

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**

FEIMATA KAMANDA, Respondent

and

**CALIFORNIA MEDICAL FACILITY, CALIFORNIA DEPARTMENT
OF CORRECTIONS AND REHABILITATION, Respondent**

Agency Case No. 2021-1010

OAH No. 2022030970

PROPOSED DECISION

Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by video conference on October 19, 2022, from Sacramento, California.

Cristina Andrade, Staff Attorney, represented Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS).

Feimata Kamanda (respondent) appeared and represented herself. She was assisted throughout the hearing by an interpreter who translated from English to Pidgin and Pidgin to English.

There was no appearance by or on behalf of respondent California Medical Facility (CMF), California Department of Corrections and Rehabilitation (CDCR). At the hearing, CalPERS established that CDCR was properly served with the Statement of Issues and Notice of Hearing. This matter therefore proceeded as a default against CDCR under Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on October 19, 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, that would allow CalPERS to accept her late application for industrial disability retirement (IDR)?

FACTUAL FINDINGS

1. Keith Riddle, Chief of the Disability and Survivor Benefits Division of CalPERS, filed the Statement of Issues while acting in his official capacity. Respondent timely filed an appeal, and this hearing followed.

2. Respondent was employed by CMF at CDCR as a licensed vocational nurse (LVN). By virtue of her employment, respondent is a state safety member of CalPERS.

CalPERS's Evidence

RESPONDENT'S APPLICATIONS AND COMMUNICATIONS WITH CALPERS

3. On October 19, 2020, respondent submitted to CalPERS an application for service pending IDR, with a requested retirement date of December 30, 2020.

4. Respondent received numerous letters from CalPERS and had numerous telephone conversations with CalPERS staff regarding her applications and the required supporting documentation. There was no interpreter present on any of the telephone calls to help translate from English to Pidgin and Pidgin to English.

5. On October 22, 2020, CalPERS sent letters to respondent acknowledging her application for disability retirement, and requesting additional documents including medical records related to respondent's disabling condition, a job description/duty statement from her employer, and a listing of the physical requirements of her job also from her employer. CalPERS stated in its letter that respondent's application would be canceled if they did not receive the documents within 21 days.

6. On November 3, 2020, respondent called CalPERS and spoke with a representative who reminded respondent that she had 21 calendar days to submit the additional documents requested in CalPERS's October 22, 2020 letter to respondent. The representative also mailed respondent the CalPERS Publication 35 – Disability Retirement Election Application (PUB-35).

7. On November 5, 2020, respondent called CalPERS and asked that her retirement date be changed to December 5, 2020, because her last day on payroll would be December 4, 2020. CalPERS changed respondent's retirement date per her request.

8. On November 6, 2020, a CalPERS representative left a voicemail for respondent asking her to call back. On November 12, 2020, respondent called CalPERS and requested an update regarding her application. The representative reviewed with respondent the additional documents needed for her disability retirement application.

9. On November 19, 2020, CalPERS sent a letter to respondent notifying her that her application for IDR had been canceled because she had not provided the requested application information. The letter also notified respondent that if she wished "to re-apply at a later date, it will be necessary for you to complete a new application at that time."

10. The November 19, 2020 letter did not specify a deadline by which respondent needed to resubmit an IDR application. Nor did the letter state that respondent's CalPERS membership would cease when she began service retirement, and that this would possibly preclude her from re-applying for IDR.

11. On December 9, 2020, respondent called CalPERS regarding the cancellation of her disability retirement application. Respondent gave the CalPERS representative authorization to speak with her daughter. The CalPERS representative told respondent and her daughter that the disability retirement application had been canceled because respondent had provided an incomplete physician's report, and had not provided the requested job duty statement. The representative asked respondent to submit the missing information, and provided written and verbal instructions how

to upload the documents. The CalPERS representative did not specify a deadline by which respondent would need to submit the physician's report and job duty statement, nor did the representative specify a deadline by which respondent needed to resubmit an IDR application.

12. On January 4, 2021, CalPERS sent a letter to respondent notifying her that the service portion of her retirement application had been processed, and that she was service retired (SR) effective December 5, 2020.

13. On April 1, 2021, respondent called CalPERS and asked a CalPERS representative about the cancellation of her IDR application. The CalPERS representative advised respondent that she could re-apply for IDR, again.

14. On April 20, 2021, respondent called CalPERS and spoke with a representative regarding assistance with her IDR application. The representative assisted respondent with the application. The representative also reminded respondent of the 21-day deadline to submit the required documents following submission of a new IDR application.

15. On April 26, 2021, a CalPERS representative called respondent and assisted her in completing an IDR application. The CalPERS representative informed respondent she would need to send in her IDR application, as her SR had been processed.

16. On May 26, 2021, respondent resubmitted an application for service pending disability retirement, with the requested retirement date of May 12, 2020. Respondent claimed disability on the basis of an orthopedic (lower back) condition.

17. On May 27, 2021, CalPERS sent letters to respondent acknowledging her application for IDR, and requesting additional documents including medical records, a physician's report regarding her claimed disabling condition, and a list of the physical requirements of her job from her employer. CalPERS stated in its letter that respondent's application would be canceled if they did not receive the requested documents within 21 days.

18. On June 4, 2021, respondent called CalPERS and spoke with a representative regarding her IDR application package. Respondent told the CalPERS representative that all required forms had been submitted. Respondent requested a call back from CalPERS to advise her what documents needed to be submitted.

19. On June 9, 2021, a CalPERS representative called respondent and informed her that CalPERS had not yet received the physician's report on disability. The CalPERS representative advised respondent to submit the form no later than June 24, 2021, and provided respondent a fax number to use.

20. On June 10, 2021, a CalPERS representative called respondent and informed her that the physician's report and physical requirements form were missing. The representative advised respondent to submit the requested documents to CalPERS no later than June 24, 2021. Respondent advised the representative that she had just sent the requested documents to CalPERS on that date.

21. On June 21, 2021, CalPERS received a phone call from respondent who was checking to see whether CalPERS had received the physician's report. The CalPERS representative told respondent they had not received it. Respondent requested a copy of a blank physician's report form, which the CalPERS representative sent to respondent by email.

22. On June 21, 2021, CalPERS sent a letter to respondent granting her an extension to complete the IDR application package by submitting a physician's report no later than July 8, 2021. The letter also stated that respondent's IDR application would be canceled if the documents were not received by the extended deadline.

23. On July 1, 2021, respondent called CalPERS and asked a representative if she could send CalPERS a physician's report by email. The representative advised respondent to send it in by fax.

24. On July 1, 2021, respondent called CalPERS and explained to another representative that her appointment with a physician was on July 8, 2021, and asked for a couple extra days beyond July 8 to send the physician's report to CalPERS. The CalPERS representative advised respondent that an extension beyond July 8, 2021, could not be guaranteed. Respondent stated that she believed the deadline was July 9, 2021. The CalPERS representative noted that a CalPERS representative should call respondent within five days to confirm the deadline and clarify whether an extension can be granted.

25. On July 6, 2021, respondent called CalPERS and asked a representative to email her a link to upload her physician's report. The CalPERS representative noted that CalPERS should send respondent a link to upload the physicians report.

26. On July 7, 2021, respondent called CalPERS and asked a representative if the missing documents for her IDR application had been received. The representative told respondent that the documents had not been received.

27. On July 7, 2021, respondent again called CalPERS and asked another representative to provide her CalPERS's fax number. The CalPERS representative provided the fax number.

28. On July 8, 2021, a CalPERS representative sent respondent an email with a secure link to upload the physician's report, as respondent had requested on July 6.

29. On July 9, 2021, respondent spoke by telephone with a CalPERS representative and stated that she had mailed the physician's report on July 3, 2021, and sent it in by fax on July 8, 2021. The CalPERS representative told respondent that CalPERS had not yet received the documents, and to allow a couple days for it to be placed in respondent's file. The CalPERS representative also advised respondent that she could send the physicians report by email using the secure link that was provided to her on July 8, 2021. Respondent stated that she will have her son help her send the physicians report form by email.

30. On July 9, 2021, CalPERS received the physician's report, which completed respondent's IDR application package.

31. On July 15, 2021, a CalPERS representative left a voicemail for respondent that her IDR application had been reactivated and that she would be assigned an analyst to review her case.

32. On July 19, 2021, CalPERS sent respondent a letter stating that they had received her request to change from SR to IDR, and that a member generally cannot change their retirement status after they retire. The letter also stated that an exception can be made if there was an error or omission because of mistake, inadvertence, surprise, or excusable neglect.

33. On September 27, 2021, CalPERS sent respondent a letter stating that they had reviewed her IDR application, and that CalPERS could not accept it for reasons including that she submitted the complete package with all the required

documents approximately eight months after her original application was cancelled on November 19, 2020.

TESTIMONY OF CALPERS ANALYST

34. Timothy Grigsby is an associate government program analyst employed at CalPERS since 2019. He testified regarding the reasons why CalPERS canceled respondent's 2020 application and refused to accept her 2021 application. Mr. Grigsby stated that CalPERS did not accept respondent's 2021 IDR application because she submitted the full application package more than six months after CalPERS had canceled her 2020 application on November 19, 2020. Mr. Grigsby asserted that pursuant to Government Code section 20160, subdivision (a)(1), respondent could correct her mistake of failing to submit the required supporting documents within six months of CalPERS's November 19, 2020 cancellation of her initial application.

35. Mr. Grigsby also asserted that respondent's December 5, 2020 retirement date is significant because under Business and Professions Code section 20340, subdivision (a), respondent ceased to be a member eligible to apply for IDR when she retired. Consequently, respondent is precluded from submitting an IDR application unless she can show that she committed excusable error.

36. Mr. Grigsby does not work in the CalPERS call center with the representatives who take calls from members such as respondent. He has not had any experience with members who have difficulties communicating because of language differences. Members can ask for an interpreter if they have problems communicating. He cannot speak on behalf of the CalPERS call center staff or what they were thinking regarding respondent.

Respondent's Evidence

RESPONDENT'S TESTIMONY

37. During the hearing it was clear that respondent needed an interpreter to fully communicate and understand what was said, though there were some isolated instances in which she was able to communicate and understand without the interpreter.

38. Respondent was very isolated and alone during much of 2020 and 2021, because she was exercising precautions to avoid catching Covid-19. She has adult children, but they did not spend much time with her because they wanted to protect her from Covid-19. She caught Covid-19 in December 2020. She felt "confusion" from Covid-19 and from isolation.

39. When she called CalPERS for assistance, they gave her step-by-step instructions. However, without someone with her to help she could not understand what to do.

40. She did her best to get documents from her employer and health care provider, as CalPERS requested. Her employer and health care provider told her they had already sent the documents. She felt like CalPERS "sandwiched" her in the middle.

41. Respondent's failure to get the documents when CalPERS requested them was not negligence on her part. Rather, it was the effect of "confusion in [her] head."

TESTIMONY AND WRITTEN STATEMENTS OF RESPONDENT'S ADULT CHILDREN

42. Hindolo Brima is one of respondent's sons. He has noticed that respondent's "mental capacity has shifted" and that she is "more difficult to understand" since she had Covid-19. Her ability to manage detailed instructions is now limited.

43. Respondent immigrated to the United States on her own from Sierra Leon. One of the important social values in Africa is that the younger generation will pay attention to their elders. The pandemic negatively affected respondent's state of mind because she was not able to have her children and grandchildren around her. She was basically locked up by herself and isolated.

44. Even with these challenges, respondent did her best to comply with CalPERS's requests. However, the documents CalPERS was requesting were not in respondent's possession. They were possessed by her doctor and her employer.

45. Sia Brima is respondent's daughter. Respondent is not computer literate. Respondent tries to reach out to her children for assistance on the computer. Sia helped respondent with emails. Respondent had trouble understanding what CalPERS representatives wanted.

46. Kenie Brima is one of respondent's sons. To his observation, respondent's Covid-19 infection and isolation took a toll on her emotional and physical condition.

Analysis

47. CalPERS's central argument is that respondent did not timely correct her errors and omissions. She did not re-apply for IDR and submit a full set of documents

within six months of the CalPERS's November 19, 2020 cancellation of her original application. Also, her 2021 application is precluded because she was retired for service in December 2020, unless respondent can demonstrate that she timely corrected that error.

48. CalPERS's contends that respondent had six months from its November 19, 2020 letter canceling respondents 2020 application. This argument is flawed. Specifically, pursuant to Government Code section 20160, subdivision (a)(1), the CalPERS Board may correct the errors of an active or retired member if certain conditions are met, including that the member requests 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." The November 19, 2020 letter did clearly tell respondent of her right to correct her mistake. The letter does not specifically explain respondent's mistake, her right to correct it, how to correct it, and the time frame within which to correct it.

49. CalPERS also contends that CalPERS staff provided extensive assistance to respondent through telephone conversations, and that based on those telephone conversations with CalPERS representatives, respondent understood or should have understood what she needed to do to correct her errors. This argument conspicuously ignores two facts. First, respondent required the assistance of an interpreter to meaningfully participate in the hearing in this matter. There is no reason to believe she was less in need of an interpreter during her 2020 and 2021 telephone communications with CalPERS staff. Second, respondent's cognitive abilities noticeably declined following her Covid-19 infection and as a result of her isolation. Although CalPERS staff may have been sincere in their attempts to provide assistance, without an interpreter the utility of those efforts was materially diminished.

LEGAL CONCLUSIONS

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, note 5.) Thus, respondent has the burden of establishing by a preponderance of the evidence that she is entitled to have CalPERS accept her 2021 application. Respondent has met her burden of proof.

2. Government Code section 21154 requires that any application for disability retirement 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."

3. Under Government Code section 21152, subdivision (d), an application for disability retirement may be made by "[t]he member or any person in his or her behalf." However, under Government Code section 20340, subdivision (a), "A person ceases to be member . . . [u]pon retirement."

4. Although respondent's 2020 application was made timely (i.e., prior to her retirement), CalPERS canceled that application. Respondent's 2021 application was made after she had retired for service and was no longer a CalPERS member.

5. In *Button v. Bd. of Admin.* (1981) 122 Cal. App. 3d 730 (*Button*), the court analyzed the precursor statutes to Government Code sections 21152, 21154, and

20340 in similar circumstances. While Government Code sections 21152, 21154, and 20340 “evidence a legislative intent that under normal circumstances retirees may not change their status,” Government Code section 20160 dictates that CalPERS’s “interests in administrative and actuarial efficiency are not of overriding importance so as to allow honest mistakes to remain uncorrected,” and “[t]hat section equally applies to post-retirement changes in status.” (*Button, supra*, at p. 737.) Consequently, although respondent’s 2021 application was not filed in conformity with Government Code sections 21152, 21154, or 20340, respondent is afforded the opportunity to seek relief from her mistake under Government Code section 20160.

6. Government Code section 20160 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, 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.

(b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system. [¶]

(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).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in

subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

7. Government Code section 20160, subdivision (a)(2), references Code of Civil Procedure (CCP) section 473, which is generally used to grant civil relief when a judgment or some other action has been taken against someone due to that person's mistake, inadvertence, surprise, or excusable neglect. A mistake of fact can support relief under CCP section 473. (*In re Marriage of Kerry* (1984) 158 Cal.App.3d 456, 465.) "Excusable neglect," whether or not it is the result of "mistake," may also support relief under section 473. The "excusable neglect" may be the result of disability. (*Ibid.*) "The existence of some degree of mental confusion or illness of the party moving to set aside an order supports granting the motion, and the court may infer the existence of such problems from the whole record before it." (*Id.*, p. 466.)

8. Relief under CCP section 473 is conditioned on the party seeking relief within a reasonable time, and relief may be denied when there is an unreasonable delay. (*Mercantile Collection Bureau v. Pinheiro* (1948) 84 Cal.App.2d 606.) Similarly,

Government Code section 20160, subdivision (a), requires a member to “make the inquiry that would be made by a reasonable person in like or similar circumstances.”

9. Respondent was diligent in pursuing her 2020 and 2021 applications. The record clearly demonstrates that respondent contacted CalPERS representatives on numerous occasions inquiring about her applications and responding to CalPERS’s inquiries of her. Following CalPERS’s cancelation of her 2020 application, respondent prepared to submit a new application.

10. There was no failure by respondent “to make the inquiry that would be made by a reasonable person in like or similar circumstances.” Given the foregoing, respondent’s errors or omissions were caused by excusable neglect which would entitle her to relief under Government Code section 20160, as long as her request to correct the error or omission was made “within a reasonable time after discovery of the right to make the correction, [not exceeding] six months after discovery of this right.” (Gov. Code, § 20160, subd. (a)(1).)

11. CalPERS’s November 19, 2020 cancelation letter did not provide respondent with notice of her right to correct her errors or omissions. CalPERS told respondent, and she reasonably believed, she could re-submit her application. CalPERS did not inform respondent in any of their numerous communications that she had only six months to do so. Respondent resubmitted her IDR application on May 26, 2021, which CalPERS acknowledged on the following day. CalPERS then gave respondent until July 8, 2021, to submit all necessary supporting documents, which she did on July 9, 2021.

12. Courts have provided relief from mistakes under similar circumstances, allowing retirees to change their retirement status years after electing a different

option. (*Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559 (*Rodie*); *Button, supra*.) In *Rodie*, a police chief knew that he was eligible for either disability or service status but elected disability retirement believing he would receive larger payments. Years later, he learned he was mistaken and sought to change to service retirement. In *Button*, a district attorney's investigator was initially unaware he may have been eligible for disability retirement and elected service retirement. Years later, he sought to change to disability retirement. In both cases, the courts applied the precursor statute to Government Code section 20160 and allowed the retirees to correct their mistakes and to change their retirement status.

13. In rendering their decisions, the *Rodie* and *Button* courts pointed to the established policy requiring liberal construction of pension statutes in favor of the applicant. (*Rodie, supra*, at p. 565; *Button, supra*, at p. 737.) Such a liberal interpretation is essential "to effectuate, rather than defeat, [the] purpose of providing benefits for the employee[.]" (*Button, supra*, at p. 737.)

14. If not for the delayed submission of documents outside respondent's control and CalPERS's discretionary cancelation of her 2020 application, respondent's IDR application could have reached a determination on its merits. Here, similar to *Rodie* and *Button*, the broad interpretation of Government Code section 20160 is essential "to effectuate, rather than defeat, [the] purpose of providing benefits for the employee," and to avoid barring an employee from receiving a disability pension to which she may be entitled.

15. Based on the Factual Findings and Legal Conclusions as a whole, respondent must be allowed to correct her mistake, and CalPERS must accept and consider respondent's IDR application to determine whether she was disabled when she retired.

ORDER

Respondent Feimata Kamanda's appeal is GRANTED. CalPERS shall accept as timely and consider respondent's application for industrial disability retirement to determine whether respondent was disabled when she retired and entitled to change her retirement status.

DATE: November 18, 2022

Timothy Aspinwall

TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings