

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:**

JOHN P. FALLIS, Respondent,

and

**CALIFORNIA REHABILITATION CENTER, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent**

Case No. 2023-0840

OAH No. 2024030138

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearing, State of California, heard this matter by videoconference on September 23, 2024.

Bryan Delgado, Attorney, represented complainant, Sharon Hobbs, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS), State of California.

John P. Fallis, respondent, represented himself.

California Rehabilitation Center, California Department of Corrections and Rehabilitation (CDCR), respondent, did not appear, despite being properly noticed. This matter proceeded as a default against CDCR under Government Code section 11520, subdivision (a).

The record was closed, and the matter submitted for decision on September 23, 2024.

ISSUE

Did respondent¹ make an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect when he filed a February 23, 2023, disability retirement election application, more than six months after he discovered the right to file the application?²

¹ Hereafter, any reference to respondent means respondent, John P. Fallis, and not CDCR.

² Respondent filed disability retirement election applications on November 2, 2020, June 22, 2021, and February 23, 2023. He did not appeal the

SUMMARY

Respondent did not make an error or omission that was the result of mistake, inadvertence, surprise, or excusable neglect when he filed the February 23, 2023, disability retirement election application³ seeking an industrial disability retirement. CalPERS is therefore prohibited from considering the late application under Government Code section 21060.

Background and Jurisdiction

1. The following factual findings were derived from the testimony of Linda Ha, an Associate Governmental Program Analyst in the disability retirement unit at CalPERS, and documents submitted by CalPERS that were received into evidence.

2. Respondent was last employed with CDCR as a correctional officer. By virtue of his employment, respondent was, at the time of his last employment, a state safety member of CalPERS.

rejection/cancellation of the first two applications; this appeal concerns only the February 23, 2023, application.

³ Although respondent is seeking an industrial disability retirement, the form used to do so is entitled, "Disability Retirement Election Application," and will be referred to as such throughout this decision. The appeal is not whether CalPERS should accept respondent's late application for an industrial disability retirement; rather, the appeal is about whether CalPERS should accept respondent's late Disability Retirement Election Application.

3. On August 13, 2020, respondent submitted an application for service retirement with a requested effective retirement date of December 2, 2020. Respondent subsequently retired for service effective December 2, 2020.

4. By letter dated August 13, 2020, CalPERS informed respondent of his right to apply for a disability retirement. The letter stated in pertinent part:

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. Please note that your retirement date cannot be earlier than the day following your last day on pay status.

5. On September 4, 2020, respondent contacted CalPERS asking if he could complete his application for industrial disability retirement. CalPERS informed respondent that he needed to submit a hardcopy application (as opposed to online) for industrial disability retirement. On the same day, CalPERS mailed "A Guide to Completing Your CalPERS Disability Retirement Application" (PUB 35) to respondent. The PUB 35 provides extensive details regarding the process for correctly filing an application for industrial disability retirement, what should be provided, and cites all applicable law. Notably, Page 3 of PUB 35 states:

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 of permanent or extended duration and expected to last at least 12 consecutive months or will result in death.

Once we receive all the required information described in this publication, we can begin processing your application.

[¶] . . . [¶]

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.

[¶] . . . [¶]

CalPERS can cancel your application for any of the following reasons:

- If you fail to provide the information or forms needed to make a determination on your disability retirement; or
- If you fail or refuse to attend an Independent Medical Examination (IME) appointment when requested; or
- If you do not meet the eligibility requirements for disability or industrial disability retirement.

6. On November 2, 2020, two months after he inquired whether he could file an application for industrial disability retirement, respondent filed the application. By letter dated November 4, 2020, CalPERS returned the application to respondent (i.e., did not accept it) because it was missing multiple pages, did not include a retirement payment option selection, and was not signed as required. As a courtesy,

CalPERS mailed respondent a second PUB 35 on November 4, 2020, when it returned his incomplete application. Respondent did not appeal the return of the application or correct the application and send it back to CalPERS.

7. On December 24, 2020, December 29, 2020, June 22, 2021, July 14, 2021, and July 16, 2021, CalPERS received medical records from respondent's workers' compensation carrier, State Compensation Insurance Fund (SCIF).

8. On June 3, 2021, six months after his November 2, 2020, application was returned to him due to missing information, respondent contacted CalPERS by phone to ask what he needed to submit for an industrial disability retirement. A CalPERS employee informed respondent what forms he needed to include with his application. Those forms included the following: Workers' Compensation Carrier Request form, Physician's Report on Disability, Report of Separation and Payroll, Physical Requirements of Position, Job Duty Statement. CalPERS also told him to provide and medical records.

9. On June 22, 2021, respondent submitted a second disability retirement election application seeking an industrial disability retirement, and listing an effective retirement date of December 2, 2020. Respondent claimed disability based on orthopedic conditions (back and left leg) and high blood pressure. The second application also did not contain all the required forms. By letter dated June 23, 2021, CalPERS requested respondent provide a completed Workers' Compensation Carrier Request form, Authorization to Disclosure Protected Health Information form, and medical records. The letter further notified respondent that, if the requested documents were not received within 21 days, his application would be canceled. Respondent did not provide the requested documents.

On July 7, 2021, CalPERS contacted respondent and sent him a letter giving him until August 4, 2021, to provide the Workers' Compensation Carrier Request form and Physician's Report on Disability form. Respondent was placed on notice that if he did not submit the required documentation, his application would be canceled.

Respondent did not provide the required documentation. By letter dated August 4, 2021, CalPERS notified respondent that the second application he filed was canceled. Respondent did not appeal the cancellation.

10. Approximately one and a half years later, on February 1, 2023, respondent contacted CalPERS asking if CalPERS could request the information needed from his doctors for his disability retirement application. In response, CalPERS mailed a third PUB 35 to respondent.

11. On February 3, 2023, a CalPERS employee contacted respondent and advised him about the disability retirement application process. Respondent told the employee that his previous two applications had been cancelled because he could not obtain all the required medical documentation. The employee again informed respondent of all the documents needed.

12. On February 23, 2023, more than two years after his effective service retirement date, respondent submitted a third application for industrial disability retirement with an effective retirement date of December 2, 2020. On this application, respondent claimed disability based on a lumbar spine orthopedic condition.

By letter dated March 23, 2023, CalPERS requested information from respondent and CDCR regarding respondent's request to change from service retirement to disability retirement, to determine if a correctable mistake was made

within the meaning of applicable law that would permit CalPERS to receive the late application.

On April 11, 2023, and April 13, 2023, respondent provided the following responses to CalPERS' request for additional information:

1. We sent you a letter dated May 27, 2020, letting you know we received your application for Service Retirement. In that letter, it indicated you may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. It further stated to apply for a disability retirement you must complete a Disability Retirement Election Application. Please explain why you did not apply for disability retirement when you received this letter or prior to your retirement date of December 2, 2020.

Response: I did not apply for disability retirement on 12/02/2020. Because my work comp cases where [*sic*] not completed with SCIF I was approved after 12/02/2020 for industrial disability. I also was not aware of your letter on 05/27/2020.

2. How did you learn about disability retirement?

Response: I learned about disability retirements, from a CalPERS member (a retired member).

3. On what date did you become aware that you could file an application for a disability retirement?

Response: I don't know the specific date. I learned about disability retirement but as soon as I was aware of disability retirements I applied for it. It was after 12/02/2020 my service retirement [date]. I also became aware I was eligible for disability retirement after my service retirement. I was also out of work on a pending work comp cases (2).

4. What specific disabling condition prevented you from performing your duties continuously from December 1, 2020 to present?

Response: Lumber, enlarged heart valve, hearing, leg (upper thigh).

5. At the time you filed for service retirement, were you under regular medical care for this condition?

a. If yes, who was your physician (Name, Address, Phone#)?
Did this or any physician instruct you to stop working due to your condition?

b. If no, when did you begin medical treatment for your disabling condition?

Response: Yes, was continuing my evaluations with SCIF and my primary doctor. My personnel [*sic*] Dr. Xu He 909-294-3682, 1600 E Citrus Ave A. Redlands CA 92374.

6. Did you advise your employer that you had to retire because of this disabling condition?

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

b. If no, why not?

Response: Yes, zero information from employer they were fully aware of my ongoing work comp cases (2). They provided nothing.

7. Did you participate in an interactive process with your employer where they provided you with information regarding disability retirement?

a. If yes, what information was provided?

b. On what date was this information provided to you?

Response: No, I was never [afforded or participated] in any interactive process.

8. Did you contact CalPERS for information regarding disability retirement before you retired for service?

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

b. If no, why not?

Response: To my knowledge I am not aware of ever contacting CalPERS of disability retirements.

9. Did you leave work for any reason other than a disabling condition (i.e., termination, resignation, settlement agreement, etc.)?

a. 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.

On April 13, 2023, CalPERS contacted respondent and sent him a letter giving him until May 4, 2023, to provide the missing documents, including medical records. Respondent was placed on notice that if he did not submit the required documentation, his third application would be canceled.

Respondent did not provide the required documentation. CalPERS notified respondent on June 26, 2023, that his third application for industrial disability retirement was cancelled because the requested/required medical information had not been received. CalPERS also advised respondent of his appeal rights.

13. On August 15, 2023, respondent timely filed an appeal; this hearing followed.

14. On February 23, 2024, CalPERS filed the Statement of Issues in this matter. This appeal is limited to the issue of whether respondent made 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 his late (February 23, 2023) application for industrial disability retirement.

Participant Log Notes and Documents

15. CalPERS submitted documentation supporting the above dates and information provided to respondent. CalPERS also submitted participant log notes

showing all communications made with respondent between September 2020 and May of 2024. The number of contacts CalPERS had with respondent concerning the need to obtain documentation in support of his claimed orthopedic conditions were numerous. The notes show CalPERS went to great lengths to not only explain the industrial disability retirement application process, but to also get the proper information to respondent.

Respondent's Testimony and Documents

16. Respondent's testimony is summarized as follows: Respondent said he understands that the appeal is because CalPERS is saying his application is late but they did not tell him that until the last letter they sent. CalPERS sent back his first application because of missing documents. Respondent had a hard time getting all his documentation together because it was during COVID. Respondent acknowledged that he received all the letters that CalPERS sent and even though his applications were sent back or rejected, they should all be considered one continuous application and not be considered late. Respondent said he was hurt on the job so his applications have always been about filing for industrial disability retirement not just a disability retirement. When asked why respondent, after his first application was rejected, did not file another application until June of 2021, respondent said he thought it was a "continuous process" and he would always just check things "online." CalPERS does not help members fill out the forms and he did the best he could. All CalPERS ever does is tell members what they are missing. Respondent still has not received all of his medical reports because he is still receiving treatment for his condition. Respondent feels he was diligent in filing his applications and CalPERS is denying him a disability retirement even though they have known about it all along.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The management and administration of CalPERS is vested in the Board of Administration (board). (Gov. Code, § 20120.)

2. Article XVI, section 17, subdivision (a), of the California Constitution provides in part:

The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

3. The board, subject to applicable law and regulations, shall determine and may modify benefits for service and disability retirement benefits. (Gov. Code, § 20123.)

4. The Constitution imposes on CalPERS a duty to "ensure the rights of members and retirees to their full, earned benefits." (*City of Oakland v. Public Employees' Retirement System* (2002), 95 Cal.App.4th 29, 46 (cited with approval in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544.)

5. Government Code section 20026 provides:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

6. Government Code section 20160, provides (emphasis added):
 - (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.

7. Government Code section 20340 provides:

A person ceases to be a member:

(a) Upon retirement, except while participating in reduced worktime for partial service retirement.

(b) If he or she is paid his or her normal contributions, unless payment of contributions is the result of an election pursuant to paragraph (1) of subdivision (b) of Section

21070, or unless, after reducing the member's credited service by the service applicable to the contributions being withdrawn, the member meets the requirements of Section 21075 or if he or she is paid a portion of his or her normal contributions where more than one payment is made, or these contributions are held pursuant to Section 21500. For the purposes of this subdivision, deposit in the United States mail of a warrant drawn in favor of a member, addressed to the latest address of the member on file in the office of this system, electronic fund transfer to the person's bank, savings and loan association, or credit union account, constitutes payment to the person of the amount for which the warrant is drawn or electronically transferred.

(c) If the member has less than five years of service credit, or less than 10 years of service credit if the member is subject to Section 21076 or 21076.5, and no accumulated contributions in the retirement fund at the time of termination of service, unless the member establishes membership in the Judges' Retirement System, the Judges' Retirement System II, the Legislators' Retirement System, the State Teachers' Retirement System, or the University of California Retirement Plan, or establishes reciprocity with a reciprocal retirement system.

8. Government Code section 21152 provides:

Application to the board for retirement of a member for disability may be made by:

- (a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.
- (b) The university if the member is an employee of the university.
- (c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.
- (d) The member or any person in his or her behalf.

9. Government Code section 21154 provides:

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. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the

board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

10. Government Code 21453 provides:

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.

This section shall apply to any member who retires on or before December 31, 2017.

Burden and Standard of Proof

11. Government Code section 20160, subdivision (d), provides that the party seeking to avail themselves of the mistake/correction provisions set forth in Government Code section 20160 has the burden of showing right to correct the mistake. The standard of proof is a preponderance of the evidence. (Evid. Code, §§ 110, 115, 500.) In this case, respondent has the burden of proving that he is entitled to require CalPERS to accept his late application for disability retirement.

Evaluation

12. Respondent did not meet his burden. While CalPERS has the authority to correct errors or omissions concerning service and disability retirements, if the error or omission was borne out of mistake, inadvertence, surprise, or excusable neglect, in no event may CalPERS correct any mistake when the request comes more than six months after discovery of the mistake. (Gov. Code, § 21060, subd. (a).) Respondent was aware of the mistakes in his original disability retirement election application in November 2020.

Mistake, inadvertence, surprise, or excusable neglect, are understood as each of those terms are used in Section 473 of the Code of Civil Procedure. Case law has also interpreted each of those provisions. Mistake, for example, must be an honest mistake "where there are no elements of negligence, laxness or indifference." (*Security Truck Line v. City of Monterey* (1953) 117 Cal.App.2d 441, 445.) Mistake is not a grounds for relief when it is the result of "ignorance of the law . . . or unjustifiable negligence in discovering the law." (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.) Surprise, as used in Section 473, refers to some condition or situation in which a party "is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." (*Ibid.*) Finally, as for inadvertence or neglect, a party's neglect "must have been such as might have been the act of a reasonably prudent person under the same circumstances." (*Ibid.*)

Respondent's service retirement date is December 2, 2020. Respondent had already inquired about filing a disability retirement election application in August of 2020 and was provided with a PUB 35 explaining the process and what was required. Despite being placed on notice of that process, and the need to timely file a disability retirement election application, respondent waited until November 2, 2020, to do so. His application did not include the required documentation and was not signed, so it was returned. CalPERS properly returned the incomplete and unsigned application and explained what was missing.

Respondent waited another seven months to submit his second disability retirement election application on June 22, 2021. Again, CalPERS communicated with respondent regarding his missing documents, and the application was canceled on August 4, 2021. CalPERS properly canceled the incomplete application.

On February 23, 2023, approximately one and a half years after the cancellation of his second application, and more than two years after his effective service retirement date, respondent filed a third application. Despite being extremely late, CalPERS nonetheless gave respondent an opportunity to cure that untimely submission by answering a series of questions aimed at determining whether the late application was the result of mistake, inadvertence, surprise, or excusable neglect as required by Government Code section 21060. Based on respondent's answers, as noted in the factual findings above, the untimely submission was not the result of mistake, inadvertence, surprise, or excusable neglect as required by Government Code section 21060. Consequently, CalPERS properly canceled respondent's third application.

During the time respondent filed his initial service retirement application and his third disability retirement election application, respondent had many discussions with CalPERS employees, as reflected in the participant notes, concerning the need to provide specified information. Further, respondent received the PUB 35 on multiple occasions, which explained everything applicable to a disability retirement.

On this record, there is no evidence that respondent's failure to timely and correctly file any of his disability retirement election applications was the result of mistake, inadvertence, surprise, or excusable neglect as required by Government Code section 21060. Although respondent would like to consider the applications as one continuous process, they are not. It is also not the responsibility of CalPERS to help a member fill out his or her applications; CalPERS is responsible for providing direction for members to assist themselves by, for example, sending PUB 35 to a member who might be eligible for a disability retirement.

CalPERS properly rejected respondent's November 2, 2020, disability retirement election application; and properly canceled his June 22, 2021, and February 23, 2023, disability retirement election applications. Respondent did not appeal the November 2, 2020, and June 22, 2021, rejections and cancellations, respectively, and this appeal therefore only concerns the February 23, 2023, disability retirement election application. There being no mistake, inadvertence, surprise, or excusable neglect to justify accepting the late application, the appeal must be denied.

ORDER

Respondent John P. Fallis's appeal from CalPERS's cancellation of his February 23, 2023, disability retirement election application is denied. CalPERS acted properly in canceling the late application and is barred from accepting the late application under Government Code section 20160.

DATE: October 22, 2024



KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings