





















## **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

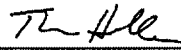
discovered and determined to have arisen out of his employment with a contracting agency of CalPERS. The court held that if the retiree was disabled when he retired, then his and CalPERS's belief he was not disabled was a mistake of fact he could correct. The mistake of fact was an honest one; the retiree, 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