SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME **JUDGE**	**January 6, 2017, 1:30 p.m.** **HON. CHRISTOPHER E. KRUEGER**	**DEPT. NO** **CLERK**	**44** **M. GRECO**
PHILIP M. THORMAN, **Petitioner,** **v.** **BOARD OF ADMINISTRATION OF THE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,** **Respondent.**		**Case No.: 34-2016-80002303**	
Nature of Proceedings:	**PETITION FOR WRIT OF MANDATE**		

The court's tentative ruling is to grant the petition for writ of mandate, in part, for the reasons stated below.

INTRODUCTION

Petitioner Philip Thorman was a meter reader for the Nevada Irrigation district ("NID") for approximately twelve years. Through his job with NID, he was a member of Respondent California Public Employees' Retirement System ("CalPERS"). In approximately January 2012, Thorman stopped working due to an injury to his feet. In September 2013, he submitted an application to CalPERS for disability retirement. That application was approved in March 2014, with an effective retirement date of September 1, 2013. Thorman contends his effective retirement date should actually be January 16, 2012, because January 15, 2012, was his last day of service with NID. Following an evidentiary hearing before an administrative law judge ("ALJ"), CalPERS upheld its initial determination that Thorman's effective retirement was September 1, 2013. Thorman now challenges this decision, arguing it is based on errors of law and fact. For the reasons stated below, the court agrees, at least in part. The court thus grants the petition and remands this case to CalPERS to reconsider its decision in light of this ruling.

BACKGROUND

The challenged decision in this case was made following an evidentiary hearing before an Administrative Law Judge ("ALJ"). Most of the facts below come from the evidence and testimony offered at that hearing. A citation to "fact" refers to the numbered factual findings in the ALJ's proposed decision, which CalPERS adopted in its entirety. (See Administrative Record ["AR"] 275-82, and 312.)

Thorman began working for NID in 2000. (AR 162.) The administrative record contains surprisingly little information about Thorman's disability or its onset. It appears undisputed, however, that Thorman suffered some type of injury to his feet, and that the injury was caused, at least in part, by his job as a meter reader. (See, e.g., AR 6, 25.) In December 2011, Thorman went off work due to the injury. (AR 18, 162.) He thereafter used up his sick leave and vacation until approximately January 15, 2012, at which time he went into "unpaid status."[1] (AR 18, 20, 136, 247.) It appears undisputed that Thorman was deemed to have discontinued state service on the date he began unpaid status. Thorman also filed a worker's compensation claim around this time. (See AR 29.)

Thorman never returned to work, although it appears undisputed from the administrative record that he initially anticipated he *would* be able to return to work. Thorman underwent medical treatment for his foot problems from December 2011 until "well into 2013." (AR 196-97.) He had two surgeries in 2012 – one in January and one in May. (AR 196.) After both surgeries, he underwent several months of rehabilitation and physical therapy. (AR 196.) He has stated he thought the surgeries would make his feet "better" and enable him to "do [his] job 100% after they were both completed." (AR 18.) He has also stated that the first surgery had "complications," and that, after the surgery, he "thought it would be wise to research my disability options in the event my feet were not successfully better" because "I didn't know which way it was going to go." (AR 18, 165.) It is reasonably clear that by "I didn't know which way it was going to go," Thorman meant he did not know whether he was going to be able to return to work.

[1] The precise date may be disputed. In one document, NID states his last day of paid service was January 15, 2012; in another, it states his last day of paid service was January 20, 2012. (Compare AR 20 with 128.) The court uses January 15 as Thorman's last day of paid service, because that is the date used in the ALJ's proposed decision. (See Facts 1 and 3.)

The administrative record contains a letter that Thorman wrote to CalPERS in June 2012. (AR 72-73.) This letter was offered into evidence by CalPERS, and it was cited several times by the ALJ in the proposed decision. (See Facts 7, 18.) It is a difficult letter to understand.[2] Much of it appears to have nothing to do with the disability retirement that is at issue in this case. The letter opens with a question from Thorman about paying off what he owed for purchasing five additional years of service credit (referred to by CalPERS as "air time"). (AR 72, 213-14.) It also contains what appear to be two questions about regular (i.e., non-disability) retirement benefits. There is also a confusing question about the "procedure if I'm able to use the Disability Retirement benefits," but this questions appears to deal with a *different* disability involving his knees. It also appears that Thorman's question may pertain to whether the medical benefits that he received as a result of a worker's compensation claim involving his knees would be added to, or otherwise effect, his monthly pension in the event that he retired.

The letter also mentions Thorman's foot problems: "I had surgery on my feet being workmen's comp related. Off since Jan. 6th and *will go back to work commencing Sept*." (AR 72 [emphasis added].) The letter states: "I hope the surgeries on both my feet are successful. If by some reason I still have pain in them that makes it difficult to work and fulfill my duties am I able to do the same with at what has been done with my knees*? I know this is premature at this time* but I could like to know the best case scenario *if the situation should arise*." (*Id*. [emphasis added].) It appears reasonably clear from this letter that, as of June 2012, Thorman expected he would be able to return to work in September, and that it would thus be "premature" to assume he would not be able to do so. Thorman confirmed this at the hearing when he testified that, at the time he wrote the letter, it was his understanding that he would be returning to work shortly: "Yes, because each of the surgeries were to take, maybe, two or three months and then I could be able – my foot would be good, then the next foot. So I figured six months. So, yeah, so I thought that I would be going back to work." (AR 173.)

Thorman was treated and/or examined by at least three doctors for his foot problems – Dr. Runte, Dr. Vassar and Dr. Weiner. These doctors, or at least some of them, may have been examining him for his worker's compensation claim. In September 2012, a worker's compensation claims examiner wrote to Dr. Runte to ask if he believed Thorman could return to

[2] Indeed, as discussed below, the CalPERS representative who testified at the hearing stated she did not understand it. (AR 261.)

work. That letter stated: "According to your last report of 9/10/12 you indicated that Mr. Thorman may be able to return to work full duty upon his next recheck of 10/15/12." (AR 37.) According to this letter at least, as of September 2012, Dr. Runte thought Thorman could soon return to work. The next month, however, Thorman told Dr. Runte that he did not feel like he was ready to return to work full-time, and Dr. Runte noted "I think he needs a QME[3] for proper evaluation and rating of his continued forefoot pain." (AR 30.) That same month, Dr. Vassar noted "[p]ermanent disability does exist" and that "limitations will be determined by QME." (AR 31.)

Also in October 2012, CalPERS sent Thorman a Disability Application Election Package. (AR 23.) It is unclear when Thorman requested or received the application (the cover letter that accompanied the application is dated October 11, 2012). The Disability Application Election Package is a lengthy document, only a few pages of which CalPERS introduced into evidence at the hearing. (AR 84-87.) Those pages contain the following statements:

- "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 expected to be permanent or last longer than six months." (AR 85.)
- "If you have a worker's compensation claim, you should not wait until your condition is 'permanent and stationary' under workers' compensation requirements to submit your application. [¶] A workers' compensation award does not automatically entitle you to a CalPERS industrial disability retirement." (AR 86.)

In February 2013, NID wrote to Thorman and stated it had received two conflicting reports regarding his ability to work. The first report was from Dr. Vassar, who stated Thorman was permanently disabled, but that he could "return to modified duty with certain restrictions." (AR 38.) NID, however, informed Thorman it could not accommodate Dr. Vassar's restrictions. The second report was from Dr. Weiner, who stated Thorman could return to his usual position with no restrictions. NID wrote it was concerned about these conflicting reports, and that, as a result, "we cannot safely return you to work until the issue between the reports have [sic] been resolved." (AR 39.) Thus, as of February 2013, one doctor had stated Thorman could return to work with restrictions while another had stated he could return to work with no restrictions, and NID had stated it needed to resolve "the issue between the reports" before it could determine whether it could return him to work. Thorman testified at the hearing that it was his

[3] Presumably a qualified medical examination.

understanding he needed to wait until NID resolved this issue before he applied for disability retirement, although he could not say precisely how he came to this understanding. (AR 203, 219-21.) He also testified that at, this point in time, "no one knew where I st[ood]," and that "the gist of that, it was, you need to be – until you're permanently disabled." (AR 220-21.) The court interprets the gist of Thorman's testimony to mean that he thought he was not supposed to apply for disability retirement unless and until he was found to be actually permanently disabled. He testified, "I needed to go and speak to my work and to my doctors, and that way I would know if I'm going to be permanently disabled or not before I put in an application." (AR 222.) The court emphasizes that, at least as of the date of NID's February 2013 letter, both Dr. Vassar and Dr. Weiner thought Thorman could return to work. Dr. Vassar, however, imposed certain restrictions. It was not until NID stated it could not accommodate Dr. Vassar's restrictions that it began to appear as though Thorman might not be able to return to work.

In May 2013, Thorman received an estimate from CalPERS of his disability retirement benefits. (AR 22.) It is unclear what prompted CalPERS to send the estimate. At the hearing, CalPERS introduced a page of entries or notes from a database known as "Customer Touch Point" or "CTP," which is used to document communications with its members. (AR 65; see also AR 235 [explaining database].) The only CTP entry for 2013 is dated January 16, 2013. It states, "Mailed DR Application went over estimates information and calculation." (AR 65.) It is possible that CalPERS discussed the estimate with Thorman in January, but did not mail it until May.

In August 2013, NID informed Thorman that, during his deposition, Dr. Weiner had changed his prior opinion, and had testified that Thorman would never be able to return to his position. (AR 41, 42.) NID met with Thorman on or about September 4, 2013, to discuss his alternatives. Following that meeting, NID wrote to Thorman and informed him that it was unable to accommodate his disability, and it advised him that one of his options was to apply for disability retirement through CalPERS. (AR 42.) Thorman testified that this was when he first learned he was permanently disabled and would not be able to return to work at NID, and that, prior to this time he still thought he could return to work. (AR 199.)

Thorman submitted an application to CalPERS for disability retirement on September 20, 2013, less than two weeks after NID told him it would be unable to accommodate his disability.[4] (AR 5-14.) In the application, he identified his disability as bilateral foot pain that was work related. He also stated that, as a result of his disability, he was not able to perform his job as a meter reader. (AR 6.) The court pauses here to note that the application must be signed under penalty of perjury, with the applicant attesting that the information contained therein – including information about the existence of a disability and its effect on the applicant's ability to do his job – is true and correct. (AR 13.) The application contains spaces to enter the "last day on payroll" and the "retirement effective date." Thorman left both spaces blank. (AR 5.) Although Thorman spends quite a bit of time discussing this fact in his opening brief, CalPERS has stated it had "no bearing" on its decision. (AR 247, 263.)

CalPERS approved Thorman's application on March 17, 2014, finding he was indeed substantially incapacitated from performing his usual duties for NID due to the condition of his feet. (AR 15-16.) Thorman's entitlement to disability retirement benefits in the first instance is thus not at issue here. Instead, the issue is *when* those benefits should start. CalPERS's approval letter addresses that issue:

> Your disability retirement will be effective immediately, unless you remain on the payroll to the extent of your unused sick leave. In this case, your retirement will not become effective until the day after the expiration of your sick leave credit. Subject to the regular requirements of the law and/or local rules or ordinances governing the use of sick leave, the effective date of your retirement cannot be earlier than the day following the last day of sick leave with compensation *or* earlier than the first day of the month in which the application is received. The retirement effective date would be either the day after the expiration of your sick leave *or* if the application is filed within nine months of the discontinuation of service, the application shall be deemed filed on the last day for which salary was payable. You may request an earlier retirement date if these circumstances do not apply.

[4] In his opening brief, Thorman states that NID also submitted an application on his behalf. Although the evidence appears to show that NID filled out the employer portion of Thorman's application for disability retirement, (see AR 125-28), there is no evidence that it submitted a separate application on his behalf. It is also not clear why NID's purported separate application would be relevant to this case. Thorman may believe it is relevant because the portion of the application that NID filled out specifies his last day on pay status, while Thorman's application does not. As noted below, however, this fact appears to be irrelevant to the outcome of this case.

(AR 15 [italics in original].) The court, quite frankly, cannot tell from this letter when Thorman's effective retirement date would be. At some point (perhaps at the time it wrote this letter), CalPERS determined that Thorman's effective retirement date was September 1, 2013. (See, e.g., AR 20.) Although not cited by CalPERS until quite late in the underlying administrative process, this determination was based on Government Code section 21252,[5] which provides:

> A member's written application for retirement, if submitted . . . within nine months after the date the member discontinued . . . state service, and, in the case of retirement for disability, if the member was physically . . . 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 . . . , 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 . . . 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 . . . .*

(Italics added.) Thorman discontinued state service in January 2012, and he submitted his application for retirement more than nine months later, in September 2013. CalPERS thus determined his effective retirement date was September 1, 2013 (i.e., the first day of the month in which it received his application).[6]

In April 2014, Thorman wrote to CalPERS. Although his letter is not as clear as it could be, he essentially asked CalPERS to change his retirement date from September 1, 2013, to January 16, 2012 – the date he effectively discontinued state service. (AR 18-19.)

In May 2014, CalPERS sent Thorman a letter asking him a series of questions about the onset of his disability and when he first became aware he could apply for disability retirement. (AR 26-27.) Thorman responded with the following information:[7]

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[5] As far as the court can tell, CalPERS did not actually cite section 21252 until it filed its statement of issues prior to the evidentiary hearing.

[6] The court assumes that Thorman has received disability retirement benefits from September 2013 forward. If this is incorrect, the parties may so state at the hearing.

[7] Some of the dates in Thorman's letter appear to be incorrect. He refers in the letter to various reports and correspondence which are attached, and the court has attempted to correct the dates in the letter to correspond with the dates of the reports or correspondence.

- Thorman did not immediately apply for disability retirement because he was having "corrective surgery," and he hoped the surgery would enable him to return to work. He explained it was "not the objective at the time (to apply for disability with CalPers)." (AR 29.)

- In April 2012, Thorman was told by some co-workers that "if I'm off work and on disability that is pending I could at least apply for [disability retirement] as it takes a very long time to be accepted or not. If I was ok to work then I could easily decline the disability. . . . I did not apply at that time b/c I really did not know what the outcome would be. I did not want NID to think I did not want to work at my present job. I thought I should wait for more doctor reviews on my work status." (AR 29.) At the hearing, Thorman was asked why he did not apply for disability retirement in April 2012. He responded: "I didn't know if I should do that because . . . *I didn't know the outcome of my feet*." (AR 170-71 [emphasis added].) He also testified that the coworkers who had told him he could apply for disability retirement were "not professional people" and that "I didn't know what was the right thing to do." (AR 171-72.)

- In October 2012, Thorman told Dr. Runte he "was not ready to go back to work b/c of pain in my feet," and Dr. Runte "stated I should look into permanent disability." (AR 28.)

- In December 2012 and/or January 2013, Dr. Vassar told Thorman he was permanently disabled. (AR 28.) Recall, however, that Dr. Vassar was also of the opinion that Thorman could return to work with certain restrictions.

- In December 2012, Thorman was examined by Dr. Weiner, who told him "if I put work restrictions on you for your job, you will most likely not have a job with N.I.D." Dr. Weiner also told Thorman "to stick it out for the next six years and then retire at age 50." Thorman stated he left his appointment with Dr. Weiner "feeling unsure with integrity piece of my mind [sic], knowing what my body can and cannot do. At this time I was considering disability with Calpers." (AR 28.) He largely reiterated this at the hearing. (AR 183-84.) Recall that Dr. Weiner was initially of the opinion that Thorman could return to work with no restrictions, and that he did not change his opinion until August 2013.

On June 20, 2014, CalPERS denied Thorman's request for an earlier retirement date. (AR 44-45.) CalPERS based its denial on Government Code section 20160, which provides it "may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member." CalPERS found "the evidence did not establish that you made a correctable mistake at the time you separated from employment." It cited two facts to justify this

conclusion: (1) fellow employees had told Thorman in April 2012 that he could apply for disability retirement; and (2) Thorman had received and/or requested an application for disability retirement in October 2012. To CalPERS, this evidence suggested Thorman "had knowledge of the application process" by October 2012 at the latest, and therefore was "unable to establish that a correctable mistake was made."[8] (AR 44-45.)

Thorman appealed the decision, and an evidentiary hearing was held before an Administrative Law Judge ("ALJ") with the Office of Administrative Hearings. The ALJ upheld CalPERS's decision, finding Thorman failed to establish "that in filing his application he made an error or omission that resulted from mistake, inadvertence, surprise, or excusable neglect, which would warrant granting his appeal for an earlier effective retirement date." (Fact 16.) The factual basis for this finding will be discussed below.

CalPERS adopted the ALJ's decision in its entirety, and this petition followed. (AR 312.)

STANDARD OF REVIEW

A public employee's right to pension and disability benefits is a fundamental vested right. (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 751; *Meyers v. Board of Administration for the Federated City Employees Retirement Fund* (2014) 224 Cal.App.4th 250, 256.) The court thus exercises its independent judgment in examining the challenged decision. (*Welch v. State Teachers' Retirement System* (2012) 203 Cal. App. 4th 1, 16.) "Under the independent judgment rule, the trial court must weigh the evidence and make its own determination as to whether the administrative findings should be sustained." (*Id*.) As our Supreme Court explains, however:

> In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.

(*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817; see also *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 536.) Issues of law are also subject to the court's

[8] The court notes that having knowledge of the application process is not the same thing as knowing you are eligible for disability retirement.

independent review. (*Donaldson v. Department of Real Estate* (2005) 134 Cal. App. 4th 948, 954.)

ANALYSIS

The gist of Thorman's argument is that it was entirely reasonable to wait until September 2013 to file his application for disability retirement, because, prior to that date, he did not know he was permanently disabled and would be unable to return to work. The court tends to agree. At the very least, the court finds that many of the factual findings on which CalPERS based its ultimate conclusion are not supported by the evidence, which requires that this case be remanded to CalPERS for reconsideration.

The court begins by emphasizing two things. First, there is no suggestion that Thorman is not, in fact, permanently disabled. As noted above, CalPERS *granted* his application for disability retirement, and has presumably paid him benefits from September 1, 2013, forward. Second, there is no suggestion that Thorman's application was untimely. Government Code section 21154 provides that an application is timely if it is filed "while the member is physically . . . incapacitated to perform duties from the date of discontinuance of state service to the time of application." In other words, so long as Thorman was continuously disabled between the time he discontinued state service to the time he filed his application, his application was timely. (See *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1044.) It is implicit that CalPERS determined Thorman's application was timely, because if it had not, presumably it would have simply denied the application outright. The only issue in this case is thus whether Thorman's effective retirement date should be September 1, 2013 (as determined by CalPERS) or January 16, 2012 (as requested by Thorman).

It is undisputed that Thorman discontinued service with NID on or about January 15, 2012. (Fact 1; AR 20, 43, 168.) It is also undisputed that Thorman did not submit an application for disability retirement until on or about September 20, 2013 – approximately 20 months later. (AR 5-14.) CalPERS determined Thorman's effective retirement date pursuant to Government Code section 21252, which, again, provides:

> [1] A member's written application for retirement, if submitted . . . *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 . . . , shall be deemed to have been submitted on the last day for which salary was payable. [2] The effective date of a written application for retirement submitted . . . *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 . . . .

(Bracketed numbers added.) This provision contains just two sentences, and each sentence specifies a different retirement date based on when the application is submitted. The first sentence specifies that if a member submits an application within nine months of the date he discontinues service, his effective retirement date is the last day for which salary was payable – which in this case would be January 15, 2012. Here, however, Thorman did *not* submit his application within nine months of the date he discontinued service. In that case, the second sentence provides that his effective retirement date is the first day of the month in which his application was received. Because Thorman submitted his application on September 20, 2013, section 21252 provides that his effective retirement date is September 1, 2013.

As noted above, CalPERS treated Thorman's request for an earlier retirement date as if it had been made pursuant to Government Code section 20160. Section 20160 provides that CalPERS "may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member." (Gov. Code § 20160, subd. (a).) In effect, CalPERS interpreted Thorman's request for an adjustment to his retirement date as a request to "correct" his "error" or "omission" of not submitting an application for disability retirement within nine months of discontinuing service with NID (i.e., by October 15, 2012). Section 20160 provides that CalPERS may only correct an error if: (1) the request is made within a reasonable time, not to exceed six months after discovery of the error, (2) the error is "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," and (3) the correction will not provide the member with rights not otherwise available under the law. (*Id*.) Section 20160 also provides the member "has the burden of presenting documentation or other evidence . . . establishing the right to correction . . . ." (Gov. Code § 20160, subd. (d).)

Here, there is no suggestion that Thorman's request was not made within a reasonable time, or that granting his request would provide him with benefits not otherwise available under the law. The issue, as framed by CalPERS, is thus whether Thorman established that his failure

to submit an application for disability retirement within nine months of discontinuing service with NID was the result of "mistake, inadvertence, surprise, or excusable neglect" within the meaning of Code of Civil Procedure section 473. Whether an error is the result of mistake, inadvertence, surprise, or excusable neglect within the meaning of section 473 generally boils down to a question of *reasonableness*. (See *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206 [surprise, inadvertence and neglect grounds for relief if person acted "with ordinary prudence," and exercised "reasonable diligence"]; *Credit Managers Ass'n of So. Calif. v. National Independent Business Alliance* (1984) 162 Cal.App.3d 1166, 1173 ["surprise" means condition or situation in which party is placed "without any . . . negligence of his own, which ordinary prudence could not have guarded against"]; *Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58 ["Neither mistake, inadvertence, or neglect will warrant relief unless upon consideration of all the evidence it is found to be of the excusable variety. [Citation.] To entitle [a party] to relief the acts which brought about the default must have been the acts of a reasonably prudent person under the same circumstances."].) This is also explicit in Government Code section 20160 itself, which provides the failure of a member to make an 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." (Gov. Code § 20160, subd. (a).) Another way to frame the issue in this case is thus whether it was reasonable for Thorman to wait until September 2013 to file his application for disability retirement rather than filing it earlier. CalPERS ultimately concluded the answer to that question was no. This conclusion, in turn, is based on several factual findings made by the ALJ. As explained below, however, the court finds that many of these findings are not supported by the evidence.

For example, the ALJ found Thorman "did not have to be permanently disabled . . . to apply for disability retirement." (Fact 17.) This finding is counterintuitive at best.[9] At worst, it is either not supported by the evidence or at odds with the relevant law. Indeed, there is an argument to be made that applying for disability retirement if you are not actually permanently disabled would be a type of fraud. Recall that an application for disability retirement must be signed under penalty of perjury. (AR 13.) In this case, Thorman stated under penalty of perjury that his foot injury rendered him unable to perform his job. Does CalPERS really contend

[9] It is somewhat like saying you do not have to be dead in order to attempt to collect on a life insurance policy.

Thorman should have applied for disability retirement before he believed his foot injury rendered him permanently unable to perform his job?

It is implicit that, by signing an application for disability retirement, the member is attesting to the fact that he believes he is eligible for disability retirement. And in order to be eligible for disability retirement, one does indeed have to be permanently disabled. Government Code section 21156 provides a member "shall" be "retire[d] . . . for disability" if "the medical examination and other available information show . . . that the member . . . is incapacitated physically or mentally for the performance of his or her duties . . . ." (Gov. Code § 21156, subd. (a)(1); see also § 21150 ["A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service"].) Case law interpreting this provision holds that it requires a showing that the member is substantially unable to perform his "usual duties." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 344 [emphasis added].) Finally, the terms "disability" and "incapacity for performance of duties" mean "disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion." (Gov. Code § 20026; see also § 21156, subd. (a)(2) [determination of whether member is eligible to retire for disability must be based on "competent medical opinion."].)

Based on these Government Code provision, it seems quite obvious – to the court at least – that a member is not eligible for disability retirement unless competent medical opinion shows he has a disability that renders him unable to perform his usual job duties either permanently or for an extended and uncertain length of time. And, as noted above, it strikes the court as equally obvious that it would be inappropriate for a member to apply for disability retirement unless he had a reasonable basis for believing he was eligible for it. Thorman testified at the hearing as follows:

> Q: Was it your understanding that you could apply to CalPERS for permanent disability when, in fact, you had been found by medical personnel to have been permanently disabled?
>
> A: Yes.

(AR 199.) Thorman's understanding is entirely reasonable, particularly in light of the fact that eligibility for disability retirement must be based on medical evidence. As for the ALJ's finding that one does not have to be permanently disabled in order to apply for disability retirement,

CalPERS's point appears to be that a member can and should apply for disability retirement before obtaining medical evidence of disability, because CalPERS will send the member for a medical examination in order to determine whether the member is, in fact, disabled. (See, e.g., Gov. Code § 21154 [upon application for disability retirement, CalPERS may order a medical examination].) In other words, the medical evidence can be obtained during the application process itself, and need not be obtained prior to starting that process. Thorman's contrary understanding, however, is both reasonable and consistent with the Government Code provisions cited above. Moreover, case law instructs that those provisions "are to be liberally construed in favor of an applicant." (*Goins v. Board of Pension Commissioners* (1979) 96 Cal.App.3d 1005, 1009; see also *Rodie v. Board of Administration* (1981) 115 Cal.App.3d 559, 565 [noting "established policy require[es] a liberal interpretation of pension statutes in favor of the applicant."]; *Cavitt v. City of Los Angeles* (1967) 251 Cal.App.2d 623, 626 ["pension statutes are to be liberally interpreted in favor of the applicant so as to effectuate, rather than defeat, their avowed purpose of providing benefits for the employee and his family"].)

The ALJ also found Thorman knew, or should have known, that he could file for disability retirement "as early as January 2012." (Fact 19.) It is difficult to see how Thorman could have known he should file for disability retirement in January 2012 when all of the evidence in this case demonstrates he reasonably believed at that time that the surgeries on his feet would be successful and that he would be able to return to work. Indeed, as late as September 2012, it appears that *all* of the medical evidence suggested Thorman would be able to return to work. (AR 37 [Dr. Runte thought in September 2012 that Thorman could return to work in October]; AR 38 [Dr. Vassar opined in October 2012 that Thorman could return to work with certain restrictions]; AR 39 [Dr. Weiner opined in December 2012 that Thorman could return to work with no restrictions].) CalPERS points to Thorman's statement in his request for an earlier retirement date that his first surgery had complications, and, as a result "I thought it would be wise to research my disability options in the event my feet were not successfully better." (AR 18.) CalPERS ignores Thorman's statement in that same request that, at the time of his surgeries (the second of which occurred in May 2012), he did not anticipate going out on disability. (*Id*.) It also ignores his statement that he thought the surgeries would make his feet better and enable him to "do my job 100% after they were both completed." (*Id*.) The finding that Thorman

"knew he could file for disability retirement as early as January 2012" is thus not supported by the evidence.

The ALJ also found, "As early as January 2012, [Thorman] discussed his disability retirement options with CalPERS and requested a disability retirement estimate." (Fact 18; see also Fact 5 [finding Thorman "contact[ed] CalPERS in January 2012 to 'research his disability [retirement] options'" and "received at least two disability retirement estimates between January 2012 and May 2103].) The court has scoured the administrative record, and can find *no* evidence that Thorman discussed disability retirement options with CalPERS as early as January 2012. According to CalPERS's CTP notes, the first time Thorman discussed his retirement options with CalPERS was in July 2012. (AR 65.) Moreover, what little information there is about that discussion suggests it had nothing to do with disability retirement, and that it instead had something to do with paying off the purchase of five years of service credit.[10] (AR 65 [identifying "category" of contact with "participant" as "service credit purchase"].) From the CTP notes, it appears Thorman first discussed disability retirement with CalPERS on October 31, 2012, and that CalPERS "[e]ncouraged [him] to request a DR estimate" on that date.[11] (AR 65.) The CTP notes also show that on January 16, 2013, CalPERS "went over estimate information and calculation." (AR 65.) Finally, the administrative record contains one (and only one) disability retirement estimate: it is dated May 6, 2013. (AR 22.) This evidence shows that Thorman (1) first discussed his disability retirement options with CalPERS in late October 2012, (2) discussed a disability retirement estimate with CalPERS in January 2013, and (3) obtained a written disability retirement estimate in May 2013. The ALJ's contrary findings are thus not supported by the evidence.

The ALJ also found, "in April 2012, his coworkers encouraged [Thorman] to apply for disability retirement." (Fact 18.) This finding is largely supported by the evidence – although it appears fairer to state that Thorman's coworkers told him he *could* apply for disability retirement, not that they encouraged him to do so. (AR 29.) According to Thorman, he was told

[10] There is another entry dated July 11, 2012, that also appears to deal with the purchase of service credit. In addition to the service credit issue, this entry states "Document with mbrs questions routed to Disability Docs for review." (AR 65.) The CalPERS representative who testified at the hearing did not know where this document was routed. (259-60.)

[11] For the record, the court notes that October 31 was already more than nine months after Thorman discontinued service with NID, and that it is was thus already too late for Thorman to be automatically entitled to the January 16, 2012, retirement date he seeks.

by coworkers that he "could at least apply for it [i.e., disability retirement] as it takes a very long time to be accepted or not. If I was ok to work then I could easily decline the disability."[12] (AR 29.) In any event, the apparent conclusion drawn from this finding – i.e., that it was unreasonable for Thorman to ignore the advice of his coworkers and to not apply for disability retirement in April 2012 – is not supported by the evidence.

The determination about whether someone is disabled is not made by coworkers; it is instead made on the basis of "competent medical opinion." (Gov. Code § 20026.) The evidence shows that, in April 2012, precisely zero doctors had opined that Thorman would not be able to return to work. As late as September 2012, Dr. Runte thought Thorman *would* be able to return to work. (AR 37.) In October 2012, Dr. Vassar thought Thorman could return to work with restrictions. (AR 38-39.) And in December 2012, Dr. Weiner thought Thorman could return to work with *no* restrictions. (AR 39.) Is it really CalPERS's position that Thorman should have applied for disability retirement in April 2012 based on the advice of his coworkers, when no doctor had opined he was unable to return to work?

The ALJ also found, "in June 2012, [Thorman] asked CalPERS about the procedure for using disability retirement benefits and wanted to know what his pension would be is he resigned at his current age rather than retired at age 50." (Fact 18; see also Fact 7.) This finding appears to be based entirely on Thorman's June 12, 2012, letter to CalPERS. (AR 72-73.) As discussed above, however, this letter is entirely unclear. It appears to be primarily about an unrelated issue – namely, paying off the purchase of service credit. To the extent the letter is about disability retirement based on Thorman's foot problems, it tends to support his argument that, at the time he wrote the letter, he reasonably believed he would be returning to work, and that it would thus be premature to apply for disability retirement. (AR 72 ["I had surgery on my feet . . . . Off since Jan. 6th and will go back to work commencing Sept."].) Moreover, the court has been unable to find any evidence in the record that suggests CalPERS responded to the disability retirement related questions in this letter. The CTP notes appear to show that, when it received the letter, CalPERS routed it "to Disability Docs for review." (AR 65 [July 11, 2012, entry].) The CalPERS representative who testified at the hearing, however, did not know where the letter was routed and did not know what action, if any, CalPERS took in response. (AR 259-60.) Indeed, she testified that she did not really understand what Thorman was trying to say in the

[12] In other words, you have nothing to lose by applying.

letter. (AR 261.) This letter is simply too unclear to support CalPERS's ultimate finding that Thorman should have applied for disability retirement earlier than he did.

The ALJ also found, "in October 2012, [Thorman] received Publication 35, which specified that he should file for disability retirement as soon as he believed he could not perform his job duties, and should not wait until his condition was 'permanent and stationary.'" (Fact 18.) Publication 35 is CalPERS's Disability Application Election Package. (AR 84-87.) It does indeed contain the following two statements: (1) "You should apply for disability . . . retirement *as soon as you believe* you are unable to perform your usual job duties because of an illness or injury that is expected to be permanent or last longer than six months;" and (2) "If you have a worker's compensation claim, you should not wait until your condition is 'permanent and stationary' under workers' compensation requirements to submit your application." (AR 85, 86 [emphasis added].) Neither of these two statements, however, support CalPERS's ultimate conclusion in this case.

Thorman testified that he did not believe he would be unable to perform his usual job duties due to his foot problems until September 2013. He was asked, "when did you learn that you were not physically able to go back to work and that that was going to permanent?" (AR 197.) He responded that it was not until he received the September 4, 2013, letter from NID stating it was unable to accommodate his work restrictions. (AR 198-99.)

> Q: Is that letter the first time you learned that you were permanently disabled and would not be able to return to work at NID?
>
> A: Yes.
>
> Q: Okay. So, therefore, prior to that time you were still of mind that you may return to work for NID?
>
> A: Yes.

(AR 199.) There is *no* contrary evidence in this case.

Although it does not explicitly state this, presumably CalPERS contends that a reasonable person in Thorman's circumstances would have believed much earlier that he would not be able to resume his usual job duties. Thorman's contrary belief, however, was entirely reasonable. He testified it was his understanding that he needed to wait until both his doctors and his employer determined he was permanently disabled before he applied for disability retirement. (AR 201-02.)

> Q: Was it your understanding it was up to your doctors and NID to make a determination that you were, in fact, disabled and eligible for retirement before you could file the application?
>
> A: Absolutely.
>
> Q: And is that why you waited to file your application until after you received the letter from NID on [September]4, 2013 saying, in fact, we find you permanently disabled?
>
> A: Yes, that's why.

(AR 210.) Again, his understanding is entirely reasonable. As discussed above, a finding of disability can only be based on medical evidence. It was thus reasonable for Thorman to assume he had to wait until his doctors agreed he could not return to work before filing an application for disability retirement. That did not happened until August 2013, when Dr. Weiner changed his original opinion that Thorman could return to work.

Thorman's understanding that he also had to wait for NID to determine he was disabled was also reasonable. The ultimate question in a case like this is not whether a member is disabled in the abstract, but whether a member's disability prevents him from performing his usual job duties.[13] If the member's doctors believe the member can return to work with certain restrictions, it is up to the employer to determine whether it can accommodate those restrictions. Here, Dr. Vassar opined in October 2012 that Thorman could return to work with certain restrictions, but NID did not inform Thorman until February 2013 that it could not accommodate those restrictions. Moreover, when NID informed Thorman it could not accommodate Dr. Vassar's restrictions, it also informed him that Dr. Weiner had opined he could return to work with no restrictions, and that it needed to resolve the conflicting medical opinions before it could make a decision about returning him to work. NID did not make that decision until September 2013. Thorman's belief that he had to wait for NID to make that decision before applying for disability retirement was reasonable.

As for the second statement in Publication 35 – that "you should not wait until your condition is 'permanent and stationary' under workers' compensation requirements to submit your application" – it is not relevant. A finding that someone is permanent and stationary is not

[13] In other words, a member can be both partially disabled and still able to substantially perform his usual job duties. (See, e.g., *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876 [game warden whose disability prevented him from lifting or carrying heavy objects not entitled to disability retirement where evidence showed heavy lifting was not a common occurrence on the job].)

the same a finding that someone is permanently unable to work. To give just one example, Dr. Vassar thought Thorman was permanent and stationary as of October 2012, but he also thought Thorman could return to work with certain restrictions. The relevant question in this case is not when did Thorman believe he was permanent and stationary, but when did Thorman believe he was permanently disabled and would be unable to return to work.

As demonstrated above, the court finds that many of the ALJ's findings are not supported by the evidence. That does not mean, however, that Thorman is automatically entitled to an earlier retirement date. As noted above, Government Code section 21252 provides for a September 1, 2013, retirement date, because Thorman submitted his application more than nine months after he discontinued state service. CalPERS elected to treat Thorman's request for an earlier retirement date as a request made under Government Code section 20160. Section 20160, in turn, provides CalPERS "*may, in its discretion*" grant him an earlier retirement date if he demonstrates that his failure to submit an earlier application was due to mistake, inadvertence, surprise, or neglect. (Emphasis added.) The court remands this case to CalPERS to exercise its discretion in the first instance, in light of this ruling. (See, e.g., *Welch v. State Teachers' Retirement System* (2012) 203 Cal.App.4th 1, 27-28.)

CONCLUSION

For the foregoing reasons, the petition for writ of mandate is granted. The court vacates CalPERS's decision denying Thorman's request for an earlier retirement date, and remands this case to CalPERS to reconsider his request in light of this ruling.

The tentative ruling shall become the court's final ruling and statement of decision unless a party wishing to be heard so advises the clerk of this department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear. In the event this tentative ruling becomes the final ruling of the court, counsel for the prevailing party is directed to prepare a formal judgment and writ, incorporating this ruling as an exhibit; submit it to opposing counsel for approval as to form; and thereafter submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

The court prefers that any party intending to participate at the hearing be present in court. Any party who wishes to appear by telephone must contact the court clerk by 4:00 p.m. the court

day before the hearing. (See Cal. Rule Court, Rule 3.670; Sac. County Superior Court Local Rule 2.04.)

In the event that a hearing is requested, oral argument shall be limited to no more than thirty (30) minutes per side.

If a hearing is requested, any party desiring an official record of the proceeding shall make arrangement for reporting services with the clerk of the department not later than 4:30 p.m. on the day before the hearing. The fee is $30.00 for civil proceedings lasting under one hour, and $239.00 per half day of proceedings lasting more than one hour. (Local Rule 9.06(B) and Gov't. Code § 68086.) Payment is due at the time of the hearing.