

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Appeal Regarding Denial of Retroactive
Enrollment in CalPERS Medicare Health Benefits Plan and
Retroactive Reimbursement of Medicare Part B Premiums of:
PHYLLIS CHAVIS, Respondent.**

Agency No. 2022-0519

OAH No. 2022090814

PROPOSED DECISION

Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 3, 2023, by videoconference. The record closed and the matter was submitted for decision at the conclusion of the hearing.

Cristina Andrade, Senior Attorney, represented complainant California Public Employees' Retirement System (CalPERS).

Phyllis Chavis (respondent) represented herself.

SUMMARY

Respondent appeals CalPERS' denial of her requests to be enrolled in a CalPERS Medicare plan, and to provide her with Medicare Part B premium reimbursements, both retroactive to November 1, 2010.

However, respondent failed to meet her burden of establishing by a preponderance of the evidence that she requested CalPERS to enroll her in a CalPERS Medicare plan on November 1, 2010. Instead, the more convincing evidence established that respondent did not request CalPERS to enroll her in a CalPERS Medicare plan until January 18, 2022. Applicable law required CalPERS to enroll respondent in a CalPERS Medicare plan effective the first day of the month following her request, which was February 1, 2022. The same law does not provide for Medicare Part B reimbursement before a member is actually enrolled in a CalPERS Medicare plan. Finally, respondent failed to establish her failure to enroll in a CalPERS Medicare plan earlier than she did was an error or mistake correctable by Government Code section 20160.

Therefore, respondent's appeal is denied.

FACTUAL FINDINGS

Parties and Jurisdiction

1. CalPERS is administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.) CalPERS is governed by its Board of Administration (Board). (Ex. 1.)

2. The CalPERS Health Program is governed by the Public Employees' Medical and Hospital Care Act (PEMHCA), commencing with Government Code section 22750 et seq. and implemented by regulations. PEMHCA authorizes and requires the Board to provide health benefits for state employees, dependents, and annuitants, as well as for employees and annuitants of contracting public agencies that elect to contract with CalPERS for health benefits coverage. (Ex. 1.)

3. Respondent established membership with CalPERS on March 2, 1994, through employment with the California Employment Development Department. By virtue of her employment, respondent is eligible for CalPERS health benefits under PEMHCA. (Exs. 1, 5.)

4. As explained in more detail below, on January 18, 2022, respondent contacted CalPERS requesting enrollment in a CalPERS Medicare health benefits plan and reimbursement of Medicare Part B premiums. She requested the enrollment and reimbursement retroactive to November 1, 2010, the date she contends she previously advised CalPERS she was enrolled in Medicare and requested enrollment in a CalPERS Medicare health benefits plan. (Ex. 4.)

5. By letter dated February 10, 2022, CalPERS notified respondent of its determination to deny her requests and advised her of her appeal rights. (Ex. 3.)

6. By letters dated January 28, 2022, and March 7, 2022, respondent timely appealed CalPERS' denial and requested an administrative hearing. (Ex. 4.)

7. The Statement of Issues was filed on behalf of complainant by Kellye A. Smith, Interim Chief of CalPERS' Health Account Management Division (HAMD). (Ex. 1.)

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Respondent's Health Benefits Plan Enrollment

BASIC HEALTH BENEFITS PLAN

8. Respondent first enrolled in a health benefits plan as a state employee when she was hired in March 1994. (Ex. 5.) CalPERS refers to the non-Medicare health benefits plan respondent enrolled in as "Basic." (Testimony [Test.] of Jose Doria.)

9. Respondent retired for disability effective September 30, 2006. (Test. of respondent; Ex. 9, pp. A74-86.) She remained enrolled in a Basic health benefits plan (Basic health plan) as a retired member. (Ex. 5.)

10. A member can change his or her health benefits plan during the open enrollment period each year. (Test. of Doria.)

MEDICARE HEALTH BENEFITS PLAN

11. Respondent testified that after retiring from state service for disability, she was required to wait a certain period of time before she could enroll in Medicare. Respondent enrolled in Medicare Parts A and B in November 2010, when she first became eligible to enroll. Medicare Part A pertains to hospital costs, and Part B pertains to medical costs. Respondent was under the age of 65 at the time. (Test. of respondent, Doria; Exs. 4, 7.)

12. Jose Doria, a CalPERS employee, explained in his testimony the interplay between the Medicare system and health benefits plans available to CalPERS members. Mr. Doria has worked in CalPERS' HAMD since 2009, and in the Medicare Administration Unit of HAMD since 2015. Mr. Doria specializes in enrolling members in Medicare health benefits plans, helping members with Medicare Part B reimbursements, and resolving complex issues that sometimes arise in the confluence

of these systems. Mr. Doria's experience with CalPERS made him a credible witness to discuss the issues presented in this case. His testimony was consistent with applicable laws (discussed below). Overall, Mr. Doria's testimony was convincing.

13. Persons eligible for Medicare are required by law to enroll at age 65. A retired CalPERS member who turns 65 must also enroll in a Medicare health benefits plan administered by CalPERS (CalPERS Medicare plan). At that time, Medicare becomes the retired member's primary health insurer, and the CalPERS Medicare plan is the secondary or "supplemental" health insurer. Once enrolled in Medicare, the retired member pays premiums to Medicare for Part A and Part B coverage. The requirements are different for CalPERS members who continue working past age 65. (Test. of Doria.)

14. Persons with certain disabilities may enroll in Medicare before age 65. A CalPERS member with a qualifying disability under age 65 may also enroll in a CalPERS Medicare plan, but that is optional. Thus, a CalPERS member under age 65 enrolled in Medicare may continue to be enrolled in a Basic health plan. (Test. of Doria.)

15. CalPERS does not receive notification from the Social Security Administration (SSA) when a CalPERS member under the age of 65 enrolls in Medicare. (Test. of Doria.)

16. A member eligible for CalPERS through state employment, who is enrolled in Medicare and also a CalPERS Medicare plan, is eligible for reimbursement from CalPERS of the premiums they pay to Medicare for Part B coverage. The amount of the reimbursement, if any, depends on various factors, including the agency plan through which the member is eligible for CalPERS membership, the amount of premiums paid, dependents, etc. Thus, not all members enrolled in a CalPERS

Medicare plan will receive Medicare Part B reimbursements. Regardless, a retired CalPERS member is not eligible for a Part B reimbursement if he or she is enrolled in a Basic health plan, even if also enrolled in Medicare. (Test. of Doria.)

Health Benefits Plan Notifications Sent to Respondent

17. Each year from 2012 through 2021, CalPERS mailed to respondent an annual Health Plan Statement (annual statement). (Test. of Doria; Ex. 6.) Each annual statement showed respondent was enrolled in a Basic health plan. (See, e.g., Ex. 6, p. A22.) The annual statements also showed the cost of monthly premiums for the various Basic health plans available. (See, e.g., Ex. 6, p. A23.)

18. Beginning in January 2019, CalPERS began mailing courtesy letters to retired members under age 65 that were enrolled in a Basic health plan explaining they may be eligible to enroll in a CalPERS Medicare plan. The letter provides instructions about how to submit a request to CalPERS to change their health plan enrollment. (Test. of Doria; Exs. 7, 8.)

19. By letter dated January 29, 2019, CalPERS informed respondent she may be eligible to enroll in a CalPERS Medicare plan. The letter stated:

We are contacting you regarding your CalPERS health benefits plan and Medicare eligibility. Our records indicate that you and/or your dependent(s) may be enrolled in Medicare Part A (Hospital) and Part B (Medical) through the Social Security Administration (SSA) and are currently enrolled in a CalPERS Basic health plan. *You or your dependent(s) may be eligible to enroll in a CalPERS*

Medicare health plan if you are retired and enrolled in Medicare Part A and Part B.

CalPERS Medicare health plans have similar coverage and typically lower monthly premiums compared to CalPERS Basic health plans. To learn more about the CalPERS Medicare health plans available to you, log into your myCalPERS account at my.calpers.ca.gov and use the Find a Medical Plan tool to complete a benefit comparison.

To enroll in a CalPERS Medicare health plan, submit the enclosed Certification of Medicare Status form and provide supporting documentation to CalPERS. Your health plan change will be effective the first day of the month following the receipt of your form and supporting documentation.

For information regarding your Medicare eligibility and enrollment, please contact the SSA at (800) 772-1213 or TTY (800) 325-0778 or visit their website at www.ssa.gov.

(Ex. 7, italics added; emphasis elsewhere in original removed.)

20. By letter dated April 1, 2020, CalPERS again informed respondent she may be eligible to enroll in a CalPERS Medicare plan. The letter stated:

We are contacting you regarding your CalPERS health benefits plan and Medicare eligibility. Our records indicate that you and/or your dependent(s) may be enrolled in Medicare Part A (Hospital) and Part B (Medical) through the

Social Security Administration (SSA) and are currently enrolled in a CalPERS Basic health plan.

You and/or your dependent(s) may now be eligible to enroll in a CalPERS Medicare health plan. CalPERS Medicare health plans provide coverage similar to your current Basic plan, while typically requiring lower monthly premiums.

If you and/or your dependent(s) elect to maintain your enrollment in a CalPERS Basic health plan, you may find that plan offers fewer benefits because of your and/or your dependent's(s') Medicare eligibility. We urge you to review your Basic health plan's Evidence of Coverage (EOC) document to determine the extent to which your current coverage is affected by Medicare eligibility. You may also learn more about how Medicare eligibility affects your health benefits by sending a secure message through your myCalPERS account at my.calpers.ca.gov or by contacting CalPERS at 888 CalPERS (or 888-225-7377).

To learn more about CalPERS Medicare health plans, and whether they are right for you, log into your myCalPERS account at my.calpers.ca.gov and use the Search Health Plans tool to complete a benefit comparison.

Please note that if you and/or your dependent(s) did not enroll in Medicare Part B when first eligible, you and/or your dependent(s) may be subject to a federal late

enrollment penalty resulting in potential higher Medicare Part B premiums. For more information contact SSA at (800) 772-1213 or TTY (800) 325-0778 or visit their website at www.ssa.gov.

If you and/or your dependent(s) choose to enroll in a CalPERS Medicare health plan, you and/or your dependent(s) will not be permitted to change your enrollment to a CalPERS Basic health plan unless your [sic] and/or your dependent's(s') Medicare benefits are involuntarily terminated or you and/or your dependent(s) move, other than temporarily, out of the United States as defined in the federal Social Security Act.

To enroll in a CalPERS Medicare health plan, submit the enclosed Certification of Medicare Status form and provide supporting documentation to CalPERS. Your health plan change will be effective the first day of the month following the receipt of your form and supporting documentation.

For information regarding your Medicare eligibility and enrollment, please contact the SSA at (800) 772-1213 or TTY (800) 325-0778 or visit their website at www.ssa.gov.

(Ex. 8, italics added; emphasis elsewhere in original removed.)

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21. Respondent conceded in her testimony that she received the annual statements mailed to her from 2012 through 2022, as well as the two courtesy letters concerning her possible eligibility for a CalPERS Medicare plan mailed to her in 2019 and 2020. (Test. of respondent.)

22. Respondent testified she disregarded all of those documents because they were “pointless” and “irrelevant.” Respondent explained that her Basic health plan was through Kaiser Permanente (Kaiser) and, as discussed in more detail below, she contacted CalPERS in November 2010 to enroll in a CalPERS Medicare plan, also through Kaiser. Respondent testified that because she remained insured with Kaiser after her claimed November 2010 contact with CalPERS, she assumed she had been switched from her Basic health plan to a comparable CalPERS Medicare plan and therefore did not need to read the documents in question. (Test. of respondent.)

Respondent’s Request for Retroactive Enrollment in a Medicare Health Benefits Plan and Retroactive Part B Reimbursements

23. On January 18, 2022, respondent contacted CalPERS and expressed dismay over learning she had not been enrolled in a CalPERS Medicare plan in November 2010 when she first enrolled in Medicare. Respondent requested enrollment in a CalPERS Medicare plan and reimbursement of Medicare Part B premiums, both retroactive to November 1, 2010. Respondent told the CalPERS staff member she was requesting retroactive enrollment and reimbursement because an SSA employee recently told her she should have been receiving Part B premium reimbursements since she enrolled in Medicare on November 1, 2010. (Ex. 9, p. A57.)

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24. During that contact, the CalPERS staff member informed respondent that CalPERS sent a letter to her on April 1, 2020, notifying her of possible eligibility to enroll in a CalPERS Medicare plan prior to age 65. Respondent told the staff member she did not receive the letter. The CalPERS staff member also told respondent she could not be retroactively enrolled in a CalPERS Medicare plan, and that her enrollment would only be "going forward." Respondent advised she would appeal if her requests for retroactive enrollment in a CalPERS Medicare plan and reimbursement of Medicare Part B premiums were denied. The staff member explained to respondent how to appeal. (Ex. 9, p. A57.)

25. On January 19, 2022, a CalPERS staff member contacted respondent and informed her that she would be enrolled in a CalPERS Medicare plan effective February 1, 2022, the first day of the month following receipt of her Medicare information, pursuant to the governing regulations, and that Medicare adjustments would be reflected on her March 1, 2022 warrant. (Ex. 9, pp. A56-57.)

26. Respondent was enrolled in a CalPERS Medicare plan effective February 1, 2022. (Ex. 5.)

27. On February 3, 2022, CalPERS received respondent's appeal letter dated January 28, 2022, arguing she should be reimbursed for Medicare Part B premiums retroactive to November 2010, and requesting reconsideration of the denial of her request for retroactive enrollment. Respondent explained in her letter she recently had been told by an SSA employee that she should have been receiving Medicare Part B premium reimbursements since she enrolled in Medicare in November 2010. Respondent wrote, "I informed your department [CalPERS] of Medicare approval back in November 2010 when I received the authorization [sic] I knew benefits were available to be enrolled but was clear on payments/premiums deductions being

refunded to me monthly on retirement check [sic] I have not received any deduction re-imburements of funds.” (Ex. 4, p. A17.)

28. Mr. Doria explained in his testimony CalPERS’ MyCalPERS management system. Each member has his or her own MyCalPERS account. Any mail or faxes concerning a member are uploaded into the member’s account. Phone calls from or to a member, as well as in-person visits to a CalPERS office by a member, also are logged into the member’s MyCalPERS account. The CalPERS staff member who handles the call or personal contact creates a note concerning the substance of the contact, which note is uploaded into the member’s MyCalPERS account. The member’s account also shows when documents were mailed or e-mailed to the member, as well as a brief description of the item sent. A Customer Touch Point Report can be printed for each member’s account, which shows the dates of contacts with a member, the substance of the contacts, and documents received from or sent to the member. (Test. of Doria.)

29. CalPERS reviewed respondent's MyCalPERS account and found no record of respondent requesting enrollment in a CalPERS Medicare plan or Medicare Part B reimbursement before January 18, 2022. (Test. of Doria; Ex. 9.)

30. By letter dated February 10, 2022, CalPERS denied respondent's request for retroactive enrollment in a CalPERS Medicare plan. The stated reason for the denial was that respondent did not request enrollment in a CalPERS Medicare plan until January 18, 2022. Respondent also was advised she did not qualify for Medicare Part B reimbursement until February 1, 2022, when she was enrolled in a CalPERS Medicare plan. (Ex. 3.)

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31. On or about March 7, 2022, respondent sent CalPERS a letter requesting reconsideration of the denial of her requests for retroactive enrollment and reimbursement. (Ex. 4, p. A19.) The record does not show CalPERS sent respondent a written response to this letter. However, the Customer Touch Point Report for respondent's MyCalPERS account shows there were several telephone calls in March 2022 during which the denial of respondent's requests were explained to her, as well as her rights to appeal the denial. (Ex. 9, pp. A55-56.)

32. An unidentified CalPERS staff member created a spreadsheet showing the cost of premiums actually paid by respondent's employing agency and respondent for her Kaiser Basic health plan, as well as projected premiums that would have been paid assuming respondent had enrolled in the same CalPERS Medicare plan through Kaiser she has now. The spreadsheet covers the period of November 1, 2010, through April 1, 2022. (Test. of Doria; Ex. 10.)

33. According to the spreadsheet, if in November 2010 respondent had enrolled in the CalPERS Medicare plan that she has now, her employing agency would have paid \$47,301.78 less in premiums, and respondent would have received Medicare Part B reimbursements totaling \$15,758.90. Mr. Doria testified there is no mechanism known that would allow respondent's employing agency to recoup a portion of premium payments previously made to Kaiser during the period in question. (Test. of Doria; Ex. 10.)

Findings Based on Respondent's Evidence

CONTACT WITH CALPERS IN NOVEMBER 2010

34. Respondent has consistently maintained, both in her appeal letters to CalPERS and her testimony, that she spoke to a CalPERS staff member in early

November 2010 to report she had enrolled in Medicare. She also has consistently maintained that the staff member asked her to fax to CalPERS certain information, including a copy of her Medicare card, which respondent reports she did the same day. While in her appeal letters respondent did not write that she requested to be enrolled in a CalPERS Medicare plan during the claimed November 2010 contact, she testified that during the contact she did ask to be enrolled in Kaiser's Senior Advantage CalPERS Medicare plan, which is her current health plan. (Test. of respondent; Ex. 4.)

35. Respondent's testimony that she contacted CalPERS in November 2010 to request enrollment in a CalPERS Medicare plan was not convincing for several reasons.

36. Respondent has no evidence corroborating her claimed contact. Review of the Customer Touch Point Report for respondent's MyCalPERS account shows no logged contact concerning Medicare in 2010 or at any subsequent time before her contact in January 2022. (Test. of respondent.)

37. Without any notes or contemporaneous writing to aid her, respondent is relying on her memory of a conversation that purportedly occurred 13 years ago.

38. On the other hand, the Customer Touch Point Report does show respondent made many contacts with CalPERS staff in and around early November 2010 concerning enrollment in Delta Dental and whether she could convert to Tier One from Tier Two (pertaining to the formula used to calculate retirement benefits). It is unlikely all of those contacts would have been correctly logged in respondent's account, while one contact concerning enrollment in a CalPERS Medicare plan (and

subsequent fax containing Medicare information) would have been omitted or disregarded with no action taken. (Ex. 9.)

39. To bolster her claim that she contacted CalPERS to enroll in a CalPERS Medicare plan in early November 2010, respondent points to a log in her Customer Touch Point Report dated November 5, 2010. That log is as follows:

Inquiry Category: Health Benefit Services

Inquiry Subject: Eligibility and Enrollment

Caller Contact: [personal information redacted]

Contacting About: Phyllis Chavis

Note Text: Processed current and retro deductions in RIBS.

The member will see this reflected in the Dec.'10 warrant.

(Ex. 9, p. A63.)

40. Respondent did not establish by a preponderance of the evidence that this log concerned enrolling in a CalPERS Medicare plan. There is nothing in the log about Medicare. In fact, the log, while vague, notes deductions, not reimbursements, and is proximate in time to respondent's enrollment in Delta Dental. Moreover, when respondent called CalPERS about enrollment in a CalPERS Medicare plan on January 18, 2022, she requested retroactive enrollment to November 1, 2010, not November 5th. (Exs. 4, 9.)

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LACK OF OUTREACH

41. Respondent testified she was unaware of the Part B reimbursement until being advised about it by the SSA employee in January 2022. She complains she was unaware because CalPERS failed to engage in any outreach to her concerning Medicare benefits.

42. Respondent cites no authority requiring CalPERS to provide such outreach activity, nor is any such requirement known to exist. Mr. Doria testified the decision to enroll in a CalPERS Medicare plan before age 65 involves many factors specific to each individual. Members are expected to do their own research and decide what coverage is best for them and for their dependents.

43. Even if there was such an outreach requirement, respondent's testimony that CalPERS did not fulfill the requirement was not convincing. For example, the annual statement in 2013 mentioned Medicare; and the statements in 2019, 2020, and 2021 listed the CalPERS Medicare plans for which respondent could be eligible. Respondent did not see those provisions because she disregarded the annual statements. In 2019 and 2020, CalPERS specifically addressed in letters sent to respondent her possible eligibility to enroll in a CalPERS Medicare plan, but respondent disregarded those letters as well.

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LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for a benefit not before provided by CalPERS bears the burden of proving by a preponderance of the evidence that she is entitled to it.

(*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. A party seeking correction of an error or omission pursuant to Government Code section 20160 has the burden of establishing the right to do so. (Gov. Code, § 20160, subd. (d); subsequent undesignated statutory references are to the Government Code.) Since the statute is silent, the preponderance of the evidence standard also applies to section 20160. (Evid. Code, § 115.)

3. The preponderance of the evidence standard requires 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.)

Medicare Enrollment and Part B Reimbursement

4. Section 22778 provides that a "Medicare health benefit plan" means a health benefit plan that provides benefits in coordination with Medicare Parts A and B.

5. Pursuant to section 22844, a member who turns 65 after January 1, 1985, and is required to enroll in Parts A or B of Medicare, may enroll in a Medicare health benefits plan administered by CalPERS, but may not be enrolled in a Basic health plan.

6. California Code of Regulations, title 2, section (regulation) 599.517, subdivision (e), provides that enrollment in a CalPERS Medicare plan shall be effective

“on the date Medicare coverage became effective or the first of the month following receipt of the application, whichever is later.” (See also reg. 599.503, subd. (a).)

7. Section 22879, subdivision (a), covers Medicare Part B reimbursement as follows:

The [B]oard shall pay monthly to an employee or annuitant who is enrolled in, or whose family member is enrolled in, a Medicare health benefit plan under this part the amount of the Medicare Part B premiums, exclusive of penalties, except as provided in Section 22831. . . .

8. In this case, respondent failed to meet her burden of establishing by a preponderance of the evidence that she enrolled in a CalPERS Medicare plan in November 2010. The evidence presented by CalPERS is more convincing that respondent did not contact CalPERS to enroll in a CalPERS Medicare plan until January 18, 2022. Pursuant to applicable statutes and regulations, respondent was enrolled in a CalPERS Medicare plan effective the first day of the month following her contact, i.e., February 1, 2022. Respondent was not eligible for Medicare Part B reimbursement until she had enrolled in a CalPERS Medicare plan. Thus, respondent was not eligible for a Medicare Part B reimbursement before February 1, 2022. (Factual Findings 1-43.)

Correction of a Mistake or Error

9. There is no known provision of PEMHCA allowing a CalPERS member to obtain retroactive enrollment in a CalPERS Medicare plan or receive retroactive Medicare Part B reimbursements before being enrolled in Medicare. However, section 20160 governs a request by a CalPERS member or beneficiary to correct an error or mistake they have made concerning their CalPERS benefits. Here, since respondent

failed to establish by a preponderance of the evidence that she contacted CalPERS in November 2010 to request enrollment in a CalPERS Medicare plan, her alternative argument is that her failure to do so constituted an error or mistake that can be corrected pursuant to section 20160.

10. Section 20160 provides, in part:

(a) Subject to subdivisions (c) and (d) [not applicable here], the [B]oard 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.

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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) [not applicable here], the [B]oard 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.

[¶] . . . [¶]

(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.

11. Cases interpreting the meaning of mistake, inadvertence, surprise, or excusable neglect, as those terms are used in Code of Civil Procedure section 473, have concluded the primary question to ask is “whether ‘a reasonably prudent person under the same or similar circumstances’ might have made the same error [citation omitted].” (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1146.) Relief may be properly denied where the record shows only ignorance of the law coupled with negligence in ascertaining it. (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1412–1413.) “[W]here the court finds that the alleged mistake of law is the result of . . . laxness or indifference [citations omitted] normally relief will be denied.” (*Fidelity Fed. Sav. & Loan Assn. v. Long* (1959) 175 Cal.App.2d 149, 154.)

12. In this case, respondent’s failure to contact CalPERS in November 2010, or thereafter, to enroll in a CalPERS Medicare plan, was not the result of mistake, inadvertence, surprise, or excusable neglect, as those terms are used in Code of Civil Procedure section 473.

13. To the extent respondent professed her error or omission was because she was unaware of the Medicare Part B reimbursement, her ignorance of the law coupled with her failure to ascertain it is not a valid excuse.

14. According to respondent’s testimony concerning her claimed contact with CalPERS in November 2010, she intended at that time to enroll in a CalPERS

Medicare plan. In fact, in her January 28, 2022 appeal letter, respondent wrote that she “was clear” at that time enrolling in a CalPERS Medicare plan would result in “payments/premiums deductions being refunded to me monthly on [sic] retirement check.” (Factual Finding 27.) But respondent made no inquiry with CalPERS after receiving annual statements for 12 years showing she was still enrolled in a Basic health plan, or after receiving two letters in 2019 and 2020 strongly suggesting she was not enrolled in a CalPERS Medicare plan.

15. A reasonable person would not have disregarded notices concerning her health plan sent to her annually for 12 years. Had respondent read any of the documents in question, she would have discovered she was not enrolled in a CalPERS Medicare plan. If anything, respondent demonstrated laxness or indifference to the situation, for which relief under Code of Civil Procedure section 473 is not available. In any event, after receiving the annual statements and two letters from CalPERS over the years, respondent failed to make the “inquiry that would be made by a reasonable person in like or similar circumstances” required by section 20160, subdivision (a).

16. Even assuming respondent made a correctable mistake or error under subdivision (a)(2), respondent’s proposed correction is prohibited by section 20160, subdivision (e). Specifically, respondent cannot be granted the retroactive relief she requests. Respondent’s Medicare Part B reimbursements of over \$15,000 would only have been available provided her employing agency had paid approximately \$47,000 less in premiums. There is no way for respondent’s employing agency to recoup the additional premiums it paid while respondent had her Basic health plan. Thus, there is no way to adjust respondent’s employing agency to the same status, rights, and obligations it would have had if respondent enrolled in a CalPERS Medicare plan in November 2010. (Factual Findings 1-43.)

17. Based on the above, respondent failed to meet her burden of establishing by a preponderance of the evidence that her enrollment in a CalPERS Medicare plan should be retroactive to November 1, 2010, or that she should be reimbursed Medicare Part B premiums retroactive to November 1, 2010. (Factual Findings 1-43; Legal Conclusions 1-16.)

ORDER

The appeal of respondent Phyllis Chavis is denied.

DATE: **01/25/2023**



[Eric C. Sawyer \(Jan 25, 2023 08:46 PST\)](#)

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings