

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues Against:

JEFFREY G. LASHMET, Respondent

and

CITY OF EL CAJON, Respondent

Agency Case No. 2020-1014

OAH No. 2020120848

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 12, 2021. The matter was heard by telephone/videoconference due to the ongoing public health emergency.

Austa Wakily, Senior Attorney, represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System, State of California (CalPERS).

Jeffrey Lashmet, respondent, represented himself.

Morgan L. Foley, City Attorney, represented respondent, the City of El Cajon (City).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on May 12, 2021.

ISSUE

Did Jeffrey Lashmet make an error or omission as a result of mistake, inadvertence, surprise or excusable neglect correctable by Government Code section 20160, which would allow CalPERS to accept his late application for industrial disability retirement?

FACTUAL FINDINGS

Background

1. Mr. Lashmet was employed by the City as a Fire Captain. By virtue of his employment, he was a local safety member of CalPERS.
2. On March 28, 2017, Mr. Lashmet signed an application for service retirement. By letter dated April 7, 2017, CalPERS acknowledged his application, and he was retired for service effective May 20, 2017. By letter dated May 22, 2017, CalPERS notified Mr. Lashmet that he would begin receiving his monthly retirement allowance.
3. On May 29, 2020, Mr. Lashmet signed and submitted to CalPERS an application for industrial disability retirement based upon prostate cancer, specifying a retirement dated of May 19, 2017. He wrote that he was exposed to hazardous

conditions from smoke, fires, and chemicals over the course of his 37 years as a firefighter, and his "PSA numbers doubled the year I retired." He indicated he did not want to be treated through workers' compensation but waited two-and-a-half years for his workers' compensation claim to settle.

4. On June 3, 2020, CalPERS sent respondent a questionnaire, noting that in general, a member who has service retired cannot change his or her retirement status except if there is a correctable error as defined under Government Code section 20160, which would allow CalPERS to accept his late application for industrial disability retirement. CalPERS requested Mr. Lashmet provide additional information regarding his claimed disability.

In response to the question of whether Mr. Lashmet was under medical care for his disability at the time of service retirement, Mr. Lashmet wrote that he had prostate cancer at the time he retired, but he was not diagnosed until a biopsy in November 2017 confirmed the cancer. At the time of his retirement, he was under active surveillance and prostate-specific antigen (PSA) testing.

In response to the question of whether Mr. Lashmet's physician instructed him to stop working because of permanent disability, Mr. Lashmet wrote that the qualified medical examiner (QME) from his workers' compensation case wrote that due to the rigors of firefighting, he did not anticipate Mr. Lashmet would be able to return to his former position absent retirement.

In response to further questions, Mr. Lashmet indicated he did not advise the City of his disability or contact CalPERS because he was unaware he had cancer at the time he retired. His PSA numbers changed significantly during June and July 2017, and the biopsy in November 2017 confirmed cancer. He noted that in the Spring of 2018,

before his surgery, he filed a workers' compensation claim. He contacted his local CalPERS office about filing a disability retirement application and was told he needed a workers' compensation claim in order to apply for disability retirement.

5. On July 17, 2020, CalPERS informed Mr. Lashmet that it was cancelling his industrial disability retirement application because it concluded he had not made a correctable mistake at the time he service retired. CalPERS noted there were no medical records indicating that at the time of retirement, he was unable to perform the duties of a Fire Captain. By letter dated July 30, 2020, CalPERS advised Mr. Lashmet that his situation did not fall within the parameters of Government Code section 20160 such that it could accept his late-filed application. The letter notified Mr. Lashmet of his appeal rights.

6. On August 6, 2020, Mr. Lashmet requested to appeal the decision. In his letter, he stated that a correctable mistake had been made because although he had been monitored for prostate cancer at the time of his service retirement, it was not confirmed until November 2017, which was within six months of his retirement. He then contacted his local CalPERS office, and was informed that he needed a valid workers' compensation claim to prove that his cancer was job related. It then took two-and-a-half years for the workers' compensation claim to settle. Mr. Lashmet wrote that had he known he had cancer, he would not have elected a service retirement.

On December 23, 2020, complainant filed the statement of issues. The sole issue on appeal is whether Mr. Lashmet 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 application for industrial disability retirement.

Mr. Lashmet's Evidence

7. Mr. Lashmet's testimony was consistent with his responses to the questionnaire and his appeal letter. He expressed frustration about the process and the adversarial stance taken by CalPERS and the City's refusal to support him in the process. Although he was not diagnosed with cancer until November 2017, his workers' compensation physician determined that the cancer was caused on-the-job and was present, yet undiagnosed, while he was working as a Fire Captain. When questioned about his decision to service retire, Mr. Lashmet stated he had worked for the City for 37 years, his wife was urging him to retire, and he was not getting along with the new management in the fire department. He admitted he was not physically incapacitated in May 2017, at the time he retired. He testified that he was provided erroneous information by CalPERS and his workers' compensation attorney after he was diagnosed with cancer, and he was led to believe that he needed to have a settled workers' compensation claim before he was eligible to submit an industrial disability retirement application. He expressed frustration that CalPERS provided erroneous information in this regard. Finally, he noted that his retirement allowance would not increase with an industrial disability retirement (except for changing the taxable amounts). As a compromise, he is willing to accept a non-retroactive industrial disability retirement. In conclusion, he believes because he ultimately became disabled from an illness incurred on-the-job, his application should be accepted and presented to the City for a determination of disability.

8. Mr. Lashmet submitted email correspondence with the City regarding the City's decision not to support his industrial disability retirement claim.

9. Mr. Lashmet submitted a page from a QME panel report dated February 8, 2019, in which it is noted that "given the rigors associated with the full spectrum of

firefighting, I do not anticipate that [Mr. Lashmet] will be able to return to his position as a Captain with the City of El Cajon Fire Department. Absent retirement, he would be considered a qualified injured worker in this regard.”

Complainant’s Evidence

10. Timothy Grigsby, an Associate Governmental Program Analyst for CalPERS, testified about the documentary evidence submitted by CalPERS. Touch Point is CalPERS’s computerized system for documenting action taken involving a member’s account. All phone calls and correspondence from members to CalPERS are documented in the Touch Point system. A Touch Point report for Mr. Lashmet was received as evidence.

11. The Touch Point notes indicate that after Mr. Lashmet’s service retirement, he contacted CalPERS on December 12, 2017, to enquire about disability retirement. At that time, CalPERS mailed Mr. Lashmet an industrial disability retirement application and publication. On January 5, 2018, Mr. Lashmet visited a CalPERS office and was provided an IDR application and informed that the City would make the determination. On August 23, 2018, Mr. Lashmet again visited a CalPERS office and again received an IDR application. Mr. Lashmet called several more times with questions about IDR retirement in 2019 and 2020.

LEGAL CONCLUSIONS

Administration of the Retirement Fund

1. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the Public Employees Retirement

Law solely for the benefit of the participants. (Gov. Code, § 20170.) Management and control of the retirement system is vested in the Board of Administration. (Gov. Code, § 20123). The Board of Administration has the exclusive control of the administration and investment of the retirement fund. (Gov. Code, § 20171.)

2. Pension legislation must be liberally construed, resolving all ambiguities in favor of the applicant. However, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Burden and Standard of Proof

3. An applicant for retirement benefits has the burden of proving that he or she is entitled to it. (*Greatorex v. Bd. of Administration* (1979) 91 Cal.App.3d 54). Mr. Lashmet is seeking to utilize Government Code section 20160 to correct an error. As the party seeking correction of an error, he has "the burden of presenting documentation or other evidence to the board establishing the right to correction." (Gov. Code, § 20160, subd. (d).) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Statutes

4. Government Code section 21151, subdivision (a), provides that any local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability regardless of age or amount of service.

5. Government Code section 21154 provides:

The application [for disability retirement] 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.

6. Government Code section 21252, subdivision (a), provides in part:

A member's written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the

date the member discontinued state service to the time the written application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable.

7. Government Code section 20160 provides:

(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 . . . 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.

[¶] . . . [¶]

(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.

Evaluation

8. Mr. Lashmet seeks to use Government Code section 20160 to correct his failure to submit an application for industrial disability retirement when he was diagnosed with prostate cancer in November 2017, six months after he service retired. Mr. Lashmet argued that his failure to file at that point was based on erroneous information provided by CalPERS and his workers' compensation attorney that he had to wait for his workers' compensation claim to be adjudicated. Assuming, *arguendo*, that this is a correctable error, and his application is deemed received at the time he was diagnosed with prostate cancer, he would still not be entitled to an industrial disability retirement. Under Government Code section 21154 and 21252, a disability retirement application *must* be made while the member is in service or while the member is physically or mentally incapacitated to perform duties *from the date of discontinuance of state service to the time of application*. Here, even if Mr. Lashmet could show he was incapacitated to perform the duties of a Fire Captain at the point where he was diagnosed with prostate cancer in November 2017, he could not show incapacitation beginning on the date he separated from employment on May 19, 2017. Indeed, he testified that his decision to service retire was not health-related, but rather, due to other factors. Put another way, in order to be eligible for a disability retirement, he must have been incapacitated at the time of separation from the City. Thus, even if Section 20160 were utilized to correct his failure to file in November 2017 after he was diagnosed, he would still be ineligible under Section 21154.

9. Alternatively, Mr. Lashmet argued that because the industrially caused cancer was present, but undetected, at the time of his service retirement, he should be entitled to a disability retirement. He essentially argues that the correctable mistake is that he filed a service retirement application instead of a disability retirement application, or alternatively, he should have waited to retire until November 2017 when he was diagnosed with cancer. While it is understandable that Mr. Lashmet would believe he is entitled to a disability retirement under these circumstances, such does not accord with disability retirement law. Disability retirements are only available to members who become incapacitated from the performance of their job duties *while employed*. Even if the underlying condition existed while Mr. Lashmet was employed by the City, he was not physically incapable of performing the job duties of a Fire Captain at the time of his separation. Similarly, even had he been diagnosed with cancer in May 2017, he would only have been eligible for a disability retirement if he was physically incapacitated from performing the duties of a Fire Captain at that time, which he was not. While he might view his decision to retire when he did as a mistake due to a change in circumstances discovered several months later, it is not a correctable mistake for which he can avail himself of Section 20164. Accordingly, CalPERS is not permitted under the law to accept his industrial disability retirement application.

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ORDER

The appeal by respondent Jeffrey Lashmet is denied.

DATE: June 9, 2021


Adam Berg (Jun 9, 2021 09:47 PDT)

ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings