

ATTACHMENT A
THE PROPOSED DECISION

correctable under Government Code section 20160, such that he is entitled to an effective date of retirement retroactive to December 22, 2009. The persuasive evidence established he is not entitled to any relief under Government Code section 20160. Therefore, CalPERS's decision to deny Mr. Marquesez's request for an earlier effective date of retirement should be upheld, and his appeal should be denied.

FACTUAL FINDINGS

Procedural History

1. Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues on April 19, 2016, solely in his official capacity. Mr. Marques's alleged entitlement to an effective date of retirement retroactive to December 22, 2009, is the issue on appeal.

Mr. Marques's Employment

2. Mr. Marques was employed by SCIF as a Senior Workers' Compensation Payroll Auditor. He is a state miscellaneous member of CalPERS by virtue of his employment. He has met the minimum service credit necessary to qualify for disability retirement.

Disability Retirement Election Applications

SCIF's application

3. Lynne Costa, a human resources consultant in the Medical Management Unit of SCIF, completed a Disability Retirement Election Application seeking a service pending industrial disability retirement on behalf of Mr. Marques. CalPERS received the application on August 29, 2013.

4. On September 20, 2013, CalPERS sent Mr. Marques correspondence acknowledging receipt of the application filed on his behalf, and requested he submit his own application and any documentation he had that would help CalPERS determine whether he was substantially incapacitated for the performance of his usual duties as a Senior Workers' Compensation Payroll Auditor.

5. CalPERS sent Mr. Marques correspondence following up to its previous correspondence on November 13, 2013. CalPERS again requested documentation that would help it determine whether he was substantially incapacitated. The correspondence closed with the following warning:

Your file will be placed in suspense for 30 days from the date of this letter in anticipation of your response. If we do not hear

from you within that time, we will assume you do not wish to cooperate with the development of the application. We will then have no alternative but to make a determination based upon medical records, if any, submitted by your employer.

However, if we are unable to make a determination [sic] the application will be canceled and you and your employer will be notified. If canceled, you would need to submit a new application for any future retirement request. Please be aware that with a new application you [sic] retirement effective date cannot be earlier than the first day of the month your application is received by CalPERS, if not currently on pay [sic] status. You could lose retroactive benefits that you may now be entitled to under the current application. You may also lose other benefits provided by your employer.

(Emphasis added.)

6. On December 24, 2013, CalPERS sent Mr. Marques correspondence notifying him the application submitted by SCIF on his behalf had been canceled. The correspondence closed with the following statement: "Any future request will require a new application."

Mr. Marques's application

7. On November 3, 2015, Mr. Marques signed a Disability Retirement Election Application requesting a service pending disability retirement, which CalPERS received on November 18, 2015. He identified his last day on payroll as March 15, 2007, and requested his retirement be made effective December 22, 2009.

8. CalPERS acknowledged receipt of Mr. Marques's application by correspondence dated November 20, 2015. The correspondence advised the effective date of his service retirement would be November 1, 2015.

9. CalPERS sent subsequent correspondence acknowledging Mr. Marques's request for an earlier retirement date. The correspondence advised that his requested retirement date was earlier than the first day of the month in which CalPERS received his application, the date on which a member's retirement is usually made effective. Therefore, CalPERS posed several questions to help determine if he was entitled to an earlier effective date. The following is one of the questions and his response:

4) On what day did you become aware that you could submit an application for disability retirement? Why did you not apply at that time?

Response To the best of my recollection, my employer telephoned me sometime early in 2010, and we discussed Retirement, but not specifically Disability Retirement. I did not understand there was a difference in retirements. I was further informed if I did not make a decision, my employer (State Fund) would make the decision and apply on my behalf. Shortly thereafter, my employer sent me a letter summarizing our conversation and included a Guide to Completing your CalPERS Disability Retirement Election Application booklet. This is when I became aware there was such a thing as Disability Retirement. I did not differentiate the difference between Disability Retirement and retiring because I was permanently disabled. Since I was still seeking medical care, I assumed my employer would apply when all medical treatment avenues were exhausted.

(Emphasis original.)

10. On January 15, 2016, CalPERS sent Mr. Marques correspondence informing him his application for disability retirement was approved. The correspondence also advised his request for an earlier retirement date was being reviewed to determine if he is entitled to relief under Government Code section 20160 for making an error or omission which was the result of a mistake, inadvertence, surprise, or excusable neglect in delaying submitting his Disability Retirement Election Application.

11. That same day, CalPERS sent separate correspondence informing Mr. Marques his request for an earlier retirement date was denied. The correspondence advised that Government Code section 20160 does not apply to “a mistake caused by the claimant’s neglect of a legal duty, error in judgment, or change in circumstances.” The correspondence further advised Mr. Marques of his rights to appeal CalPERS’s denial of his request for an earlier effective date of retirement.

12. Mr. Marques sent the following correspondence appealing CalPERS’s determination:

Dear Mr. Suing [*sic*] I am writing this letter in reference to the denial letter I received regarding the back dating [*sic*] of my Disability Retirement request. I disagree with the decision made and am therefore appealing stated decision. Although your letter states that, “the evidence suggests that you had knowledge of the application process,” this does not mean that I had actual knowledge of the application process. Furthermore, it would seem reasonable that, at the very least, my approved Disability Retirement would be back dated [*sic*] to September [*sic*] 3, 2013 [*sic*] since that is the stated date of CalPERS’

receipt of, "an employer originated application" as your letter dated January, [sic] 15, 2016 [sic] and postmarked on January 20, 2016, indicates.

I am requesting a second consideration of my request for a back dated [sic] Disability Retirement date. Your re-consideration [sic] and prompt attention to this matter is appreciated.

Discussion

13. Mr. Marques received two letters from CalPERS in 2013 requesting information to help with its determination of whether he was substantially incapacitated, both of which he failed to respond to. The second letter warned he had 30 days to respond, and it would be assumed he does not wish to pursue disability retirement and he would be required "to submit a new application for any future retirement request" if he did not respond within that timeframe. With regard to any new application, the letter further warned:

Please be aware that with a new application you [sic] retirement effective date cannot be earlier than the first day of the month your application is received by CalPERS, if not currently on pay [sic] status.

(Emphasis added.)

CalPERS sent correspondence dated December 24, 2013, advising Mr. Marques his employer-generated Disability Retirement Election Application had been canceled.

14. Mr. Marques submitted his own Disability Retirement Election Application more than two years after CalPERS first requested information in support of his employer-generated Disability Retirement Election Application. He admitted his last day on payroll was March 15, 2007, and requested an effective retirement date of December 22, 2009. In response to CalPERS's investigation of whether he was entitled to an earlier retirement date, Mr. Marques admitted his employer sent him "a Guide to Completing your CalPERS Disability Retirement Election Application booklet" shortly after his telephone conversation with his employer "sometime early in 2010." He further admitted, "[t]his is when I became aware there was such a thing as Disability Retirement."

Summary

15. When all the evidence is considered, Mr. Marques failed to introduce persuasive evidence his decision to wait to submit his Disability Retirement Election Application until November 18, 2015, was an error or omission which was the result of a mistake, inadvertence, surprise, or excusable neglect correctable under Government Code section 20160. Therefore, CalPERS's determination he is not entitled to an earlier effective date of retirement should be upheld, and his appeal from that determination should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Mr. Marques has the burden of proving he is entitled to relief under Government Code section 20160. (Gov. Code, § 20160, subd. (d) [“The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b)”].) And he must do so by a preponderance of the evidence. (Evid. Code, § 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence”].) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Law

2. Government Code section 21252, subdivision (a), provides the following with regard to determining the effective date of an application for retirement:

A member’s written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. The effective date of a written application for retirement submitted to the board more than nine months after the member’s discontinuance of state service shall be the first day of the month in which the member’s application is received at an office of the board or by an employee of the system designated by the board.

3. Government Code section 20160, subdivision (a), provides for the correction of errors or omissions made by a member as a result of a mistake, inadvertence, surprise, or excusable neglect as follows:

Subject to subdivisions (c) and (d), 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.

Failure by a member or beneficiary 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 this section.

Conclusion

4. Mr. Marques failed to satisfy his burden of producing persuasive evidence his decision to wait to submit his Disability Retirement Election Application until November 18, 2015, was an error or omission that was the result of a mistake, inadvertence, surprise, or excusable neglect correctable under Government Code section 20160. Therefore, CalPERS's determination he is not entitled to an earlier effective date of retirement should be upheld, and his appeal from that determination should be denied.

ORDER

Respondent Christopher B. Marques's appeal from CalPERS's determination he is not entitled to an earlier effective date of retirement is **DENIED**.

DATED: November 29, 2016

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Coren D. Wong
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COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings