

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of Accepting the Late
Application for Disability Retirement of:

Case No. 2017-0525

PAUL A. BELLAMY,

OAH No. 2017080485

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CALIFORNIA REHABILITATION
CENTER,

Respondent.

PROPOSED DECISION

Administrative Law Judge Tiffany L. King, Office of Administrative Hearings, State of California, heard this matter on May 1, 2018, in Sacramento, California.

Cynthia A. Rodriguez, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Paul Bellamy was present at the hearing and represented himself.

Though duly served with the Notice of Hearing, there was no appearance by or on behalf of the California Department of Corrections and Rehabilitation (CDCR), California Rehabilitation Center. The matter therefore proceeded as a default against CDCR, pursuant to California Government Code section 11520, subdivision (a).¹

Evidence was received, the record was closed, and the matter was submitted for decision on May 1, 2018.

¹ Unless otherwise noted, all further statutory references are to the Government Code.

ISSUE

Did respondent make an omission or error as a result of inadvertence, mistake, surprise, or excusable neglect correctable by section 20160, which would entitle him to retroactively change his retirement status from service retirement to industrial disability retirement?

FACTUAL FINDINGS

1. Respondent was employed by California Department of Corrections as a Correctional Officer for more than 25 years. By virtue of his employment, respondent is a state safety member of CalPERS subject to section 21151.
2. On March 12, 2015, respondent underwent knee replacement surgery on his left knee. Respondent's physician, Israel Rottermann, M.D., completed a Physician's Report on Disability. He signed and dated the form on March 30, 2015, and submitted it to CalPERS by fax on the same date. In the report, Dr. Rottermann listed respondent's diagnosis as "osteoarthritis left knee." He further wrote that (1) respondent was not substantially incapacitated from performance of his usual duties as a Correctional Officer, and (2) his disability was temporary and would last "6-8 weeks."
3. On April 7, 2015, respondent filed with CalPERS an application for service pending industrial disability retirement (application), with an effective date of July 1, 2015. Respondent described his disability as an orthopedic condition (right and left knee).
4. By letter dated April 15, 2015, CalPERS notified respondent it could not approve his application because Dr. Rottermann estimated the duration of his disability to be less than six months. CalPERS invited respondent to provide additional information or seek a second opinion, and included a blank Physician's Report on Disability form.
5. On or about April 30, 2015, CalPERS received a second Physician's Report on Disability from Dr. Rottermann. Like the first report, the second report was dated March 30, 2015. Dr. Rottermann again listed respondent's diagnosis as "osteoarthritis left knee," and stated the disability was temporary. However, in the second report, Dr. Rottermann estimated the duration of respondent's disability to be less than six months.
6. On May 6, 2015, CalPERS issued a second letter to respondent advising it could not approve his application because Dr. Rottermann estimated the duration of his disability to be less than six months. CalPERS again invited respondent to provide additional information or seek a second opinion, and provided another blank Physician's Report on Disability form.
7. Respondent did not respond to the May 6, 2015 letter. By letter dated June 26, 2015, CalPERS notified respondent that his application was canceled due to "insufficient

information.” It further advised respondent that “[a]ny future request for industrial disability will require a new application.”

8. On July 6, 2015, respondent called and spoke with CalPERS representative regarding the cancelation of his application. The representative advised respondent to file a new industrial disability retirement application. That same day, CalPERS mailed respondent a copy of CalPERS Publication No. 35, *A Guide to Completing Your CalPERS Disability Retirement Election Application* (PUB-35).

9. On July 23, 2015, respondent underwent knee replacement surgery on his right knee. On August 12, 2015, he again called and spoke with a CalPERS representative and asked why his application had been canceled. The representative informed him Dr. Rottermann estimated the duration of his disability as less than six months, and respondent did not respond to CalPERS’s request for additional information.

10. On October 29, 2015, CalPERS approved respondent’s application for service retirement, effective September 1, 2015. Respondent has received his retirement allowance continuously since that time.

11. On May 24, 2016, Dr. Rottermann performed a comprehensive orthopedic permanent and stationary evaluation of respondent in connection with respondent’s workers’ compensation claim. Following the evaluation, Dr. Rottermann opined that respondent had reached “maximum medical improvement,” and that his condition was “permanent and stationary.”

12. In June 2016, respondent moved to Florida. Approximately one month later, he learned that Dr. Rottermann had died on July 3, 2016. In August 2016, Stephen Suzuki, M.D. was retained by the State Compensation Insurance Fund (SCIF) to conduct a qualified medical reevaluation of respondent in relation to his workers’ compensation claim.

13. On October 15, 2016, respondent traveled from Florida to Lake Elsinore for the reevaluation by Dr. Suzuki. Thereafter, Dr. Suzuki prepared a report in which he diagnosed respondent with “bilateral knee degenerative arthritis.” He further opined that respondent had reached “maximum medical improvement,” and that his condition was “permanent and stationary.”

14. Respondent received a copy of Dr. Suzuki’s report on or about November 21, 2016. On November 22, 2016, per respondent’s request, CalPERS provided him with a second copy of PUB-35. On December 6, 2016, he filed with CalPERS a new application to change from service to disability retirement.²

15. By letter dated January 23, 2017, CalPERS advised respondent that, in general, a change in retirement status is not permitted after CalPERS membership ceases due

² Respondent did not designate his disability as industrial in his latest application.

to retirement. The letter requested respondent provide additional information so CalPERS could determine if a correctable mistake was made which would allow a change in status.

16. Respondent responded to CalPERS's letter on January 30, 2017. In his letter, respondent asserted he initially filed for service pending industrial disability retirement in April 2015, but Dr. Rottermann had rated him as only temporarily disabled at that time. Respondent claimed he met with a CalPERS representative in the Orange County office, who advised him to file first for service retirement "pending disability" and to refile once respondent attained permanent disability status. Once respondent received notice of his permanent disability from Dr. Suzuki, he refiled for disability retirement in December 2016.

17. By letter dated February 23, 2017, CalPERS notified respondent his request to change from service to disability retirement was denied because his application was received after he had service retired. The letter further advised respondent of his right to appeal CalPERS's decision.

18. On March 9, 2017, respondent appealed from CalPERS's decision and requested an administrative hearing. On August 10, 2017, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and thereafter filed the Statement of Issues.

Respondent's Testimony

19. Respondent does not dispute the timeline of events as stated above. He testified that he believed he followed the rules to apply for disability retirement and at all times he "attempted his best" to respond to CalPERS's requests.

20. When respondent asked Dr. Rottermann why he listed respondent's disability as "temporary," Dr. Rottermann stated he could not list the disability as "permanent" until after all the surgeries were completed. Dr. Rottermann's death caused a considerable delay in respondent's workers' compensation action and the scheduling of a reevaluation by Dr. Suzuki. Respondent contended that these matters were beyond his control, he did not want to refile for disability retirement until he had been evaluated as permanently disabled, and he was unaware of the time period in which he needed to refile.

21. Respondent would have stayed in better contact with CalPERS and refiled his application sooner had he known about the time limit to refile. He is seeking relief to file a late application so that his wife is provided for after he passes.

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Discussion

22. In this case, respondent mistakenly believed that he could not refile for disability retirement until after he received a permanent disability rating in his workers' compensation claim. Respondent's subjective belief aside, CalPERS did not mislead him in this regard. Respondent initially applied for disability retirement in April 2015, five months before his service retirement date. CalPERS informed him twice that it could not approve his initial application because Dr. Rottermann had determined the duration of his disability was less than six months. CalPERS invited respondent to seek a second opinion or provide additional information; he did not do so. Rather, he waited more than a full year after his initial application was canceled before refiling for disability retirement.

In any event, findings issued for the purposes of workers' compensation are not evidence that may be used to establish that respondent is substantially incapacitated for the purpose of disability retirement. (*Smith v. City of Napa*, (2004) 120 Cal.App.4th 194, 207; *English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.) Therefore, whether or not respondent was deemed to be permanently disabled in his workers' compensation case had no bearing on whether he was permanently and substantially incapacitated for disability retirement purposes.

23. Finally, respondent's assertion that he did not know he had to refile for disability retirement by a certain time is unavailing. Respondent spoke with CalPERS representatives several times regarding his application. On at least two separate occasions, CalPERS issued respondent a copy of its PUB-35, which advises on page 4:

You may apply for disability or industrial disability retirement:

- While you are in CalPERS-covered employment;
- Within four months of separation from CalPERS-covered employment; or
- At any time, if you "separated" from or left your job because of a disability and you have remained disabled since then; or
- While on military or approved leave.

Respondent did not fall within any of the above-listed categories. He claimed he did not stay in contact with CalPERS because he was waiting for his permanent disability paperwork. Yet, he made regular contact with CalPERS's representatives who advised him as early as July 6, 2015, that he should refile for disability retirement. Accordingly, respondent's asserted lack of knowledge was not credible.

24. Respondent bears the burden of presenting documentation or other evidence he made an error or omission that was a result of mistake, inadvertence, surprise or excusable neglect. When all the evidence is considered, he failed to meet this burden. Accordingly, his

appeal should be denied and CalPERS' denial of his request to change from service to disability retirement should be affirmed.

LEGAL CONCLUSIONS

1. The sole question for determination in this proceeding is whether respondent established that his application for disability retirement, filed more than 15 months after the effective date of his service retirement, should be accepted pursuant to section 20160.

2. Section 21151, subdivision (a), states:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

3. Section 21152, subdivision (d) provides that an application for disability retirement may be made by the member or any person on his behalf. Section 21154 sets forth the timeline for filing the application as follows:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, 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.

4. Section 21252, subdivision (a), states the conditions under which a member who has ceased his employment in state service may apply for retirement as follows:

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 determined in accordance with Section 20160. (Italics added.)

5. Respondent filed his current disability retirement application on December 6, 2016, more than nine months after his state service employment ended. Therefore, the determination of whether to accept respondent's application must be made in accordance with section 20160. (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, 567.)

6. Section 20160 governs requests by CalPERS members or beneficiaries to correct an error or omission. It provides in pertinent part:

(a) 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, 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.

[¶] . . . [¶]

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(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).

7. Section 20340 provides that a person ceases to be a member:

(a) Upon retirement, except while participating in reduced worktime for partial service retirement.

(b) If he or she is paid his or her normal contributions, unless payment of contributions is the result of an election pursuant to paragraph (1) of subdivision (b) of Section 21070, or unless, after reducing the member's credited service by the service applicable to the contributions being withdrawn, the member meets the requirements of Section 21075 or if he or she is paid a portion of his or her normal contributions where more than one payment is made, or these contributions are held pursuant to Section 21500. For the purposes of this subdivision, deposit in the United States mail of a warrant drawn in favor of a member, addressed to the latest address of the member on file in the office of this system, electronic fund transfer to the person's bank, savings and loan association, or credit union account, constitutes payment to the person of the amount for which the warrant is drawn or electronically transferred.

(c) If the member has less than five years of service credit, or less than 10 years of service credit if the member is subject to Section 21076 or 21076.5, and no accumulated contributions in the retirement fund at the time of termination of service, unless the member establishes membership in the Judges' Retirement System, the Judges' Retirement System II, the Legislators' Retirement System, the State Teachers' Retirement System, or the University of California Retirement Plan, or establishes reciprocity with a reciprocal retirement system.


8. The courts have recognized that "pension statutes are to be liberally interpreted in favor of the applicant so as to effectuate, rather than defeat, their avowed purpose of providing benefits for the employee and his family." (*Button v. Bd. of Administration* (1981) 122 Cal.App.3d 730, 737, quoting *Campbell v. Bod. of Administration* (1980) 103 Cal.App.3d 565, 571.) However, when all the evidence is considered, respondent did not show that he should be allowed to file a disability retirement application. Respondent initially filed for industrial disability retirement in April 2015, but failed to provide the additional information regarding his disability as requested by CalPERS. As a result, CalPERS canceled his application in June 2015. Notwithstanding the advice from CalPERS representatives, respondent waited more than a year to refile for disability retirement. Respondent failed to demonstrate that his failure to timely refile his application was the

result of mistake, inadvertence, surprise, or excusable neglect. Even when the applicable pension statutes are interpreted liberally, respondent did not establish that that he is entitled to the protections and benefits of Government Code section 20160. Consequently, respondent did not establish that he should now be allowed to seek disability retirement.

ORDER

The request of respondent Paul Bellamy to file a late disability retirement application is DENIED.

DATED: May 30, 2018

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TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings