

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal of Accepting the Late Request to
Change Service Retirement:**

JESUS CASTILLO,

Respondent,

and

**PAROLES AND COMMUNITY SERVICES DIVISION,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION,**

Respondent.

Agency Case No. 2023-0804

OAH No. 2024060963

PROPOSED DECISION

Irina Tentser, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 12, 2024.

Austa Wakily, Staff Attorney, represented California Public Employees' Retirement System (CalPERS).

Jesus Castillo (Respondent) appeared and represented himself at hearing.

No appearance was made by respondent Paroles and Community Services Division, California Department of Corrections and Rehabilitation (CDCR). The hearing proceeded in default as to CDCR.

Testimonial and documentary evidence was received. The record was closed and the matter was submitted for decision on September 12, 2024.

FACTUAL FINDINGS

Jurisdictional Matters

1. CalPERS is a defined benefit plan administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.; undesignated statutory references are to the Government Code.) CalPERS is governed by its Board of Administration (Board).

2. Respondent was employed by the CDCR as a Parole Agent I. By virtue of his employment, Respondent was a state safety member of CalPERS subject to the

governing industrial disability retirement application requirements. (§§ 20026, 20160, 20340, 21154, 21453.)

Summary – Late Appeal

3. In 2014 Respondent was notified by CalPERS of the cancellation of his application for industrial disability retirement (IDR).

4. Respondent waited over eight years, until 2023, to reapply for IDR.

5. CalPERS determined it could not accept Respondent's request to change his service retirement to disability retirement because Respondent did not meet the criteria under section 20160 that allows for the correction of a mistake.

6. Respondent appealed CalPERS' determination and requested an administrative hearing.

7. The sole issue at this administrative hearing was whether Respondent made an error or omission because of mistake, inadvertence, surprise, or excusable neglect correctable by section 20160, which would allow CalPERS to accept Respondent's request to change from service retirement to disability retirement.

8. As set forth below, Respondent failed to establish through the evidence presented at hearing that Respondent's extensive years long delay was due to mistake, inadvertence, surprise or excusable neglect pursuant to section 20160.

Background – Late Appeal

9. Effective December 31, 2013, Respondent retired from service. Since January 2014, Respondent has been receiving his service retirement benefits.

Respondent's IDR claim was based on his orthopedic conditions; specifically, cervical

disc disease with stenosis, lumbar disc disease with stenosis, bilateral shoulder impingement syndrome with labral tear and peripheral nerve entrapment conditions.

10. By letters dated April 10, 2014 (First Request), and May 12, 2014 (Second Request), CalPERS requested additional information from Respondent regarding his request to change from service retirement to IDR. (Exhibits 8 and 11.) Both letters were sent by Certified Mail with Return Receipt Requested to Respondent's address of record.

11. Both CalPERS's April 10, 2014, and May 12, 2014, letters to Respondent provided in relevant part:

NOTICE TO MEMBER

Cooperation in providing the requested information is essential to CalPERS' efforts to reach a determination, however, we cannot proceed without it and will cancel the request to change from service to disability retirement if we do not receive a written response within 30 days from the date of this letter. A cancellation notice will be forwarded upon expiration of the 30 days. Since you are currently on the service retirement roll, if your disability retirement application is canceled, you will not be permitted to reapply for disability retirement in the future.

(Exhibits 8, p. A65; 11, p. A74.) (Bold and underline in original.)

12. Respondent did not respond to the April 10, 2014, and May 12, 2014, letters. Respondent failed to provide the requested additional information to CalPERS.

13. By letter dated June 30, 2014, CalPERS notified Respondent that his application for IDR was cancelled (June 30, 2014 Notice of Cancellation) and "any future request will require a new application." (Exhibit 13, p. A79.)

14. On July 3, 2014, Respondent contacted CalPERS by telephone to inquire why CalPERS canceled the IDR application. (Exhibit 15, p. A91.) In response to Respondent's inquiry, CalPERS sent Respondent a detailed letter explaining what caused the cancellation of the IDR application. (*Id.*)

15. By letter dated July 9, 2014 (July 9, 2014 Notice of Cancellation), CalPERS notified Respondent that his IDR application was cancelled because "CalPERS did not receive a response to the attached letters dated April 10th and May 12th, 2014." (Exhibit 14, p. A80.) The July 9, 2014 Notice of Cancellation letter provided Respondent with a phone number to contact CalPERS's "[i]f Respondent [had] any questions." (*Id.*)

16. Respondent did not contact CalPERS regarding his IDR application and its cancellation between July 3, 2014 and July 19, 2017. (Exhibit 15.)

17. On July 20, 2017, according to CalPERS's records, a "[Respondent's] [b]usiness partner called to inquire about the status of [Respondent's] disability retirement application." (Exhibit 15, p. A90.) CalPERS notified the "business partner" that the IDR application had been cancelled consistent with CalPERS July 9, 2014 notes. (*Id.*) (CalPERS's July 9, 2014 notes state, "[m]ailed letter to [Respondent], per [Respondent] request advising [Respondent] the IDR application was cancelled due to no response to the letters sent on 4/10/14 and 5/12/14 requesting additional information regarding [Respondent] late application and also for [Respondent] to provide medical documentation showing continuous disability." (Exhibit 15, p. A91).)

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18. Respondent did not contact CalPERS regarding his IDR application and its cancellation between July 21, 2017 and July 12, 2018. (Exhibit 15.)

19. On July 13, 2018, Respondent sent a message to CalPERS through myCalPERS workflow, that his "case has ended with Workman [*sic*] Compensation and [Respondent] was awarded 71% disable." (Exhibit 15, p. A90.) As part of the message, Respondent inquired "how [Respondent] can change [Respondent's] regular retirement to disability retirement." (*Id.*)

20. By letter dated March 27, 2019, CalPERS provided Respondent with documents including the publication, PUB-35 (A Guide to Completing Your Disability Retirement publication). (Exhibits 16 and 17.)

21. On October 10, 2019, Respondent visited CalPERS's Glendale Regional Office in person. CalPERS staff member Renzo Vergara entered the following note regarding Respondent's CalPERS October 10, 2019 visit:

[Respondent] walked into [Glendale Regional Office] and stated [Respondent] just won [Respondent's] case and that [Respondent] now wants to apply for IDR. Advised [Respondent] the documents that [Respondent] would need to submit for a complete IDR packet. Also informed [Respondent] that [Respondent] will likely be sent an additional questionnaire, [Respondent] needs to complete that and comply with anything that is asked of [Respondent] in order to prevent the IDR application from being cancelled again. [Respondent] stated that when [IRDR application] got cancelled in 2014 [Respondent] was told

that [Respondent] should just wait until the case was over to reapply so that is why [Respondent] is coming in now. [Respondent] was provided with current [Disability Retirement] publication and will return with all forms.

(Id., pp. A89-A90.)

22. There is no credible evidence that corroborates Respondent's October 10, 2019 claim to CalPERS, as set forth in Factual Finding 21, that Respondent was told by CalPERS in 2014 to wait until Respondent's worker's compensation case concluded to reapply for IDR with CalPERS.

23. Respondent did not contact CalPERS regarding his IDR application and its cancellation and did not provide any forms related to renewing his cancelled IDR application to CalPERS during the next three-years and four-months, between October 11, 2019, and February 7, 2023. (Exhibit 15.)

24. On February 8, 2023, Respondent visited CalPERS's Glendale Regional Office in person and applied for service pending IDR with a retirement date of December 31, 2013. (Exhibit 18.) Respondent claimed industrial disability based on his heart (quintuple bypass) and orthopedic (neck, back, right and left shoulders, carpal tunnel on right and left hands) conditions. *(Id.)*

25. By letter dated June 22, 2023, CalPERS requested additional information from Respondent regarding Respondent's request to change from service retirement to IDR. (Exhibit 20.) The letter notified Respondent, 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) . . . To determine if a correctable mistake was made, we need [Respondent] to provide information regarding the circumstances at the time [Respondent] separated from CalPERS covered employment.

(Ibid.)

26. On July 11, 2023, Respondent provided responses to CalPERS's request for additional information, as follows:

1. You originally submitted a service pending industrial disability retirement application on 03/24/14. The industrial disability retirement portion of the application was canceled on 06/28/14 because the requested information had not been received. You submitted another industrial disability retirement application on 02/10/23. Please explain why you did not comply with the notifications informing you that your application would be canceled if the appropriate documents were not submitted?

Response: Unfortunately, I had no control of requested documents from my orthopedic doctor on my previous

application. At that time I requested and paid twice for the documents to be submitted by the doctor office on a timely manner without success. On both occasions I was advised that said documents were mailed out and was not provided with a copy of letters.

2. Did you contact CalPERS after your industrial disability retirement application was cancelled?

a. If yes, when and what assistance did you receive?

b. If no, why did you not do so?

Response: I did make contact with CalPERS at that time and advised them of my situation of the missing doctors medical report. I was advised by CalPERS representative that due to missing reports my application was to be terminated immediately for missing documentation without recourse.

3. Please explain why you waited until 02/10/23 to reapply for industrial disability retirement after receiving the cancellation letter dated 06/28/14?

Response: I reapply for industrial disability again until 02/10/23, due to my workman cases being settle and awarded with 71% and 6% disability compensation for my work-related disabilities: heart, neck, back, hands, both shoulders, abdominal wall (hernia) and hand nerve damage.

As I have noted and have made CalPERS aware [sic] that my workman cases have taken six (6) and ten (10) years to resolve and be awarded favorably. So finally, I decided to again attempt and apply for industrial disability due to finally being able to have the necessary proof needed [sic] to resolve [sic] my industrial disability application.

4. Did any physician instruct you to stop working in your former position due to your disabling condition?

a. If yes, who was the physician (Name, Address, Phone #) and when did they instruct you to stop working?

b. If no, when did your doctor determine that you were unable to perform your former job duties?

Response: Yes, Dr. Michael C. Luciano MD (QME/AME) approximately around 12/2013, advised me that due to my extensive injuries to my "cervical [sic] spine, lumbar spine, both shoulders, both hands and both wrists" I was not going to be able to perform my Parole Agent I work duties as required. (50 Bellefontaine St. Pasadena, CA. 91105. 800-699-2613.

5. Did you advise your employer that you had to retire because of a disability? If no, why did you not do so?

Response: Yes, I advised my personnel [sic] specialist at that time of my intent to retire due to my medical

disabilities. At which time, I was advised by my specialist to acquired [s/c] an attorney to represent me due to my work disabilities and to be able to proceed with my claim.

6. Did you leave work for any reason other than a disabling medical condition (i.e., moving, termination, resignation, settlement agreement, etc.)? If yes, please explain and forward any copies of the Notice of Adverse Action, resignation letter, settlement agreement, stipulation agreement or any other relevant information.

Response: No, I did not leave work for any other reasons other than my medical conditions at the time.

On a side note: I received this letter on 07/07/2023 by USPS service, and due to time constraints on requested response dated of 07/17/2023 I would like to be scheduled for an independent medical examination. I will attempted [s/c] to have both medical doctors fill and returned [s/c] on a timely manner. Due to having a scheduled [s/c] total hip replacement surgery on 07/12/2023 (another open workman's compensation case still going through it's [s/c] process), my options are/will be limited at this time due to my scheduled [s/c] total left hip replacement surgery and recovery period.

(Exhibit 21, pp. A196-A197.)

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27. By letter dated July 27, 2023, CalPERS notified Respondent that after review of the information in Respondent's file, CalPERS could not accept Respondent's late application because "[t]he evidence suggests [Respondent] had knowledge of the application process and, therefore, [CalPERS is] unable to establish that a correctable mistake was made [by Respondent in submitting the late IDR application]." (Exhibit 22, p. A209.)

28. On August 3, 2023, Respondent appealed CalPERS's denial to accept his late IDR application.

29. CalPERS specifically explained at hearing that after reviewing the medical reports and information received and after considering Government Code section 20160 and other applicable precedents, CalPERS determined Respondent's member status ceased on December 31, 2013, citing Government Code section 20340. CalPERS found that Respondent did not seek to change his status from service to disability prior to receiving his first warrant in January 2014, citing Government Code section 21453. Respondent had information, according to CalPERS, on applying for disability retirement, citing Government Code section 21154. Accordingly, Respondent did not meet the necessary criteria under Government Code section 20160 that would allow CalPERS to find the correction of a mistake in Respondent's late filing of the IDR application.

30. CalPERS argued at hearing Respondent knew or should have known, based on the CalPERS Notice of Cancellation letters sent to him on June 30, 2014, and July 9, 2014, of the cancellation of his application for IDR and waited, without any reasonable basis, for over eight years to reapply for IDR. As a result, CalPERS determined that it could not accept Respondent's request to change his service retirement to disability retirement.

31. During the hearing, Respondent was afforded the opportunity to testify and submit documentary evidence to support his appeal. Respondent, however, chose not to testify and did not submit any documentary evidence to support his appeal of CalPERS's determination denying his request to accept his late IDR application.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. A CalPERS active or retired member, such as the case is here for Respondent, seeking a correction of an error or omission pursuant to Government Code section 20160, "has the burden of presenting documentation or other evidence to the board establishing the right to correction." (§ 20160, subd. (d).)

2. An applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he is entitled to it absent a statutory presumption. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

3. In this matter, the preponderance of the evidence standard requires Respondent to present 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.)

Disability Retirement – Statutory Authority

4. The general purpose of the public retirement system, as set forth in the PERL is "to prevent hardship to state employees who because of age or disability are replaced by more capable employees. (*Quintana v. Board of Administration* (1976) 54 Cal.App.3d 1018, 1021.)

5. CalPERS has exclusive fiduciary responsibilities over the assets of the public retirement system and the way benefits and related services are administered to participants and their beneficiaries. (Cal. Const., art. 16, § 17, subd. (a).)

6. Disability retirement requires a “disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the [B]oard . . . on the basis of competent medical opinion.” (§ 20026.)

7. A person ceases to be a “member,” “[u]pon retirement, except while participating in reduced worktime for partial service retirement.....” (§ 20340, subd. (a).)

8. An application for disability retirement may be made by, among others, the member, or any person on his or her behalf. (§ 20340, subd. (a).)

9. Section 21154 describes “Application Requirements,” 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

10. Section 21453 provides, in relevant part:

“An election, revocation, or change of election shall be made within 30 calendar days after the making of the first payment on account of any retirement allowance or, in the event of a change of retirement status after retirement, within 30 calendar days after the making of the first payment on account of any retirement allowance following the change in retirement status. “Change in retirement status” includes, but is not limited to, change from service to disability retirement, from disability retirement to service retirement, from nonindustrial disability retirement to industrial disability retirement, or from industrial to nonindustrial disability retirement.

For purposes of this section, payment shall be deemed to have been made on the date a warrant is mailed, or the date funds are electronically transferred to a bank, savings and loan association, or credit union account for deposit in the member’s account.

This section shall not be construed to authorize a member to change his or her retirement status after the election, revocation, or change of election provided in this section.

Errors or Omissions Statute

11. Government Code section 20160 provides the criteria under which CalPERS may correct an active or retired member’s errors or omissions and states:

(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.

(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).

(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.

Disposition

12. In this case, Respondent retired and ceased to be a member on December 31, 2013. (Factual Finding 9; Legal Conclusion 7.) Respondent did not seek to change his status from service to disability retirement prior to receiving his first warrant in January 2014. (Factual Finding 9; Legal Conclusion 9.) Respondent had information on applying for disability retirement and knew, or should have known, based on the CalPERS Notice of Cancellation letters sent to Respondent on June 30, 2014, and July 9, 2014, of the cancellation of his application for IDR. (Factual Findings 10-15; Legal Conclusions 9-10.) Respondent then waited over eight years, until February 8, 2023 to reapply for IDR. (Factual Findings 16-24.) Respondent's February 8, 2023 IDR application was untimely because it was made after the applicable statutory deadlines. (§§ 21154 and 21453.)

13. Respondent failed to establish by a preponderance of the evidence that he is entitled to relief under Government Code section 20160, which would allow CalPERS to accept his untimely IDR application. Specifically, first, Respondent did not establish that his 2023 reapplication for IDR was made in a "reasonable time" after he knew or should have known in 2014 of the cancellation of his IDR application. (§

20160, subd. (a) (1.) Second, Respondent waited over eight years to reapply without demonstrating his delay was due to "mistake, inadvertence, surprise, or excusable neglect." (§ 20160, subd. (a)(2).)

14. Respondent has not, therefore, met his burden of presenting evidence that he made a legally correctable error or omission, or a timely filing, under Government Code section 20160. Respondent's appeal is denied and CalPERS's denial of Respondent's request to accept his late application and change from service to disability retirement is affirmed. (Factual Findings 1-31; Legal Conclusions 1-13.)

ORDER

CalPERS's determination to deny respondent Jesus Castillo's request to file a late application for disability retirement is affirmed. The appeal filed by respondent Jesus Castillo is denied.

DATE: 10/07/2024

Irina Tentser

IRINA TENTSER

Administrative Law Judge

Office of Administrative Hearings