

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Application for Industrial
Disability Retirement of:

RICHARD HOFFPAUER,

Respondent,

and

CALIFORNIA HIGHWAY PATROL,

Respondent.

Case No. 2014-1072

OAH No. 2015020735

PROPOSED DECISION

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on March 24, 2016, at Orange, California.

Terri Popkes, Staff Attorney, appeared and represented the complainant California Public Employees' Retirement System (CalPERS).

Respondent Richard Hoffpauer appeared and represented himself.

No appearance was made on behalf of respondent California Highway Patrol (CHP) despite its having been properly served with notice of the date, time, and location of the hearing.

The record was closed and the matter was submitted for decision at the conclusion of the hearing.

FACTUAL FINDINGS

1. On February 17, 2015, Diane Alsup, Interim Chief of the Benefit Services division of CalPERS, made and filed the Statement of Issues in her official capacity.
2. Respondent Hoffpauer worked for the CHP as an officer for approximately 30 years. Pursuant to Government Code section 21151, respondent Hoffpauer was a state safety

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member of CalPERS. In the course of his employment with the CHP, respondent Hoffpauer accrued the minimum service credits necessary to qualify for retirement.

3. Respondent Hoffpauer filed a claim for workers' compensation insurance benefits alleging a cumulative injury to his neck and low back caused by working conditions since 1977. The reported date of injury was February 27, 2007.

4. On February 28, 2007, respondent Hoffpauer inquired with Janise Truelock, a personnel supervisor, about his retirement options. Ms. Truelock incorrectly informed respondent Hoffpauer that he would be allowed to convert to an industrial disability retirement (IDR) election at any time. Respondent Hoffpauer testified that he believed Ms. Truelock was an authorized representative of CalPERS. Complainant presented evidence to show that Ms. Truelock executed an employer certification, thereby establishing that she was employed with CHP, and not CalPERS.

5. A request to change from one option to the other must be made prior to the effective date of retirement or within 30 days after the date of the letter approving an application for retirement. To apply for service retirement benefits while awaiting a determination of an IDR election, the correct procedure is to file an IDR election application and check a box entitled "Service Pending Industrial Disability Retirement."

6. On March 5, 2007, respondent Hoffpauer applied for Service Retirement Election (SRE) benefits. At Section 3 of the application, respondent Hoffpauer was offered six payment options with the following warning: "Once you select a payment option, you cannot change to another option." (Ex. 3.) Respondent Hoffpauer elected an unmodified SRE allowance option. Respondent Hoffpauer executed the application and certified "I understand that to cancel this application I must notify CalPERS before the mailing of my first full monthly retirement allowance check." (Ex. 3.)

7. Nadine Molina, Retirement Program Specialist II with CalPERS, executed the acknowledgement of respondent Hoffpauer's application. She contemporaneously entered the following note in respondent Hoffpauer's retirement record:

Witnessed signature today on app for SR . . . told him he can change [option] prior to first warrant . . . he stated this could revert to IDR, but if it does he will return to submit and app for ID [sic], not done today since not sure yet if it will and if he filed today all docs would not be in within 30 days and therefore the IDR would be cancelled. He will wait to hear from his Atty before submitting the IDR. He has the IDR app. (Ex. 8.)

8. On April 2, 2007, a CalPERS representative Denise Mansperger entered the following note in respondent Hoffpauer's retirement record: "Spoke with member and went over retirement questions." (Ex. 8.)

9. On April 23, 2007, CalPERS analyst Taras L. Kachmar entered the following note in respondent Hoffpauer's retirement record: "answered [member] questions about dr and workers' comp." (Ex. 8.)

10. Respondent Hoffpauer last worked for the CHP on April 30, 2007. He was granted SRE benefits and, beginning in the following month, received, and continues to receive, regular monthly payments of his SRE allowance.

11. On August 10, 2009, respondent Hoffpauer underwent back surgery. Specifically, a surgeon performed a laminectomy on lumbar regions 1 through 4, and the S-1 vertebrae to correct spinal stenosis.

12. On October 16, 2012, respondent Hoffpauer wrote a letter to CalPERS to notify the agency that he had mistakenly applied for SRE benefits, intending to apply for IDR benefits with an option for SRE benefits pending a determination on his disability. He requested an application for IDR benefits and explained the five-year delay as follows:

(A) That respondent Hoffpauer had been under continuous medical care from February 27, 2007, through August 25, 2011, the date his surgeon concluded that his injury status was permanent and stationary for purposes of the pending workers' compensation claim.

(B) That, on September 22, 2011, the State Compensation Insurance Fund (SCIF) objected to the determination of respondent Hoffpauer's surgeon and would require an independent medical examination to determine the existence and extent of any permanent disability.

(C) That respondent Hoffpauer was examined by an independent medical examiner (IME) on October 26, 2011, and the IME reported to SCIF that respondent Hoffpauer's condition was permanent and stationary.

(D) That the IME appeared at a hearing before the Workers' Compensation Appeals Board on August 31, 2012, and verified that respondent Hoffpauer's injury status was permanent and stationary.

(E) That a mandatory settlement conference was set on November 6, 2012, and that a resolution of respondent Hoffpauer's workers' compensation claim remained pending at the date of his October 16, 2012 letter.

(F) That respondent Hoffpauer was informed and believed that he should not file for IDR benefits until his injury status was determined to be permanent and stationary and his workers' compensation claim was settled.

(G) That respondent Hoffpauer was not informed of any timeline to file for IDR benefits.

13. CalPERS file-stamped the written explanation on October 18, 2012, at 10:34 a.m., but took no action until December 10, 2012, when a staff member ordered and sent to respondent Hoffpauer the booklet "A Guide to Completing your CalPERS Disability Retirement Election Application" (IDR Election Guide). The IDR Election Guide sets forth the procedures described at Factual Finding 5 and includes an application for IDR benefits. The IDR Election Guide also sets forth the following advisory:

If you have a workers' compensation claim, you should not wait until your condition is 'permanent and stationary' under workers' compensation requirements to submit your application . . . A workers' compensation award does not automatically entitle you to a CalPERS industrial disability retirement. Medical evidence will be required to show that you meet the CalPERS definition of disability. (Ex. 9, p. 13.)

14. On November 6, 2012, the Workers' Compensation Appeals Board made an award in favor of respondent Hoffpauer against CHP.

15. On December 21, 2012, a CalPERS staff member entered the following note in respondent Hoffpauer's retirement record: "I spoke with [respondent Hoffpauer] and advised him on completing disability retirement forms and sending information to his prior employer and physician to apply retroactive to 2007." (Ex. 8, p. 17.)

16. On January 28, 2013, respondent Hoffpauer completed and signed an application for IDR benefits. He requested a retirement effective date of May 1, 2007.

17. On July 17, 2014, CalPERS determined that respondent Hoffpauer had not made a correctable mistake under Government Code section 20160 and denied the application.

18. On August 8, 2014, respondent Hoffpauer filed an appeal of CalPERS' denial of his application.

LEGAL CONCLUSIONS

1. As the applicant for government benefits, respondent Hoffpauer bears the burden of proof. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156; see also Govt. Code, § 20160, subd. (d).) The standard of proof is preponderance of the evidence. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044.)

2. A state safety member who is incapacitated for the performance of duty as the result of an industrial disability is eligible for IDR benefits. (Gov. Code, § 21151, subd. (a).)

3. As a basis of retirement, a disability must be of a permanent or extended and uncertain duration. The board, or the governing body of the contracting agency employing the

member in the case of a local safety member, must determine an applicant's incapacity on the basis of a competent medical opinion. (Gov. Code, § 20026.)

4. The findings of the Workers' Compensation Appeals Board has no res judicata effect on whether an appellant was incapacitated to perform his job duties. (*Petrillo v. Bay Area Rapid Transit Dist.*, (1988) 197 Cal.App.3d 798.)

5. A member may waive his right to retire for disability and elect to retain rights to SRE benefits. (Gov. Code, § 21153.)

6. An election, revocation, or change of election must be made within 30 calendar days after the making of the first payment on account of any retirement allowance or, in the event of a change of retirement status after retirement, within 30 calendar days after the first payment is made on account of any retirement allowance following the change in retirement status. "Change in retirement status" includes, but is not limited to, a change from service to disability retirement. (Gov. Code, § 21453.)

7. CalPERS may correct the errors or omissions of a retired member provided that all of the following conditions of Government Code section 20160 exist:

(A) 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.

(B) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect.

(C) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under the Public Employees' Retirement Law.

8. Failure by a member to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under Government Code section 20160. (Govt. Code, § 20160, subd. (a).)

9. In this case, respondent Hoffpauer filed an application for IDR benefits on January 23, 2013, almost six years after electing to receive SRE benefits. If respondent Hoffpauer intended to collect SRE benefits pending an IDR application, he mistakenly filed the wrong application and failed to check a necessary box. More substantively, respondent Hoffpauer denied CalPERS the opportunity to make its own determination of respondent Hoffpauer's disability status on April 30, 2007, the effective date of his retirement.

10. A reasonable person with a potential claim for industrial benefits would inquire before making a binding election. Complainant presented compelling evidence that respondent Hoffpauer availed himself of CalPERS counseling at the time of his SRE election, and inquired with CalPERS on several occasions before the effective date of his retirement. Respondent Hoffpauer deferred filing an IDR application until his workers'

compensation claim was settled, despite published advisories that an award of the Workers' Compensation Appeals Board would not automatically result in his eligibility for IDR benefits.

11. Respondent Hoffpauer chose to rely entirely on the advice of Ms. Truelock, a CHP personnel supervisor. CalPERS is not estopped from denying respondent Hoffpauer's application because he has failed to show that CalPERS affirmatively told him his chosen course of action was correct. (*United States v. Tallmadge* (9th Cir. 1987) 829 F.2d 767.) Although respondent Hoffpauer relied on incorrect information furnished by Ms. Truelock, he has failed to show that his reliance was reasonable. (*United States v. Batterjee* (9th Cir. 2004) 361 F.3d 1210.) No evidence was presented to show that Ms. Truelock was qualified to advise respondent Hoffpauer on the substantive law and procedures applicable to IDR benefits, or that respondent Hoffpauer made full disclosure to Ms. Truelock of all material facts.

12. By collecting SRE benefits for almost six years, respondent Hoffpauer effectively waived his right to IDR benefits. Respondent Hoffpauer failed to take corrective action within a reasonable time after the right to make the correction should reasonably have been discovered. During his contacts with CalPERS in March and April 2007, Respondent Hoffpauer had several opportunities to inquire about deadlines, and his failure to do so is not a correctable error or omission. Relying exclusively on Ms. Truelock's incorrect advice is not excusable neglect in light of the abundance of accurate information that was available to respondent Hoffpauer.

13. Respondent Hoffpauer has failed to prove by a preponderance of the evidence that he is entitled to IDR benefits. CalPERS reasonably declined to correct respondent Hoffpauer's applications and properly denied his IDR application.

ORDER

Respondent Hoffpauer's appeal is denied. CalPERS's denial of respondent Hoffpauer's application for IDR benefits is affirmed.

DATED: April 11, 2016

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Matthew Goldsby
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MATTHEW GOLDSBY
Administrative Law Judge
Office of Administrative Hearings