

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:**

**LEILANI J. SCOTT and CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondents**

Agency Case No. 2020-1160

OAH Case No. 2021020307

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on August 3, 2021, by videoconference and telephone from Sacramento, California.

Helen L. Louie, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Leilani J. Scott (Scott) appeared and represented herself.

Respondent California Department of Corrections and Rehabilitation (CDCR) did not appear at hearing. CDCR was duly served with all notices. The matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter submitted for decision on August 3, 2021.

ISSUE

Did Scott make 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 her late application for industrial disability retirement (IDR)?

FACTUAL FINDINGS

Jurisdiction

1. In a letter dated August 17, 2020, CalPERS refused to accept Scott's application for IDR due to its late filing, which was not deemed a correctable mistake. Scott timely appealed CalPERS' decision.

2. On February 4, 2021, Keith Riddle, in his official capacity as Chief of CalPERS' Disability and Survivor Benefits Division, filed the Statement of Issues for purposes of the appeal. The matter was then set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

CalPERS' Evidence

3. Scott was previously employed by CDCR, most recently as a Correctional Counselor I. By virtue of her employment, Scott was a state safety member of CalPERS.

4. On March 14, 2016, Scott submitted an application for service retirement to CalPERS. She requested a retirement effective date of June 12, 2016.

5. By letter dated March 17, 2016, CalPERS acknowledged receipt of Scott's application for service retirement. That same letter also included the following notice:

You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To request a service pending disability retirement, you must complete a Disability Retirement Election Application.

6. On May 6, 2016, at Scott's request, CalPERS sent Scott a copy of Publication 35 - A Guide to Completing Your CALPERS Disability Retirement Election Application (PUB 35). PUB 35 sets forth the eligibility requirements for the different types of disability retirement, the deadlines to apply, as well as detailed instructions for completing the Disability Retirement Election Application. It also includes a blank copy of the application form.

PUB 35 instructs, in part:

You should apply for disability or industrial disability retirement as soon as you believe you are unable to perform your usual job duties because of an illness or injury that is expected to be of permanent or extended and uncertain duration. Once we receive all the required information described in this publication, we can begin processing your application.

It further explains that a person “may apply for a disability or industrial disability retirement: [w]hile you are in CalPERS-covered employment; or [w]ithin four months of separation from CalPERS-covered employment; or [a]t any time, if you ‘separated’ from or left your job because of a disability and you have remained disabled since then; or [w]hile on military or approved leave.”

PUB 35 also advises of the option to apply for service pending disability retirement:

You have the option to apply for a “service” retirement pending your disability or industrial disability retirement — if you qualify for a service retirement. This would allow you to receive a monthly service retirement allowance while awaiting the determination of your disability retirement application.

To apply for a “service pending” retirement, check the Service Pending Disability Retirement or Service Pending Industrial Disability Retirement box on the *Disability Retirement Election Application* form.

PUB 35 cautions as follows:

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. Delaying your application for retirement may affect important benefits you may be entitled to receive.

7. On May 19, 2016, CalPERS received from Scott a Retirement Allowance Estimate Request form, requesting a disability retirement estimate with a projected retirement date of June 12, 2016. On June 17, 2016, CalPERS provided Scott with a disability retirement estimate.

8. On June 12, 2016, Scott retired for service. On July 5, 2016, she was issued a retroactive check to cover benefits for the period of June 12 through 30, 2016. Around August 1, 2016, she received her first regular benefit check.

9. On June 17, 2019, Scott contacted CalPERS to inquire about changing her retirement status and benefits from service retirement to IDR. CalPERS staff explained the documentation required, provided an application processing timeframe, and sent Scott another copy of PUB 35 that same day. Scott again contacted CalPERS on July 9, July 22, and September 13, 2019, and obtained further assistance from CalPERS staff on how to complete her IDR application.

10. On September 19, 2019, CalPERS received from Scott an application for IDR, with a requested retirement date of June 12, 2016. The application was missing several pages in addition to other deficiencies. In letters dated September 23 and 30, 2019, CalPERS rejected that application as incomplete and instructed Scott to submit a new application. On September 30, 2019, per Scott's request, CalPERS sent Scott another copy of PUB 35.

11. On October 14, 2019, CalPERS received from Scott a second application for IDR, with a requested retirement date of June 12, 2016. Scott claimed disability based on "[d]egenerative joint disease, carpometacarpal joint of the thumb both hands." Following receipt of the second IDR application, CalPERS requested additional information, including specified medical records, from Scott by certain deadlines. In a

March 26, 2020 letter, CalPERS cancelled the second IDR application based on Scott's failure to timely provide all requested medical records. The letter instructed Scott to file a new application, including the missing medical records, if she still desired to pursue IDR.

12. On April 28, 2020, CalPERS received from Scott a third application for IDR, labeled "Amended 4.14.20," with a requested retirement date of June 12, 2016. Scott claimed disability based on coronary heart disease, hypertension, hypertensive cardiovascular disease, and degenerative joint disease in the carpometacarpal joint of the thumb of both hands. On August 17, 2020, CalPERS refused to accept the third IDR application because it was considered late, as noted above.

Scott's Evidence

13. Scott started working for CDCR in 1986 at the age of 21. She was very happy with her career at CDCR, having worked as an officer and sergeant at several maximum security institutions, a trainer at CDCR's academy, transportation detail staff, and most recently as a correctional counselor. She always worked hard and dedicated herself to the job, and did not understand the cumulative stress and damage it caused to her body over the long term.

14. Towards the end of her career at CDCR, Scott had very high blood pressure, but it was successfully controlled with medication. She also encountered various orthopedic issues, which caused her pain, and eventually, she filed a worker's compensation claim. However, the Qualified Medical Examiner (QME) and orthopedic specialist who evaluated Scott opined that she could return to work.

15. In March 2016, Scott decided to apply for service retirement, because she was still experiencing some pain and met the requirements for service retirement. At

that time, she did not apply for IDR because she thought she was ineligible and/or could file for IDR at a later time based on the following:

First, the doctors involved in her worker's compensation case informed her that she could return to work. Thus, she did not believe that she was disabled and qualified for IDR at that time.

Second, her worker's compensation attorney told her that although she had the option to file for disability retirement in the future, "we first need to get through the worker's compensation case." Scott explained that her attorney's scope of representation was limited to the worker's compensation case; he never represented her for purposes of any application filed with CalPERS.

Third, a CalPERS staff member at a retirement workshop Scott attended in Fresno told Scott that she could file for service retirement first and then later apply for IDR.

16. In January 2017, Scott experienced sudden chest tightness and significant breathing problems. She was sent for numerous tests. Scott's symptoms and the diagnostic process were extremely stressful, and she had no time or energy to deal with CalPERS applications or other legal matters. In July 2017, she was finally diagnosed through an angiogram with a large artery blockage, for which she then received treatment. She believes that her heart condition renders her disabled.

17. Scott admits that her application for IDR was filed late. However, she explained that she was not aware of the statutory deadlines to apply for IDR. Although she received PUB 35 from CalPERS, the information was complicated and confusing, and she was also stressed and nervous due to her medical issues. She never

intentionally delayed filing her application for IDR. She urges CalPERS to construe her late-filed application as a correctable mistake.

Analysis

18. Government Code section 21154 sets forth the timeline for filing an application for IDR:

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. . . .

19. Here, Scott concedes that her application for IDR was not filed timely in accordance with section 21154. She did not file it while still in state service, while absent on military service, or within four months after the discontinuance of her state service or while on an approved leave of absence. (See Gov. Code, § 21154, subds. (a)-(c).) Additionally, subdivision (d) is inapplicable to Scott because she is no longer a "member." Scott ceased being a CalPERS member when she service retired in June 2016. (See Gov. Code, § 20340, subd. (a) ["A person ceases to be a member: (a) Upon retirement, except while participating in reduced worktime for partial service retirement"].) Thus, for CalPERS to accept the late application, Scott must

demonstrate the existence of a correctable mistake under Government Code section 20160.

20. Government Code section 20160, subdivision (a), provides that:

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.

21. Here, Scott was repeatedly provided with information, instructions, and documentation to apply for IDR or service pending IDR before she retired for service in June 2016. Nonetheless, she waited more than three years to submit her first application for IDR in September 2019.

22. Even if Scott's worker's compensation attorney told her to wait until her worker's compensation matter was resolved, Scott concedes that the attorney did not represent her for purposes of any CalPERS application. Moreover, the PUB 35 provided by CalPERS specifically instructed Scott not to delay her IDR application based on the pendency of any worker's compensation matter. At a minimum, faced with such a perceived inconsistency, a reasonable person would have made an inquiry to obtain greater clarification from CalPERS.

23. Scott's testimony that a CalPERS staff member at a retirement workshop told her that she could file for service retirement first and then later apply for IDR is vague, lacks context, and is unsubstantiated by any documentation. The staff member may well have referred to the option to file for service pending IDR. In any event, PUB 35 clearly outlines the deadlines to apply for IDR and service pending IDR.

24. Even though Scott's application for IDR has a requested retirement date of June 12, 2016, Scott's own testimony suggests that she did not consider herself disabled at that time. Instead, she contends that her disability arose when her heart condition became symptomatic in January 2017, approximately six months after she retired for service.

Even assuming, without deciding, that Scott's heart condition could be a newly-discovered basis for IDR, Scott nonetheless failed to act diligently upon discovery of that condition. After her heart condition was diagnosed in July 2017, Scott waited more than two years before filing her first application for IDR. (See Gov. Code, § 20160, subd. (a)(1) [request to correct mistake must be made "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*"'] [emphasis added].) To be sure, Scott's stress about her heart condition was understandable, but it does not explain a more than two-year delay. Here, respondent did not act in bad faith, but she failed to demonstrate that she acted diligently under the circumstances.

25. In sum, Scott failed to demonstrate that she made an error or omission as a result of mistake, inadvertence, surprise, or excusable neglect. Thus, CalPERS appropriately determined that her late application for IDR could not be accepted pursuant to Government Code section 20160.

LEGAL CONCLUSIONS

1. Scott has the burden of proving by a preponderance of the evidence that her late-filed application for IDR should be accepted pursuant to Government Code section 20160. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that [s]he is asserting"]; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. Government Code section 20160, subdivision (a), provides that:

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.

3. Based on the Factual Findings as a whole, and specifically, Factual Findings 18 through 25, Scott did not establish that her failure to file for IDR in a timely manner constituted an error or omission correctable under Government Code section 20160. Consequently, her late application for IDR was properly refused.

ORDER

The appeal of respondent Leilani J. Scott is DENIED. CalPERS' decision to refuse Scott's late IDR application is AFFIRMED.

DATE: August 19, 2021

Wim vanRooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings