

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 Industrial Disability Retirement of:**

**RICHARD GASTELLO and N.A. CHADERJIAN YOUTH
CORRECTIONAL FACILITY, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondents**

Agency Case No. 2021-0664

OAH No. 2021120018

PROPOSED DECISION

Sean Gavin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on June 1, 2022, from Sacramento, California.

Helen Louie, Staff Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Richard Gastello (respondent) appeared and represented himself.

There was no appearance by or on behalf of N.A. Chaderjian Youth Correctional Facility, California Department of Correction and Rehabilitation (CDCR), and a default was taken pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter submitted for decision on June 1, 2022.

ISSUE

Whether respondent made an error or omission as a result of mistake, inadvertence, surprise, or excusable neglect correctable by Government Code section 20160, which would allow CalPERS to accept his late application for industrial disability retirement.

FACTUAL FINDINGS

Respondent's 2017 Application

1. On December 4, 2017, respondent signed and subsequently filed an application for service pending industrial disability retirement with CalPERS (2017 application), with a requested effective retirement date of December 30, 2017. At the time of filing, respondent was employed by the CDCR as a Supervising Correctional Cook. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.

2. On January 16, 2018, CalPERS sent respondent a letter requesting additional medical information. Specifically, the letter notified respondent, in relevant part: "We have received a Physician's Report on Disability form from Kevin Booth, M.D.

The doctor states the duration of your disability to be less than 12 months. Based on the information on the Physician's Report on Disability form, you do not meet CalPERS' criteria for industrial disability retirement." The letter further provided respondent with a deadline of February 6, 2018, to submit either an updated or a new Physician's Report on Disability form.

3. Respondent did not submit any additional information or otherwise respond to CalPERS's letter. On February 7, 2018, CalPERS sent respondent a substantially similar letter requesting the additional medical information by February 28, 2018. Respondent did not respond. On February 27, 2018, CalPERS sent respondent another substantially similar letter requesting the additional medical information by March 7, 2018. Respondent did not respond. As a result, on March 20, 2018, CalPERS sent respondent a letter notifying him it had cancelled the industrial disability retirement portion of his 2017 application because it received insufficient information to continue processing his case. Respondent's service retirement became effective December 30, 2017, and has continued to the present without interruption.

Respondent's 2020 Applications

4. On October 15, 2020, respondent submitted to CalPERS a new application for service pending industrial disability retirement (October 2020 application). CalPERS rejected the October 2020 application because it was neither notarized nor signed by respondent.

5. On November 9, 2020, CalPERS received respondent's most recent application for service pending industrial disability retirement (November 2020 application). Because respondent was already service retired, CalPERS interpreted the

November 2020 application as a request to change his retirement status from service to industrial disability.

6. On February 23, 2021, CalPERS sent respondent a letter notifying him, in relevant part:

In general, a member cannot change their retirement status after they retire or refund their contributions (Government Code section 20340). An exception can be made if the error or omission was because of a mistake, inadvertence, surprise or excusable neglect. No exception can be made for a mistake caused by a member's failure to make an inquiry that would be made by a reasonable person in like or similar circumstances (Government Code section 20160).

7. CalPERS further requested that respondent answer certain questions about the timing of his November 2020 application. On March 3, 2021, respondent provided written responses to CalPERS's questions. In response to a question about why he did not comply with the warnings that his 2017 application would be canceled without additional documents, respondent explained that he could not control whether his physicians submitted the requested information. He also wrote, among other things, "After receiving cancelled applications from [CalPERS], I contacted your dept. via phone and was told to re-apply. I believe I have applied 3 times."

8. Additionally, in response to a question about whether he contacted CalPERS after his 2017 application was cancelled, he wrote "When I contacted CalPERS for disability retirement cancellation I was told to reapply." In response to a question

about when he became aware that he could resubmit his disability retirement application, respondent wrote, "The last time was Oct/Nov 2020, per Nancy."

9. On April 6, 2021, CalPERS sent respondent a letter denying his request to change his retirement status from service to industrial disability. The letter explained, in relevant part, "You were fully aware of the right to reapply for industrial disability retirement as early as March of 2018. You made an informed choice not to submit your industrial disability retirement application until 11/09/2020."

10. On June 30, 2021, respondent sent CalPERS a letter appealing its denial. In it, he summarized his injury's effect on his life and work. He also explained, in relevant part: "The [2017] application was incomplete due to physicians and workman's comp not completing their portions of the application. Due to their failure to follow through, my application was incomplete and resulted in being cancelled."

CalPERS's Evidence

11. Timothy Grigsby, a CalPERS Associate Government Program Analyst (AGPA), testified at hearing. Mr. Grigsby has worked for CalPERS since September 2016 and as an AGPA in the Disability Retirement section of CalPERS's Disability and Survivor Benefits Division since March 2019. In that role, he reviews industrial disability retirement applications and appeals. Respondent's file is part of Mr. Grigsby's caseload.

12. Prior to the hearing, Mr. Grigsby reviewed respondent's CalPERS file, which includes, among other things, his three applications and a Customer Touch Point Report that summarizes all telephone contact respondent had with CalPERS between December 7, 2009, and August 3, 2021. CalPERS submitted the Customer Touch Point Report into evidence, which was consistent with Mr. Grigsby's testimony.

13. According to the Customer Touch Point Report, after CalPERS cancelled respondent's 2017 application, the next time respondent communicated with CalPERS by phone was on October 5, 2020. On that date, a CalPERS employee spoke with respondent and, among other things, explained the reason his 2017 application was cancelled and advised him he could re-apply.

14. Mr. Grigsby also noted that, according to the Customer Touch Point Report, on March 24, 2021, respondent spoke to a CalPERS employee about CalPERS's March 3, 2021, letter requesting the reasons for his late application. During that call, respondent told the CalPERS representative that he "waited as long as he did to reapply for [industrial disability retirement]" because he "had lost hope and gave up."

Respondent's Evidence

15. At hearing, respondent testified and submitted several medical reports and letters from his worker's compensation attorneys about those reports. He believes he has been disabled since 2014. He further stated he submitted a new application for service pending industrial disability retirement in 2018 after his 2017 application was cancelled. He did not submit that application into evidence but stated it is in his paperwork at home. He did not look for it prior to the hearing.

16. Respondent also testified that he called CalPERS between March 2018 and October 2020. He did not recall the specific dates, but he knows the CalPERS representative told him he could re-apply. He criticized CalPERS for not informing him of his right to reapply sooner. He believes he has submitted three total disability retirement applications to CalPERS.

17. In addition, respondent acknowledged telling a CalPERS representative in March 2021 that he delayed reapplying after his 2017 application was cancelled

because he "lost hope and gave up." He explained he was frustrated because his physicians would not submit forms directly to him, but rather to his worker's compensation attorneys. He cited his doctors' lack of cooperation for his failure to reapply timely after CalPERS cancelled his 2017 application.

Analysis

18. Respondent discontinued his state service when he retired on December 30, 2017. He timely submitted his 2017 application, but CalPERS appropriately cancelled the industrial disability retirement portion of that application on March 20, 2018, because the Physician's Report on Disability form stated the duration of respondent's disability would be less than 12 months. Thereafter, respondent did not reapply until October 15, 2020, almost 31 months later.

19. The question to be resolved in this case is whether respondent's 31-month delay in reapplying was an error or omission attributable to mistake, inadvertence, surprise, or excusable neglect. Respondent did not meet his burden to prove it was. Specifically, respondent stated he did not reapply because he "lost hope and gave up." He also blamed his doctors' failure to cooperate. Finally, he stated he did not reapply earlier because CalPERS did not timely advise him of his right to do so.

20. Losing hope and giving up do not constitute mistake, inadvertence, surprise, or excusable neglect. Similarly, respondent's doctors' alleged failure to cooperate is not attributable to mistake, inadvertence, surprise, or excusable neglect. Finally, respondent claimed his delay was attributable to CalPERS not timely informing him of his rights. However, the evidence does not support that conclusion.

21. Mr. Grigsby credibly testified that the Customer Touch Point Report revealed no telephone contact from respondent between March 2018 and October

2020. Respondent testified that he called CalPERS in that time period, but he could not recall any specifics. His testimony was biased by self interest and less credible than CalPERS's evidence to the contrary.

22. Furthermore, respondent acknowledged that when he did communicate with CalPERS after his 2017 application was cancelled, he was told he could reapply. However, he did not do so until October 2020. His testimony that he submitted an application in 2018 was not credible. CalPERS has no record of receiving any such application, respondent did not provide a copy of it, and respondent stated in his correspondence with CalPERS and at hearing that he applied only three times.

23. Finally, to the extent respondent argued his delayed reapplication was the result of his own failure to timely communicate with CalPERS, any such failure would not justify relief. "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." (Gov. Code, § 20160.)

24. In summary, a preponderance of the evidence showed that respondent's 31-month delay in reapplying for industrial disability retirement was not an error or omission attributable to mistake, inadvertence, surprise, or excusable neglect. Consequently, CalPERS cannot accept his untimely application, and his appeal must be denied.

LEGAL CONCLUSIONS

1. A CalPERS member may apply for disability retirement. (Gov. Code, § 21152, subd, (d).) Pursuant to Government Code section 21154:

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.

2. Pursuant to Government Code section 20160, subdivision (a):

[CalPERS] 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.

3. As the party seeking correction of an error or omission pursuant to section 20160, respondent has the burden of presenting documentation or other evidence establishing the right to correction. (Gov. Code, § 20160, subd. (d).) The burden of proof is a preponderance of the evidence (Evid. Code, § 115), which means "more likely than not." (*Sandoval v. Bank of Am.* (2002) 94 Cal.App.4th 1378, 1388.)

4. As discussed in Factual Findings 4 through 10, pursuant to Government Code section 21154, respondent's November 2020 application for industrial disability retirement was not timely submitted.

5. As discussed in Factual Findings 18 through 23, respondent did not prove by a preponderance of the evidence that his failure to timely submit his November 2020 application for industrial disability retirement was an error or omission attributable to mistake, inadvertence, surprise, or excusable neglect. Therefore, there is no legal basis for CalPERS to accept respondent's untimely November 2020 application, and his appeal must be denied.

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ORDER

Respondent Richard Gastello's appeal of CalPERS's denial of his late application for industrial disability retirement is DENIED.

DATE: June 15, 2022


Sean Gavin (Jun 15, 2022 09:20 PDT)

SEAN GAVIN

Administrative Law Judge

Office of Administrative Hearings