

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:**

PHILIP F. KETTERLE, Respondent,

and

**CALIFORNIA MEN'S COLONY, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,**

Respondent.

Agency Case No. 2021-0923 (Statement of Issues)

OAH No. 2022030031

PROPOSED DECISION

Cindy F. Forman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter by videoconference on August 29, 2022.

Maria Cristina Andrade, Senior Attorney, represented complainant Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (PERS).

Philip F. Ketterle (respondent) represented himself at the hearing.

Respondent California Men's Colony, California Department of Corrections and Rehabilitation (CDCR) made no appearance at the hearing. Upon complainant's request, the ALJ found CDCR in default.

The ALJ received testimony and documentary evidence and heard argument. The record was closed and the matter submitted for decision on August 29, 2022.

SUMMARY

Respondent applied for industrial disability retirement (IDR) benefits nearly nine years after he retired from service from CDCR. PERS denied respondent's application because it was late. Respondent failed to prove his late filing was due to a correctable mistake that would entitle him to change his retirement status retroactively. Accordingly, PERS acted correctly in denying respondent's IDR application. Respondent's appeal is therefore denied.

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FACTUAL FINDINGS

Procedural Background

1. Respondent was employed by CDCR as a prison guard until he retired for service on November 23, 2012. On July 9, 2021, respondent filed an application with PERS for IDR.

2. By letter dated September 15, 2021, PERS informed respondent and CDCR of its denial of respondent's IDR application and their appeal rights. (Ex. 3.) By letter dated October 5, 2021, respondent appealed PERS' determination and requested a hearing. (Ex. 4.) On October 14, 2021, PERS acknowledged respondent's appeal and forwarded the request for hearing to the PERS Legal Office. (Ex. 5.) CDCR did not appeal PERS' determination.

3. On March 8, 2022, complainant, in his official capacity, served the Statement of Issues and the Notice of Hearing on respondent and CDCR.

4. The issue on appeal is whether respondent made a correctable mistake as a result of inadvertence, mistake, surprise, or excusable neglect, which would entitle him to retroactively change his retirement status from service retirement to IDR. Complainant contends respondent did not make a correctable mistake that would entitle him to retroactively change his retirement status nearly nine years after he began receiving service retirement benefits. Respondent contends he was unaware of any requirement for him to file his IDR application by a certain date and PERS representatives never informed him of such date. Respondent further contends he believed he could wait until his workers' compensation claim was resolved before filing an IDR application, and COVID-19 further delayed his filing.

Relevant Facts

5. Before retiring for service on November 23, 2012, respondent worked for 28 years at CDCR. On August 23, 2012, respondent had a medical event at work, which required him to leave work by ambulance to the hospital. At the hospital, respondent was diagnosed with arterial fibrillation and low blood pressure. Respondent was told not to return to work because of his medical condition. His last day of work at CDCR was August 23, 2012.

6. Respondent soon thereafter filed for workers' compensation benefits based on cardiological and psychological injuries resulting from his August 23, 2012 medical incident. Respondent took no steps to file for IDR while his workers' compensation claim was pending or when he retired for service. Respondent's workers' compensation claim was not resolved until late 2018. Under the workers' compensation settlement, the parties agreed respondent's work caused temporary disability from November 27, 2012, through August 21, 2014, and permanent injuries of 38 percent thereafter. (Ex. A, p. B8.) A psychological evaluation performed as part of respondent's claim found respondent suffered from posttraumatic stress disorder (PTSD) from "years of exposure to violence, especially self-destructive and suicidal acts of both inmates and staff." (*Id.*, p. B4.)

7. Respondent's first retirement benefit payment warrant from PERS was issued on December 10, 2012. (Ex. 13.) He has continued to receive retirement benefits since then based on his service retirement.

8. PERS uses a database to record contacts with its members and other events relating to its members. A printout of respondent's contacts with PERS, known as a Customer Touch Point Report (CTPR), reflects contacts between PERS and

respondent from September 25, 2009, to February 2, 2022. (Ex. 7.) These contacts reveal respondent engaged in numerous communications with PERS representatives about various retirement issues including health benefits, loans, and benefit payments.

COMMUNICATIONS WITH PERS REGARDING IDR BENEFITS

9. PERS first made respondent aware of his right to apply for disability retirement in a letter dated April 12, 2012, in response to respondent's application for service retirement. (Ex. 9.) The letter acknowledged PERS received respondent's service retirement application and his request to change his requested service retirement date from May 1, 2012, to August 1, 2012. In addition, the letter informed respondent of his eligibility to request a disability retirement if he was unable to work because of an illness or injury. To request a disability retirement, the letter informed respondent he would have to complete a Disability Retirement Election Application. (*Ibid.*) Respondent subsequently changed his effective service retirement date to November 23, 2012. (Ex. 7, p. A85.)

10. In a telephone call on August 24, 2012, the day after his medical incident, respondent told the PERS representative of his intention to request an IDR benefit estimate as well as file an IDR application. The CTPR note indicates a PERS staff member mailed the IDR application to respondent; however, there is no evidence PERS ever sent the IDR application at this time. (Ex. 7, p. A87.)

11. Respondent again raised the issue of filing an IDR application in a telephone call with PERS on November 20, 2012. According to the CTPR note of that call, respondent told the PERS representative he had suffered a heart issue at work and was "wondering" if he would receive a more generous retirement benefit if he applied for IDR. The PERS representative answered respondent's questions about IDR and

mailed him a copy of PUB-35 – A Guide to Completing Your CalPERS Disability Retirement Election Application (PUB-35). (Ex. 7, pp. A84–A85.)

12. According to the CTPR, the next contact concerning respondent’s IDR application occurred on January 3, 2013. On that day, respondent spoke with a PERS representative on how to apply for IDR. (Ex. 7, p. A83.) By this time, respondent received his first retirement benefit check. (Ex. 13.)

13. The CTPR contains no record of any communications from January 4, 2013, through June 11, 2015, between respondent and PERS concerning respondent’s IDR benefits or application. (Ex. 7, pp. A78–A83.) On June 12, 2015, PERS sent respondent another copy of the PUB-35. (Ex. 14.) The evidence does not make clear what prompted the mailing.

14. The CTPR contains no record of any communications from June 12, 2015, until November 18, 2018, between respondent and PERS concerning respondent’s IDR benefits or application. (Ex. 7, pp. A77–A78.) On November 15, 2018, respondent informed PERS by telephone of CDCR’s approval of his workers’ compensation settlement and his desire to change his retirement status to IDR. According to the CTPR note, the PERS representative advised respondent that “he needs to submit the IDR application,” and PERS sent him another copy of PUB-35. (Ex. 7, p. A77.)

15. According to the CTPR, respondent contacted PERS three times between March 25, 2019, and May 9, 2019, requesting help with his IDR application. During the March 25 conversation, respondent again told the PERS representative his workers’ compensation case had been settled. During each of the three conversations, the CTPR reflects the PERS representative answered respondent’s questions about IDR. (Ex. 7, pp. A75–A76.) PERS also sent another copy of PUB-35 to respondent. (Ex. 16.)

16. According to the CTPR, on January 1, 2020, respondent inquired whether he could personally submit his IDR application at the Fresno Regional Office. The PERS representative advised him he could do so. (Ex. 7, p. A74.) The CTPR does not show respondent had any further communications with PERS until February 26, 2021. (*Ibid.*)

17. According to the CTPR, between February 26, 2021, and June 28, 2021, respondent had four unscheduled telephone calls and two formal telephone appointments with PERS representatives to discuss his IDR application. During those conversations, PERS representatives answered respondent's questions regarding the difference between disability retirement and IDR, the process to obtain IDR and disability retirement estimates, and the required application documents. In addition, PERS representatives explained the 21-day period for submission of the IDR application and supplemental application documents, and they informed respondent PERS would cancel the application if respondent failed to timely submit the required additional documentation. PERS representatives also assisted respondent in completing the IDR application. PERS representatives told respondent the application had to be notarized and he could file the application in person, by fax, or by certified mail. (Ex. 7, pp. A71 -A74.) PERS mailed respondent another PUB-35 publication on May 21, 2021. (Ex. 17.)

18. Respondent submitted his IDR application on July 9, 2021. (Ex. 6.) The IDR application identifies his specific disabilities as "work related stress / AFB [arterial fibrillation] & PTSD." (*Id.*, p. A56.)

PERS PUBLICATIONS

19. PERS sent five versions of PUB-35 to respondent during the period leading up to and after his service retirement: a version published in March 2012 and

sent on November 20, 2012 (Ex. 12); a version published in March 2015 and sent on June 12, 2015 (Ex. 14); a version published in July 2017 and sent on November 15, 2018 (Ex. 15); a version published in April 2019 and sent on March 25, 2019 (Ex. 16); and a version published in December 2020 and sent on May 21, 2021 (Ex. 17).

Although the five versions contain slightly different language, each version of PUB-35 sent to respondent makes clear that PERS members should apply for disability retirement or IDR as soon as they believe they are unable to perform their job because of an illness or injury. (Ex. 12, p. A116 ["because of an illness or injury that is expected to be permanent or expected to last longer than six months"]; Ex. 14, p. A193 ["illness or injury expected to be of permanent or extended and uncertain duration"]; Ex. 15, p. A270, Ex. 16, p. A347, Ex. 17, p. A426 ["illness or injury that is of permanent or extended duration and expected to last at least 12 consecutive months or will result in death].) In addition, each version of PUB-35 spells out the four times when an employee only may apply for IDR, i.e., (1) when still in PERS-covered employment, (2) within four months of separation from PERS-covered employment, (3) while on military or approved leave, or (4) any time the employee has left the job because of a disability and has remained disabled since the time of filing for disability retirement. (Ex. 12, p. A121; Ex. 14, p. A194; Ex. 15, p. A272; Ex. 16, p. A349; Ex. 17, p. A428.)

20. All five versions of PUB-35 admonish those PERS members considering an IDR to not wait until the resolution of their workers' compensation claim to file an IDR application. Each version states 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.

A workers' compensation award does not automatically entitle you to a CalPERS industrial disability retirement. Medical evidence will be required to show that you meet the CalPERS definition of disability. If you do, your disability or industrial workers' compensation award for the same illness or injury may be used as evidence that your condition is job related.

(Ex. 12, p. A126; Ex. 14, p. A216; Ex. 15, p. A293; Ex. 16, p. A369; Ex. 17, p. A448.)

21. Versions of PUB-35 published after the 2012 version contain additional language regarding the risks of delaying a workers' compensation claim. The added language states, "Delaying your application for retirement may affect important benefits you may be entitled to receive." (Ex. 14, p. A216; Ex. 15, p. A293; Ex. 16, p. A369; Ex. 17, p. A448.)

Testimony by PERS

22. Timothy Grigsby, an associate governmental program analyst for PERS, testified at the administrative hearing. Grigsby has worked at PERS for six years and is familiar with respondent's case. Grigsby explained the basis for PERS' denial of respondent's application. Grigsby determined respondent's IDR application was late because respondent had not filed it within the allowable periods described in Government Code section 21154. (All further undesignated statutory references are to the Government Code.) According to Grigsby, respondent had submitted his application for IDR more than four months after he left state service and while he was not on any military or other leave. PERS also had no evidence respondent's disability had precluded him from timely submitting an IDR application.

23. Grigsby then concluded PERS could only accept respondent's late IDR application if the late filing could be deemed a correctable mistake under section 20160. PERS concluded respondent's late filing was not a correctable mistake because respondent had knowledge of the application process and he failed to act on that knowledge. According to Grigsby, respondent should have known a PERS member should not wait for settlement of a worker's compensation claim before applying for IDR from the repeated admonitions in the multiple PUB-35 publications PERS sent to him. According to Grigsby, PERS expects its members to read the publications provided to them in their entirety.

24. Grigsby asserted that even if respondent was correct to wait until the 2018 resolution of his workers' compensation claim, respondent still waited another three years to file the IDR application without reason. Grigsby noted that on November 15, 2018, according to the CTPR, the PERS representative advised respondent he needed to submit his IDR application, but respondent failed to do so. Grigsby also explained PERS accepted applications throughout the COVID-19 pandemic. Thus, according to Grigsby, any mistake or omission on respondent's part was caused by his failure to read the PERS materials and seek clarification as to when he was required to file his IDR application, actions that a reasonable person would have taken.

Respondent's Evidence

25. Respondent testified he was unaware he could initiate the IDR process even though he had an unresolved workers' compensation claim. According to respondent, CDCR never told him he could file for IDR immediately upon retirement. He also testified no one from PERS counseled him that he was required to file his IDR application despite the workers' compensation claim or told him there might be issues

regarding the filing date for his IDR application. Respondent recalled one conversation in which a PERS representative “clearly” told him his IDR application was “still valid” and PERS would process it upon receipt. (Ex. 4, p. A49.) According to respondent, no one from PERS ever told him he should have applied for IDR in 2012 after he was ordered not to return to work.

26. Respondent testified the delay in filing the IDR application was due in part to two family deaths in 2019, delays in obtaining records from his doctor, and his “PTSD had an effect.” He also asserted that COVID-19 caused the shutdown of PERS’ offices in Fresno so he was not able to file his application in person.

27. Santos Martinez and Edward Yett both testified on respondent’s behalf. Both Mr. Martinez and Mr. Yett worked for CDCR and were respondent’s colleagues at work. Mr. Martinez served as a CDCR facility captain. He testified he never received training about informing his employees on filing for IDR. Mr. Yett was a CDCR lieutenant when respondent experienced his medical event in August 2012. He assisted respondent in completing his workers’ compensation claim form.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for disability retirement has the burden of proving by a preponderance of the evidence that he is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.) In this case, respondent has the burden of establishing PERS should consider his application for IDR benefits even though it is late. Respondent has not met his burden.

2. Under section 21152, subdivision (d), a PERS member can apply for disability retirement. Section 21154 requires that such application be made only during

four specific times: (1) when the applicant is working for the state, (2) when the applicant is in military service, (3) within four months after the applicant discontinues state service, or (4) 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." Under section 20340, subdivision (a), a person ceases to be a member of PERS upon retirement.

3. Under section 21453, for those PERS members who retired before December 31, 2017, a PERS member must elect to change retirement status from service to disability retirement within 30 calendar days after PERS makes the first payment of any retirement allowance. In the event a PERS member has a change of retirement status after retirement, the PERS member must elect to change retirement status within 30 calendar days after PERS makes the first payment following the change in retirement status.

4. Respondent's IDR application was not timely under sections 21152 or 21154. Respondent ceased to be a PERS member on November 23, 2012, when respondent retired for service. There is no evidence respondent was in military service during the relevant period. Respondent did not submit his IDR application until July 9, 2021, more than eight years after his service retirement. Respondent testified his PTSD had an "effect" on the timing of his filing the IDR application. However, respondent presented no objective evidence that his physical or psychological condition at the time he retired for service or thereafter continuously prevented him from submitting a timely IDR application for more than eight years. Moreover, respondent's workers' compensation award, based on a permanent disability of 38 percent, does not necessarily equate to a finding of mental or physical incapacity, as repeatedly noted in the five versions of PUB-35 respondent received and applicable case law. (See Factual

Findings 19–21; see also *Reynolds v. City of San Carlos* (126 Cal.App.3d 208, 215 [Workers' Compensation Appeals Board finding of permanent disability, which may be partial for purposes of workers' compensation, does not bind PERS on the issue of employee's incapacity to perform his duties].) In addition, respondent attempted to change his retirement status to IDR more than 30 calendar days after he received his first retirement benefits from PERS. (Factual Findings 7, 12.)

5. The time deadlines and other restrictions set forth in sections 21152, 21154, and 21453 reflect the Legislature's recognition of the difficulty of making disability determinations years after the date of retirement and the need for administrative and actuarial efficiency. (See *Button v. Board of Administration* (1981) 122 Cal.App.3d 730, 735.) Thus, the statutes make clear that under normal circumstances retirees may not change their status years after they retire.

6. Section 20160 provides that inadvertence or mistake may, under certain criteria, constitute a special circumstance excusing a retired member's earlier inaction. It states 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.

(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.

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(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. . . .

7. Here, respondent has not demonstrated any unusual circumstance that would allow him to change his retirement status more than eight years after he retired for service. Respondent contends he was ignorant of when his IDR application was required to be filed. However, his ignorance does not amount to a correctable mistake. Under Code of Civil Procedure section 473, referred to in section 20160, subdivision (a)(2), the determination of whether a mistake is excusable depends on the reasonableness of the misconception and the justifiability of failing to determine the correct course of action. (*City of Ontario v. Superior Court* (1970) 2 Cal.3d 335; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313.)

8. Respondent's misconception of the law and his resulting inaction were neither reasonable nor justifiable. Respondent was aware of his right to file for IDR benefits several months before his medical event and two more times between his medical event and his service retirement. (Factual Findings 9–11.) There is no evidence respondent inquired about the effect, if any, of his workers' compensation claim on the timing of his IDR application. Moreover, respondent was on notice as early as

November 20, 2012, when he received his first PUB-35, of the time requirements for filing an IDR application and PERS' warning against waiting until the resolution of a worker's compensation claim before filing an IDR application. (Factual Finding 20.)

Each of the four additional PUB-35 publications sent to respondent between June 12, 2015, and May 21, 2021, affirmed this information. (Factual Findings 19–21.)

Respondent either did not read the publications or ignored their contents, and he did not explain the basis for his failure to do so at the administrative hearing. In addition, on November 15, 2018, a PERS representative advised respondent to file his IDR application; yet he waited to do so until July 9, 2021. (Factual Finding 14.) Considering the clear guidance provided in the PUB-35 publications and the direction by the PERS representative, a reasonable person in similar circumstances would have sought to file the IDR application within the statutory deadline or, if confused, would have sought to clarify the timing. Even if respondent's explanation for his delay is credited, i.e., he was awaiting the results of his workers' compensation claim litigation, respondent still waited more than two years to file his IDR application after his claim was resolved. In consideration of these facts, respondent did not establish he made a mistake correctable under section 20160.

9. Respondent contends that in the multiple telephone conversations he had with PERS representatives after he retired for service no one told him he could not change his retirement status to IDR, and therefore PERS should not be able to refuse his request to do so now. Respondent's contention is based on equitable estoppel, i.e., that PERS, by its omissions, intentionally and deliberately led respondent to believe he could file his IDR application late without consequences, and therefore PERS cannot now deny his application. However, estoppel does not apply here, as several of its elements are missing. In particular, respondent did not show that PERS intended him to rely upon their omissions or that respondent actually relied on the omissions. (*See*

Button, supra, 122 Cal.App.3d at 739, citing 7 Witkin, Summary of Cal. Law (8th ed. 1974) Equity, § 132, p. 5352.) Additionally, estoppel by omission is not generally recognized and should only be considered in the most inequitable of circumstances. (*Ibid.* (citations omitted).)

10. In sum, respondent filed his IDR application nearly nine years after he retired. His IDR application was late under sections 21152 and 21154, and respondent failed to prove his failure to file a timely application was the result of a mistake correctable under section 20160. PERS therefore was correct in denying respondent's IDR application.

ORDER

PERS' determination that respondent Philip F. Ketterle's July 9, 2021 application for industrial disability retirement was filed late and that no correctable mistake was made is affirmed. Respondent's appeal is denied.

DATE: 09/21/2022



CINDY F. FORMAN
Administrative Law Judge
Office of Administrative Hearings