

Placer County Case No.: 34-2016-80002303-CU-WM-GDS

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO**

Philip Thorman, Petitioner

vs.

**Board of Administrative Appeals for the California Public Employees
Retirement System ("CalPERS").**

OPENING BRIEF

**After The Decision of the Board of Administration For CalPERS
of November 20, 2015, adopting the Proposed Decision of
Administrative Law Judge Ed Washington dated September 29, 2015.**

**Patrick H. Dwyer, SBN 137743
Counsel for Petitioner,
P.O. Box 1705
17318 Piper Lane
Penn Valley, California 95946
530-432-5407 (telephone)
530-432-9122 (facsimile)
pdwyer@pdwyerlaw.com**

August 1, 2016

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ISSUES PRESENTED

The issues raised in this petition are:

1. Did CalPERS' have a fiduciary duty to give Petitioner timely and accurate notice of when he had to file an application for permanent disability?
2. Did CalPERS give notice to Petitioner of when he had to file an application for permanent disability?
3. Was Petitioner required to submit an application to CalPERS for permanent disability before he knew that he was going to be permanently disabled?
4. Did the effective date of permanent disability submitted by Petitioner's employer, NID, immediately after it determined that Petitioner was permanently disabled constitute timely notice to CalPERS of the correct effective date of disability for Petitioner?
5. Did the effective date of permanent disability submitted by Thorman immediately after he learned the date from NID constitute timely notice to CalPERS of the correct effective date of disability for Petitioner?

I. INTRODUCTION

This is a simple case of the Board of Administrative Appeals for the California Public Employees Retirement System (“CalPERS”) ignoring its fiduciary duty to properly inform its members about *when* to make a claim. CalPERS contends that its “Publication 35” pamphlet, which it mailed to Petitioner Philip Thorman (“Thorman”), provided the correct instructions for members about filing an application for permanent disability. However, Publication 35 does not tell members *when they must file*; it only says that members may file when they first “believe” that they “may” be permanently disabled. As evidenced by the facts of this case, this notice is not only inadequate, it is not correct under the law.

CalPERS argues that GC §21252(a) makes it mandatory that a member file an application when he or she first “believes” that they might be permanently disabled. Examination of this statute, however, shows that it does not have any such language. Instead, this statute uses an altogether different terminology: it says a member should file when “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.” This language clearly refers to the applicant having been deemed or adjudged to be permanently disabled, and thus, the better interpretation is that the time to file begins to run from the date that the applicant learns that he has been classified as permanently disabled, not when the applicant “believes” that he might become permanently disabled.

As the fiduciary that administers the plan for its members, CalPERS had the obligation to correctly interpret GC §21252(a) and to give members a clear, complete, and correct set of instructions about when and how to file an

application (preferably with working examples). It is obvious from the face of CalPERS' Publication 35 and the language of GC §21252(a) that CalPERS failed in this duty. If CalPERS had met its fiduciary duty, Thomas would have had the necessary information and instructions and would have been able to comply.

Neither Thorman nor his employer, Nevada Irrigation District ("NID") "believed" that he was permanently disabled before September 4, 2013, when NID completed its medical examinations, held a hearing, and made a final ruling.¹ NID then promptly filed an application with CalPERS on Thorman's behalf with an effective date of termination of January 15, 2012. If NID had "believed" prior to September 4, 2013, that Thorman was, or would be found, permanently disabled, it would (or should) have told Thorman about this and advised him to file an application with CalPERS. The fact that NID did neither of these things reinforces the reasonableness of Thorman's "belief" that he could not file with CalPERS until after NID had made a final ruling.

The crux of this case is that CalPERS contends that Thorman should have "believed" that he would become permanently disabled back in January 2012, before he went through physical therapy and before he tried to perform other duties for NID. Thorman, however, did not know that he was supposed to employ an entirely subjective "belief" standard that he might become permanently disabled. He thought that he was supposed to do everything he could to heal his injury and return to work before applying. Now he is being

¹ Thorman's understanding that the law required him to wait until a ruling was made by his employer comports with the applicable law. See GC §21156 and then GC §20026. Further, his understanding that he should not file until he had been determined to be permanently disabled comports with the language of GC §21252(a).

punished for trying to do his best and not game the system.

Further complication arose in this case when NID failed to tell Thorman that it had filed an application for him on September 13, 2013, with an effective termination date of January 15, 2012. Not knowing about this, Thorman filed his own application on September 20, 2013, but left the effective date of termination blank because NID had not given him this information. CalPERS, without explanation, never processed the application filed by NID, but did process Thorman's. CalPERS contacted Thorman in March 2014 and asked him for an effective date. Thorman got the date (January 15, 2012) from NID in April 2014 and informed CalPERS in early May 2014. CalPERS then rejected the January 15, 2012, date and asserted that the earliest possible effective date was September 1, 2013, because that was the first day of the month in which Thorman had filed.

Thorman appealed this decision under GC §20160 which allows for the correction of errors in an application on the grounds of "mistake, inadvertence, surprise, or excusable neglect".² The ALJ denied the appeal, finding that Thorman's delay in filing his application was not excusable.

² GC §20160 reads 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.

II. FACTUAL HISTORY

A. Background Facts

Mr. Thorman has a lengthy history of medical problems with his feet arising from his employment as a meter reader for NID. On or about January 6, 2012, Mr. Thorman underwent surgery on his left foot. He was in recovery and rehabilitation until on or about October 25, 2012, when Dr. Burnell Vassell, MD, concluded that there was “permanent disability” and that work on his feet had to be restricted. Administrative Record (“AR”) 31-37.

On or about January 10, 2013, Dr. Barry Weiner, MD, performed a qualified medical examination on Mr. Thorman, and although Dr. Weiner generally concurred in the medical analysis of the treating physician that Mr. Thorman did have chronic problems with both feet, he determined that Mr. Thorman could return to his work as a meter reader with correct orthotics and physical therapy. AR 31, 35.

Faced with conflicting medical reports, NID wrote to Mr. Thorman on or about February 4, 2013, stating that there had been conflicting medical reports about his physical condition and his ability to perform his job and then questioned whether Mr. Thorman was permanently disabled for his meter reading position at NID. AR 38-39. Thereafter, NID initiated a process for reviewing Mr. Thorman’s true medical status.

On August 28, 2013, NID wrote to Mr. Thorman and informed him that Dr. Weiner had, under examination in deposition, concurred with Dr. Vassell that Mr. Thorman was “not able to return to your usual and customary position based on the current job duties of the Meter Reader position”. AR 41.

On September 4, 2013, there was a meeting at NID with Mr. Thorman. During the meeting, the recent consensus of Dr. Wiener and Dr. Vassell that

Mr. Thorman was permanently disabled and could not perform his meter reading job was acknowledged by NID. There was also an examination as to whether NID could offer alternative employment and it was determined that NID could not. Based upon these conclusions, NID stated that it would promptly initiate an application for permanent retirement for disability with CalPERS. AR 42.³

On September 13, 2013, NID filed via US Mail an application with CalPERS for permanent disability retirement for Mr. Thorman (“NID Application”).⁴ AR 124-134. The NID Application states the correct effective date for retirement as January 15, 2012 (see Section 2). See Government Code 21154(c) or (d). AR 128.

Mr. Thorman was not served with a copy of the NID Application.⁵ AR 124. Not knowing what had transpired, Mr. Thorman proceeded to file with CalPERS his own application for retirement on or about September 20, 2013 (“Petitioner’s Application”). AR 5-14. Mr. Thorman’s application did not specify a date because he had not yet been provided an effective date of termination by NID.

CalPERS somehow mistakenly processed Petitioner’s Application instead of the NID Application as evidenced by CalPERS decision on or about March 17, 2014, granting Petitioner’s Application, but not mentioning the NID Application. AR 15-17. CalPERS assigned an effective date of

³ This meeting was held pursuant to GC §21156 for making a determination under GC §20026 that Petitioner was permanently disabled.

⁴ NID was required to file by GC §§ 21150, 21154, 21156.

⁵ The US Certified Mail receipt only indicates service upon CalPERS, not Mr. Thorman. AR 124.

September 1, 2013, to Petitioner's Application, apparently on the basis of CalPERS interpretation of GC §21252(a) governing the effective date when submitted by the member (i.e., the employee). See AR 26-27, 88.

On or about April 14, 2014, Mr. Thorman learned from NID what the correct effective date for his retirement should have been (i.e., January 15, 2012). Mr. Thorman then promptly submitted this date to CALPERS and requested that CalPERS set his retirement start date accordingly. AR 18-19, AR 26-27, 43. CalPERS rejected this request on or about June 20, 2014. AR 44-47. Mr. Thorman filed a timely appeal on or about July 10, 2014. AR 48. Indeed, NID wrote a letter dated April 30, 2014, stating that Mr. Thorman was effectively retired for physical disability on or about January 20, 2012. AR 43.⁶

Petitioner timely appealed the decision of CalPERS about the effective date and the administrative appeal process proceeded. AR 48-51.

B. Procedural History

The parties submitted their respective arguments and exhibits before the administrative hearing. AR 52-88, 95-141. The case went to administrative hearing on July 9, 2015. See transcript at AR 146-274. Supplemental briefing was submitted by both parties by August 26, 2015. AR 89-94, 137-140. The Proposed Decision of the Administrative Law Judge ("ALJ") was issued on September 28, 2015. AR 275-282. The parties then filed briefs setting forth their respective arguments to the Board of Administrative Appeals about the Proposed Decision. AR 297- 304. The

⁶ It is not known why NID used the January 15, 2012 date on the application it filed and then used the date of January 20, 2012, on the April 30th letter. Obviously, NID realized the mistake and tried to remedy it.

Board met on November 18, 2015. See Transcript at AR 305-311.

The Board of Administrative Appeals for CalPERS sent notice to Petitioner of its Decision to adopt the Proposed Decision on November 20, 2015. AR 312, 321-323. On November 25, 2015, Petitioner sent a letter to the Board of Administrative Appeals notifying it that Petitioner would appeal and requesting that an administrative record be prepared. AR 324. This request was acknowledged by Board of Administrative Appeals on December 11, 2015. On January 11, 2016, Petitioner was notified that a copy of the administrative record was ready and requesting payment of \$32.50 for copying. Petitioner submitted the correct payment and on February 2, 2016, the Board of Administrative Appeals sent the administrative record to Petitioner via U.S. Certified mail. Petitioner received his copy of the record on February 3, 2016. Pursuant to CCP §1094.6(d), Petitioner had thirty days from February 3, 2016, to file this Petition.

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION**

IV. LEGAL ANALYSIS AND ARGUMENT

A. Calpers Had a Fiduciary Duty to Give Petitioner Timely and Accurate Notice of When He Had to File an Application for Permanent Disability

The question of whether CalPERS had a duty to inform Petitioner about *when* he had to file an application for permanent disability was never directly contested by the parties. Indeed, this point was tacitly conceded by CalPERS and was included in the Proposed Decision under the heading “Events Leading to Respondent’s Request”, items nos. 5-8, 18-19.

The case law makes it clear that CalPERS, as a quasi-governmental insurer, has a fiduciary duty to its insured just like private insurers. See *City of Pleasanton v. Board of Administration of the California Public Employees Retirement System* (2012) 211 Cal. App. 4th 522, 545. More directly pertinent to this case, CalPERS has a fiduciary duty to provide timely notice and accurate information to its members. *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 40. See also, *Chaidez v. Biard of Administration of CalPERS* (2014) 223 Cal. App. 4th 1425, 1430.

Petitioner contends that under the facts in this case, CalPERS had an affirmative obligation to notify its insured members of all essential deadlines, operative facts, and other requirements necessary to timely file an application for permanent disability.⁷

⁷ Such notice is required in the context of private insurance. See *Fields v. Blue Shield of California* (1985) 163 Cal. App 3rd 570, 583-584 (liability of insurance providers for failure to properly warn/notify an insured of changes in coverage).

B. Calpers Did Not Provide Adequate Notice to Petitioner About When He Had to File an Application for Permanent Disability

The question of what constituted adequate notice to Petitioner about *when* he had to file his application is the central contested issue. The ALJ did not make a specific finding in the Proposed Decision as to whether or not CalPERS gave Petitioner timely, sufficient or accurate information so that *Petitioner knew when to file an application for permanent disability*. Rather, the ALJ made findings that Petitioner contacted CalPERS for information, see Proposed Decision nos. 5, 7-8 at AR 277, and that CalPERS provided Petitioner with its "Publication 35" pamphlet. AR84-87.

CalPERS contends that it gave Petitioner adequate notice based upon the statements in its Publication 35. See AR 89-93. Specifically, it argued that the excerpts cited under the ALJ's Proposed Decision nos. 8 were all that were required to give adequate notice to Thorman. In contrast, Petitioner challenged the sufficiency of the disclosures in Publication 35 at the hearing (Transcript at AR 105-112) and again in his post-hearing brief.⁸ AR 137-140, 142-144, 301-303.

Petitioner correctly pointed out that Publication 35 fails to give any notice to Petitioner that he *must* file an application for permanent disability as soon as he "believes" that he might be permanently disabled. AR 85, ¶2. All of the language quoted by CalPERS and included by the ALJ in the Proposed Decision is *permissive, not mandatory*. For example, looking at the excerpt quoted under no. 8, it reads: "You ... *may* file a Disability Retirement Application for you retirement." (Emphasis added.) It does not say you must or shall file. Indeed, not only does CalPERS' Publication 35 fail to notify

⁸ This document (Ex. "19") is at AR 84-87.

Petitioner that he must file as soon as he learns that he might be disabled, the permissive language in CalPERS' Publication 35 affirmatively misled him to believe that he did not have to file his application until he had been found to be permanently disabled.

CalPERS drafted Publication 35 and it is responsible for the ambiguity. Applying by analogy the rule of contract interpretation that uncertain or ambiguous language should be construed against the drafting party, California Civil Code §1654, the language in Pamphlet 35 should be construed most favorably to Petitioner. CalPERS, as a fiduciary, has no excuse for failing to draft a simple pamphlet that correctly and clearly explains when and how an application for permanent disability may be filed, and most importantly, setting forth in bold type that a member *must* file an application if he or she even thinks that they are permanently disabled.

Simply put, the language in Publication 35 was insufficient notice to Petitioner that he had to file as soon as he "believed" that he "might" be permanently disabled. In an era when the public is concerned about people taking advantage of the "system", Petitioner's reluctance to file for permanent disability until he had been adjudged permanently disabled was not an inexcusable error as CalPERS contends, but a very laudable reticence to seek benefits to which he might not be entitled. Petitioner should not be punished for being honest and acting in good faith, his error (if any) should be cured pursuant to GC §20160(a).

Finally, CalPERS' contention that its interpretation of GC §21252(a) requiring Thorman to have filed his application for permanent disability *before he knew he was going to be permanently disabled* is a preposterous construction of the statute. The language in CalPERS Pamphlet 35 is completely different than the language in §21252(a). The statute reads as

follows in pertinent 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.* The effective date of a written application for retirement submitted to the board more than nine months after the member's discontinuance of state service shall be the first day of the month in which the member's application is received at an office of the board or by an employee of this system designated by the board. (Emphasis added.)

The express language of the statute does not speak in terms of a member's "belief" about his possible permanent disability, it says "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." This language clearly speaks to cases where the applicant has been deemed or adjudged to be permanently disabled. Thus, the only plausible construction of the statute is that the time to file begins to run from the actual date that the applicant learns that he has been classified as permanently disabled. The permissive "may" file if the member "believes" that he may become disabled as used in CalPERS Publication 35 is not supported in any regard by this statute.

Thorman followed the letter of this statute: he waited until he had been found permanently disabled by NID and then he filed his application. This was the correct procedure and CalPERS should have allowed Thorman's application as timely.

C. The Effective Date of Permanent Disability Submitted by Petitioner's Employer, NID, Was Timely Notice to CalPERS of the Correct Effective Date of Disability for Petitioner

There was no factual dispute that NID, as Petitioner's employer, was required by law to timely submit an application for permanent disability on Petitioner's behalf.⁹ And, there was no factual dispute that NID did, in fact, file an application for permanent disability with CalPERS on behalf of Petitioner on September 13, 2013 (a week earlier than Petitioner's application) and that this application did contain the correct effective date of January 15, 2012. AR 124-134. Moreover, the fact that Thorman's employer, NID (a mandated filer) also did not file an application with CalPERS until it had made a ruling that Thorman was permanently disabled, demonstrates that it had the same understanding as Thorman did about the date for filing, notwithstanding Publication 35.

CalPERS, however, was unable to explain at the hearing what it did with this earlier NID Application (AR 124-134) that had the correct date or why it did not transfer the effective date it contained to Petitioner's Application filed a week later. See Hearing Transcript, AR 244-250. It is obvious when the pages of the two applications are compared, (compare AR 5 to AR 128), that *the NID Application has the correct date*. This correct date (January 15, 2012) was submitted to CalPERS in a timely manner so that Petitioner would obtain benefits from that date forward.

The ALJ ignored this question in his decision. In the absence of any factual finding on this point, even though there is clear and uncontroverted evidence in the record that CalPERS did receive the NID Application (AR

⁹ NID was required to file under GC §§ 21150, 21154, 21156.

246:2-17, 249:11-250:3), this Court should make its own finding that NID's Application constituted correct and timely notice to CalPERS of the effective date for Petitioner and that this date should have been used in making his eligibility decision. See *Affan v. Portofino Cove Homeowner's Association* (2010) 189 Cal. App. 4th 930, 944-945; *Kemp Bros Const. v. Titan Electric Corp.* (2007) 146 Cal. App. 4th 1474, 1477-1478. If this court feels unable to make such a finding, then it must reverse and remand with appropriate instructions.

D. Petitioner's Timely Provided CalPERS With an Effective Date of Disability According to CalPERS' Own Instructions

There was no finding by the ALJ that Petitioner acted in bad faith or was otherwise trying to circumvent the rules to gain a benefit to which he was not entitled when he failed to include the effective date of his termination in his application.

The evidence is uncontroverted that NID gave CalPERS the correct effective date for Thorman's termination when it filed on behalf of Thorman on September 13, 2013. It is not Thorman's fault that CalPERS somehow lost track of this application. Thorman was unaware that NID had filed on his behalf and he was unaware of the correct effective date. That is why he left this line in his application blank. Furthermore, the uncontroverted evidence shows that Thorman was not given an effective date by NID until April 2014, when in response to a request for a date from CalPERS, Thorman asked NID for the date and NID finally gave it to him. Thorman promptly submitted this date to CalPERS.¹⁰

¹⁰ Petitioner promptly informed CalPERS of his effective date of disability retirement on or about May 8, 2014. AR 28-29, 50-51.

CalPERS, in fact, states in Publication 35 that “You may select a specific date, leave it blank, or write in “expiration of benefits.”¹¹ However, when Petitioner did not put in an effective date *because he had not yet been told by NID what that date would be*, Petitioner is punished by CalPERS for leaving this line blank.

Thorman’s omission of the effective date from his application was exactly the type of unforeseen and innocent error that the legislature had in mind when it enacted the remedial statute GC §20160. The legislature stated a clear public policy that the board of CalPERS should be liberal in allowing someone to correct a simple mistake provided that they were acting in good faith and in a timely manner to remedy the error.

¹¹ This was quoted by the ALJ in the Proposed Decision, no. 8.

V. CONCLUSION

Government Code §20160 is designed to protect members from the consequences of errors or omissions that are the result of “mistake, inadvertence, surprise, or excusable neglect.”

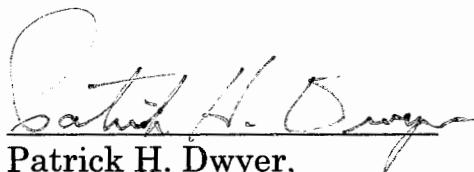
Thorman had the same understanding as his employer, NID: i.e., that he was not supposed to file an application until he had been judged as permanently disabled.

CalPERS not only failed to interpret GC §21252(a) correctly, it simply made up a completely subjective standard in its Publication 35 that a member may apply when he or she “believes” that they may become permanently disabled. Under §21252(a), the correct rule is that an application must be filed based upon a ruling or judgment of permanent disability, not the a belief that disability will happen in the future.

Thorman followed CalPERS own words: you can omit the effective date from your application and submit it when you know what it is going to be. Thorman followed these instructions. Even more astonishing, NID had given CalPERS the correct date, but CalPERS lost this information.

This Court should grant the Petition, overrule the final decision of the CalPERS’ Board, and order that CalPERS pay Thorman his disability pay commencing from January 15, 2016, plus interest.

Respectfully Submitted,

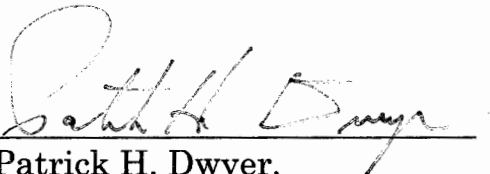


Patrick H. Dwyer,
Attorney for Petitioner

August 1, 2016

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the entire Petition (i.e., Introduction through Section V) is approximately 4052.


Patrick H. Dwyer,
Attorney for Petitioner

Date: August 1, 2016

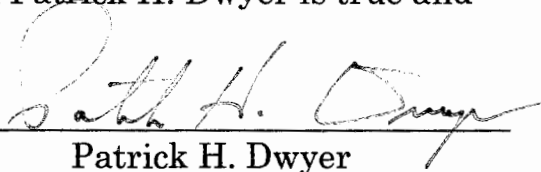
PROOF OF SERVICE

I hereby certify under penalty of perjury that I am at least 18 years of age, not a party to the action, and that a copy of Philip Thorman's Opening Brief, in the matter of *Thorman v. CalPERS*, Case No. , was served as follows.

By United States first class mail, postage pre-paid, to:

- (a) Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701
- (a) Matthew G. Jacobs, General Counsel, Rory J. Coffey, Senior Staff Attorney, California Public Employees Retirement System, Lincoln Plaza North, 400 Q Street, Sacramento, CA 95811;
- (b) Karen Fassler Gillespie, Nevada Irrigation District, 1036 W Main St, Grass Valley, CA 95945

I declare under penalty of perjury under the laws of the State of California that the foregoing certification of Patrick H. Dwyer is true and correct.


Patrick H. Dwyer

August 2, 2016
Location: Penn Valley, CA 95946