respondent,

and

DEPARTMENT OF REHABILITATION,

Respondent.

Agency Case No. 2022-0704 (Statement of Issues)

OAH No. 2023010015

PROPOSED DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on July 6, 2023, in Los Angeles, California.

Austa Wakily, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Linda Christine George (George) represented herself.

There was no appearance by or on behalf respondent Department of Rehabilitation (DOR) at the hearing. CalPERS proved it properly served DOR with a notice of hearing. Therefore, this matter proceeded as a default as against DOR only under Government Code section 11520, subdivision (a).

The parties presented witness testimony and documentary evidence. After the hearing, the administrative law judge held the record open for CalPERS to submit copies of exhibits that include previously redacted addresses related to George's claim that she lacked notice of certain facts. CalPERS submitted copies of six exhibits with the address information, along with new proposed exhibits and a new request for official notice. George objected to all of the exhibits and the request for official notice, and the matter was deemed submitted on July 27, 2023.

The copies of exhibits that include previously redacted addresses are admitted as exhibits 12a, 13a, 15a, 16a, 17a, 18a, and 19a. CalPERS's new proposed exhibits are excluded as beyond the scope of what was to be submitted after the hearing. CalPERS's new request for official notice is denied for the same reason.

SUMMARY

CalPERS approved George's application for service retirement in August 2017, after she unsuccessfully applied for disability retirement from both DOR and the Department of Social Services (DSS). Over four years after retiring for service, George applied for disability retirement again, citing job-related conditions not considered in her prior applications. CalPERS denied the application, determining there was no evidence George made a correctable mistake that excused the late filing. George

appeals and argues she made a correctable mistake that allows CalPERS to consider the new application on the merits. The evidence does not prove she did. Therefore, her appeal will be denied.

FACTUAL FINDINGS

Background and Procedural History

FIRST APPLICATION AND APPEAL

1. This case is George's third appeal of a CalPERS decision to deny an application of George for disability retirement. The first appeal concerned a May 2015 application of George, who was then known as Linda Christine Martinez, to retire for disability from DSS. George's appeal of CalPERS's denial of that application reached the Court of Appeal, which upheld CalPERS's action. (*Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*)). Most of the facts below come from the Court of Appeal's decision.

2. George began work for the State of California in 1985. In 2001, she began working at DSS; she also served in various positions with Service Employees International Union (SEIU), eventually becoming Secretary-Treasurer of the regional District Labor Council. By virtue of that employment, George was a state miscellaneous member of CalPERS. "'State miscellaneous member' includes all members employed by the state and university, except National Guard, industrial, patrol, state peace officer/firefighter, and state safety members." (Gov. Code, § 20380; undesignated statutory references are to the Government Code.)

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3. In 2014, DSS moved to terminate George's employment with a Notice of Adverse Action, citing numerous grounds for her dismissal. Believing this action was taken in retaliation for her union activities, and having already filed an unfair labor practices complaint, George prepared to contest the dismissal.

4. In September 2014, the parties negotiated a settlement under which DSS agreed to pay George \$30,000, withdraw the Notice of Adverse Action, and remove certain matters from her personnel file. George agreed to "voluntarily resign" effective September 30, 2014, and DSS agreed to accept the voluntary resignation. (*Martinez, supra*, 33 Cal.App.5th at p. 1162.) George also agreed "she will never again apply for or accept any employment position" with DSS, which "agree[d] to cooperate with any application for disability retirement filed by [George] within the next six months." (*Ibid.*)

5. George duly filed her disability retirement application, claiming she could no longer function as a Disability Evaluation Analyst because of various job-related conditions. In June 2015, CalPERS notified her the application had been cancelled because she was dismissed from employment for reasons that were not the result of a disabling medical condition, and the dismissal did not appear to be for the purpose of preventing a claim for disability retirement. Given these facts, CalPERS determined George was not eligible for disability retirement under two court cases and a CalPERS precedential decision. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194; *In the Matter of Application for Disability Retirement of Vandergoot* (2013) CalPERS Precedential Dec. No. 12-01.)

6. George appealed the denial to the Board of Administration of CalPERS (Board). Her appeal was heard by an administrative law judge, who concluded the

decision to cancel George's application for disability retirement was correct. In November 2016, the Board adopted the administrative law judge's proposed decision and denied George's petition for reconsideration.

7. George and SEIU filed a petition in the Superior Court of California for the County of Alameda against CalPERS, the Board, and DSS (named as "real party in interest") for a writ of mandate ordering the Board to "set aside and reverse" its decision. (*Martinez, supra*, 33 Cal.App.5th at p. 1163.) The trial court denied the petition. George and SEIU appealed, but the Court of Appeal affirmed the denial. (*Martinez, supra*, 33 Cal.App.5th at p. 1177.) The California Supreme Court denied George's and SEIU's petition for review.

SECOND APPLICATION AND APPEAL

8. In October 2015, while her first appeal was pending, George gained employment with DOR as a Program Technician II. In this employment, George was also a state miscellaneous member of CalPERS. George's employment at DOR lasted only about two months. On November 17, 2015, she applied for disability retirement from DOR due to her "bilateral upper arms, neck herniated disc, bilateral ankle ligament issues, endometriosis, GERD [gastroesophageal reflux disease], DM2 [type 2 diabetes], insomnia, anxiety, [and] bilateral thumb arthritis" conditions. (Exhibit 12, p. A99.)

9. By letter dated March 10, 2016, CalPERS notified George that her application for disability retirement due to her orthopedic (neck, arms, thumbs, shoulders, and bilateral upper extremities) conditions was denied. In the same letter, CalPERS notified George that the medical documentation she provided did not support a disabling condition due to bilateral ankle ligament issues, endometriosis,

GERD, DM2, insomnia, or anxiety. Therefore, CalPERS did not consider those conditions in evaluating her application.

10. George appealed the denial to the Board, and her appeal was heard by an administrative law judge on March 24, 2017. Neither George nor DOR appeared at the hearing. The administrative law judge concluded that CalPERS's determination to deny George's application for disability retirement based on her orthopedic conditions was correct. On June 27, 2017, the Board adopted the administrative law judge's proposed decision affirming the denial.

11. On August 4, 2017, George applied for service retirement from state employment with an effective retirement date of August 1, 2017. In a letter dated August 14, 2017, CalPERS informed George that it had received the application and that her effective retirement date was August 1, 2017. The letter also stated, "You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To request a service pending disability retirement, you must complete a Disability Retirement Election Application." (Exhibit 18, p. A135.) George did not submit such an application in response to the letter. She has been receiving her service retirement allowance since approximately September 1, 2017.

THIRD (CURRENT) APPLICATION

12. On September 13, 2021, George applied for disability retirement effective July 28, 2017, based on her "bilateral upper arms and neck, anxiety, PTSD, diabetes, DM2" conditions. (Exhibit 10, p. A84.) The application erroneously identified DSS as her employer. On September 22, 2021, CalPERS notified George that her application had been cancelled. CalPERS alleges it also told George she could apply for disability retirement from DOR for conditions not considered in her prior application, but

CalPERS would have to determine if it could accept the application because it would be considered late. The record does not include evidence of these alleged statements to George.

13. On December 24, 2021, George applied for disability retirement from DOR based on "PTSD [post-traumatic stress disorder], severe anxiety, diabetes [and] glaucoma/cataracts." (Exhibit 3, p. A19.) She requested the disability retirement be effective as of approximately November 1, 2015, which she identified as her last day on the DOR payroll. CalPERS requested additional information from George and DOR regarding George's retirement status. After reviewing the facts and information received, CalPERS determined it could not accept George's application because it was untimely, and she did not make a correctable mistake that would permit CalPERS to change her service retirement to a disability retirement.

14. On June 29, 2022, CalPERS notified George and DOR of its determination and their right to appeal. George filed a timely appeal and requested an administrative hearing. DOR did not appeal. On December 13, 2022, CalPERS filed a Statement of Issues "limited to the issue of whether CalPERS is required to accept George's late application for disability retirement submitted to CalPERS on December 24, 2021." (Exhibit 1, p. A11.)

Hearing

CALPERS'S CASE

15. CalPERS presented documentation of George's application history and called Toni Vargas, an employee in its Disability Retirement Section, to explain CalPERS's decision to deny the current application. Vargas testified that in CalPERS's view, George had knowledge of the disability retirement application process when she

retired for service in 2017, and the late filing of George's current application is therefore not a mistake CalPERS can correct. George's prior disability applications and appeals gave her knowledge of the process, and she has a long history of communications with CalPERS about applying for disability retirement going back to 2013. (See Exhibit 23.) Considering this history, CalPERS determined it cannot consider George's untimely application.

GEORGE'S CASE

16. Most of George's evidence concerned her disagreement with the Court of Appeal's decision in her first appeal. But that decision is final, and George's evidence contesting it is irrelevant for purposes of this case.

17. As to the late filing of the current application, George testified she did not know she could apply for disability retirement again until 2021, when CalPERS told her any member has a right to have an application reopened. She did not understand that right when she applied for service retirement in 2017. Moreover, she testified a CalPERS representative told her at the time she was not eligible for a disability retirement from DOR.

18. George also testified she was ill and taking medication in 2017, which affected her understanding of her rights. Furthermore, she testified she never received many of CalPERS's exhibits, including the notice of the administrative hearing on March 27, 2017, for her second appeal. George explained that she moved frequently, experienced periods of homelessness, and changed her last name around that time, all of which affected her receipt of mail. She testified she would have appeared at the administrative hearing had she known of it. She requests that CalPERS accept the current application due to these facts.

ANALYSIS OF EVIDENCE

19. The evidence does not support a finding that George's late filing of her disability retirement application arose from an objectively reasonable mistake. When she applied for service retirement in 2017, George already had considerable experience with the disability retirement process, having applied unsuccessfully for disability retirement from both DOR and DSS. Furthermore, upon receiving her service retirement application, CalPERS sent George a letter on August 14, 2017, stating, "You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To request a service pending disability retirement, you must complete a Disability Retirement Election Application." (Exhibit 18, p. A135.) Despite this notice, George waited over four years to apply for disability retirement again.

20. George testified a CalPERS employee told her she was not eligible for disability retirement in 2017. She also testified she was impaired by illness and medication, and she did not receive many of CalPERS's exhibits, including the notice of the administrative hearing on March 24, 2017, for her second appeal. But CalPERS's post-hearing submission of exhibits with address information show that the notice of hearing, the letter from CalPERS dated August 14, 2017, and the other exhibits were addressed correctly. Furthermore, George's alleged impairment did not prevent her from applying for service retirement, and her testimony that an unidentified CalPERS employee told her she was ineligible for disability retirement is vague and uncorroborated. Furthermore, the letter from CalPERS dated August 14, 2017, stated she may be eligible to receive a disability retirement if she is unable to work because of an illness or injury. Given these considerations, George's testimony does not prove the late filing of her application was reasonable under the circumstances.

LEGAL CONCLUSIONS

Legal Standards

1. Under the Public Employees' Retirement Law (PERL) (Gov. Code, § 20000 et. seq.), "[a] member incapacitated for the performance of duty shall be retired for disability . . . if he or she is credited with five years of state service, regardless of age," unless the person has elected to receive a service retirement allowance under section 21076, 21076.5, or 21077. (§ 21150, subd. (a).) "Disability" and "incapacity for performance of duty" mean "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion." (§ 20026; see also § 21156, subd. (a)(2).)

2. For a state member other than a university member, an application for disability retirement may be made by "[t]he head of the office or department in which the member is or was last employed" or "[t]he member or any person in his or her behalf." (§ 21152, subds. (a), (d).) "The application shall be made only (a) while the member is in state service, or (b) while the member . . . is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion." (§ 21154.) A person ceases to be a member upon retirement, except while participating in reduced worktime for partial service retirement. (§ 20340, subd. (a); see also *Barnwell v. City Council of Beverly Hills* (1947) 81 Cal.App.2d 189, 193.) "The . . . sections read together, as well as the need for administrative and actuarial efficiency and the difficulty of making disability

determinations years after the date of retirement, evidence a legislative intent that under normal circumstances retirees may not change their status." (*Button v. Board of Administration* (1981) 122 Cal.App.3d 730, 735 (*Button*) [citing sections before reorganization/renumbering of the PERL].)

3. Notwithstanding the above, "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." (§ 20160, subd. (a).) Section 20160 applies to both active and retired members, and it applies equally to postretirement changes in status. (*Button, supra*, 122 Cal.App.3d at p. 737.) A party seeking to correct an error or omission has the burden of presenting documentation or other evidence to the Board establishing the right to correction. (§ 20160, subd. (d); *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) This burden of proof requires proof by a preponderance of the evidence (Evid. Code, § 115), which means "'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

4. With respect to Code of Civil Procedure section 473, "[t]he mere recital of mistake, inadvertence, surprise or excusable neglect is not sufficient to warrant relief.

Relief on [those] grounds . . . is available only on a showing that the claimant's [error] . . . was reasonable when tested by the objective 'reasonably prudent person' standard." (*Dept. of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293.) "The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded." (*Elms v. Elms* (1946) 72 Cal.App.2d 508, 513.)

Analysis

5. George ceased to be a member of CalPERS upon her retirement for service in 2017, and her application for disability retirement is untimely under section 21154. Furthermore, under normal circumstances, retirees may not change their status. (*Button, supra*, 122 Cal.App.3d at p. 735.) Therefore, George must present evidence to the Board establishing a right to correction under section 20160 requiring CalPERS to accept her late application for disability retirement.

6. George has not established a right to correction. The evidence does not support a finding that George's late filing of her current disability retirement application arose from an objectively reasonable error. (Factual Findings 19-20.) Therefore, she did not prove her error 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." (§ 20160, subd. (a)(2).) Absent such proof, she has not shown a right to relief under section 20160.

7. In *Button, supra*, 122 Cal.App.3d 730, a retiring member elected to receive service benefits, unaware at the time he had a latent disability that may have qualified him for a more advantageous disability retirement. His disability was later

discovered and determined to have arisen out of his employment with a contracting agency of CalPERS. The court held that if the retiree was disabled when he retired, then his and CalPERS's belief he was not disabled was a mistake of fact he could correct. The mistake of fact was an honest one; the retiree, and consequently CalPERS, did not know that a potential disability existed. (*Id.* at pp. 737-738.)

8. Here, the issue is not a mistake about a latent disability; by 2017, George had already applied for disability retirement twice without success. In addition to that experience with the disability retirement process, CalPERS notified George on August 14, 2017, that she could request a service pending disability retirement. (Exhibit 18, p. A135.) Despite that notice, George waited over four years to apply again for disability retirement, which she has not proven was an objectively reasonable error under the circumstances. Therefore, she is not entitled to relief under section 20160.

ORDER

Respondent Linda Christine George's appeal is denied.

DATE: 08/28/2023



[Thomas Heller \(Aug 28, 2023 10:03 PDT\)](#)

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings