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**BEFORE THE
TEACHERS' RETIREMENT BOARD
STATE OF CALIFORNIA**

In the Matter of the Option Benefit of:

DARRYL BOLKE, Respondent

Agency Case No. STRS20220001

OAH No. 2022040332

PROPOSED DECISION

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter via videoconference on August 18, 2022, from Sacramento, California.

Jaismin Kaur, Litigation Counsel, represented complainant California State Teachers' Retirement System (CalSTRS).

Darryl Bolke (respondent) represented himself.

Evidence was received, the record closed, and the matter submitted for decision on August 18, 2022.

ISSUES

The issue for Board determination is whether CalSTRS erred in its original calculation of respondent's option benefit. If so, does respondent have a defense to repaying the last three years of overpayment?

FACTUAL FINDINGS

Background Information

1. Respondent is the option beneficiary for Shayleen Bolke (member), a deceased CalSTRS member. She was a member of CalSTRS by virtue of her employment as a teacher with the Etiwanda Elementary School District (the District).
2. On January 29, 2010, member signed and submitted an application for disability benefits to CalSTRS. She described her disability as breast cancer, which began as Stage III in October 2005 and progressed Stage IV by February 2008. She also submitted a Disability Retirement Benefit Election in which she selected "Option Plan 7," a 50 percent beneficiary option, and named her husband, respondent, as her beneficiary. She listed her eight-year-old daughter as a dependent. On March 22, 2010, CalSTRS sent a letter confirming receipt of member's disability option election.
3. On September 7, 2010, CalSTRS accepted member's application to receive disability retirement benefits, effective February 1, 2010. In the letter, CalSTRS wrote that member's final compensation was \$3,436.02. Her unmodified benefit, had she not selected a beneficiary option, was \$1,718.01, or 50 percent of her final compensation. However, because member selected a 50 percent beneficiary, her modified disability retirement benefit was \$1,473.71.

4. Member passed away on December 19, 2010. Respondent notified CalSTRS of member's death on December 31, 2010, and his benefit as member's 50 percent option beneficiary began accruing on December 20, 2010. Respondent and member's daughter began receiving a derivative option benefit as of that date.

Investigation by CalSTRS

5. In March 2020, CalSTRS reviewed the calculation of respondent's benefit and found that respondent had received an allowance¹ derived from a final compensation of \$4,452.26 for the last decade. CalSTRS believed this to be an error because it initially calculated member's final compensation as \$3,436.02 in her disability benefit. The larger final compensation amount resulted in monthly payments to respondent of \$1,126.69, rather than \$869.52. Based on the difference, CalSTRS calculated that respondent was overpaid \$26,369.03 between December 2010 and March 2020. Without notifying respondent, in April 2020, CalSTRS reduced respondent's monthly allowance to the "corrected" total (\$869.52), and further reduced his allowance by an additional five percent to recoup the overpayment.

NOTIFICATION OF BENEFIT CORRECTION AND OVERPAYMENT

6. After reducing respondent's monthly allowance, CalSTRS did not notify respondent for several months. On July 15, 2020, Evin Ege, an Associate Pension Program Analyst in the Disability and Survivor Benefits Division at CalSTRS, sent

¹ In this Proposed Decision, the term "allowance" refers to the monthly payment respondent received from his option benefit.

respondent a letter that CalSTRS "discovered errors" in the final compensation used to determine respondent's benefit. According to the letter:

There are two types of final compensation that can be used to calculate the disability benefit, what a member could have earned, known as earnable final compensation or what a member earned, known as earned final compensation. Your option benefit was being calculated with the earnable final compensation. However, since Shayleen Bolke was a part[-]time teacher[,] the earned final compensation should have been used.

In the earned calculation, CalSTRS based member's final compensation off her highest 36-month period of employment, from July 1, 2001, through June 30, 2004. In the 2001-02 school year, she earned \$39,083. In the 2002-03 school year, she earned \$34,762.52. In the 2003-04 school year, she earned \$49,851.10. The sum of those three years was \$123,696.62, which resulted an earned final compensation of \$3,436.02. CalSTRS did not provide any information what figures are used to calculate earnable final compensation.

7. The July 2020 letter notified respondent that the total overpayment from December 20, 2010, through March 31, 2020, was \$26,369.02. In a paragraph highlighted in yellow, the letter stated that CalSTRS had a legal obligation to collect this amount and would reduce respondent's allowance by five percent per month until the overpayment was collected. It went on to state:

In some circumstances, our ability to collect overpayments is limited to 36 months prior to the discovery of the error;

therefore, we have submitted a request to the accounting department to reduce the total amount of the overpayment you need to repay. You will be contacted by the accounting department within 60 days of the date of this letter, regarding the amount of the adjustment to your receivable and the actual collectable amount.

8. Five months later, respondent received the next letter. On December 8, 2020, CalSTRS sent respondent an unsigned letter from the Accounts Receivable department and copied to the CalSTRS Ombudsman. The December 2020 letter informed respondent that CalSTRS reduced the overpayment by \$17,397.01 and thus would require him to pay back \$9,035.76. Because CalSTRS had begun deducting five percent of respondent's monthly allowance prior to notifying him, it had already collected \$513.24. The remaining balance was \$8,522.52.

9. In September 2020, respondent submitted a letter to CalSTRS contesting the declaration of error. In his letter, respondent described his wife's work history, why he believed she qualified as a full-time teacher, and the difficulties he experienced with CalSTRS's lack of communication, including CalSTRS's failure to notify him for almost 90 days after reducing his monthly allowance. Respondent attached correspondence from District employees, including Heidi Soehnel, the Assistant Superintendent, during the period preceding his wife's death. In an August 25, 2006 email, Ms. Soehnel stated that she "guess[ed] [member] would be considered a 100% teacher" because there was no partner for her while she was on leave for cancer treatments. On May 21, 2008, Ms. Soehnel wrote member that she had exhausted all available leaves and was placed on the reemployment list for 39 months, which made her eligible to return to "any opening" in the teacher job classification should her health improve.

DECISION LETTER

10. On May 12, 2021, Celene Beck, Pension Program Manager II in the Disability and Survivor Benefits Division at CalSTRS, sent respondent the Decision Letter. Ms. Beck wrote that on April 6, 2020, "CalSTRS discovered an error in the calculation of [respondent's] monthly option benefit." She stated that the error resulted from CalSTRS basing the final compensation on earnable income that was not adjusted by the part-time to full-time service ratio, resulting in "overpayment of [respondent's] option benefit since inception on December 20, 2011 [sic]." Because this letter was a final decision, Ms. Beck also advised respondent of his appeal rights.

11. On June 22, 2021, respondent requested an Executive Review of the Decision Letter. Again, he reiterated his belief that the decision to use earnable final compensation in calculating his benefit was not an error. Respondent noted that at the time of his wife's passing, he had spoken with CalSTRS staff about how the benefit was calculated. He also challenged the late notice of the reduction in his option benefit, the lack of documentation, and how CalSTRS refused to offer him a contact with whom to speak so he could review the documents underlying the 2020 determination.

DETERMINATION LETTER

12. On December 7, 2021, complainant sent respondent a letter denying his request for Executive Review of the Decision Letter because the "information [he] submitted [did] not contain additional information or a legal basis for review beyond the evidence [he] provided in the initial review." Complainant wrote that the September 2010 letter determined member's final compensation was \$3,436.02, which

was the "*correct* final compensation calculation."² He further wrote that when respondent began receiving an allowance in December 2010, "CalSTRS erred in using an *incorrect* final compensation calculation" to determine respondent's benefit.

HEARING TESTIMONY BY IAN COEN

13. Ian Coen, an appeals and legislation analyst in the Disability and Survivor Benefits Division for CalSTRS, testified at hearing about respondent's appeal. Mr. Coen has worked for CalSTRS for nine years, including a prior position as a disability case analyst who helped members apply for disability benefits and recommended whether to approve applications. In his current role, he is notified about an appeal, reviews documents, and writes a memorandum with a recommendation for the determination letter.

14. In support of CalSTRS's 2020 determination that member was employed part-time, Mr. Coen cited three pieces of evidence. First, CalSTRS considered a March 7, 2010 "Employment and Benefits Information" form signed by Terry Embleton, the District's Assistant Superintendent of Personnel Services. On this form, member's dates of employment were listed as May 7, 1999, through May 12, 2008. Her status was "unpaid leave," and her type of contract was listed as "Less than full-time → 50%" and "Percentage of Contract." Ms. Embleton checked "no" in response to the question "Did the member work less than full-time due to illness"³ but noted that member "went on 39-month rehire due to exhaustion of leaves."

² All emphases in quotes are original, unless otherwise stated.

³ This information may be an employer error. A preponderance of the evidence establishes that after member's 2005 breast cancer diagnosis, her medical treatments

Second, CalSTRS reviewed a March 8, 2010 "Certification by Principal of School or Immediate Supervisor" form, completed by Rosann Marlen, the principal at member's workplace, Carleton P. Lightfoot Elementary School. The form asked for "information based on observable elements of behavior representing the actual job performance of the individual employee." Ms. Marlen wrote that she observed member from August 7, 2007, "until changed per doctor's orders or the essential functions of the position cannot be performed by the employee." During that period, member worked 3.75 hours each day at the school with a start time of 11:30 a.m.

Third, CalSTRS emailed the District in April 2021 to confirm information following respondent's internal appeal. Specifically, CalSTRS sought information related to member's full-time employee (FTE) status during the 2007-08 school year. Kim Santiago, an employee in Payroll and Benefits for the District, wrote that member was a 0.5 FTE during the final year of her employment and sent member's certificated salary for that year, noting that member "did not work the 10 month [*sic*] of that School Year because she went out on leave." Later, CalSTRS sought this information for the 2006-07 school year as well. Ms. Santiago wrote that member was on a 40 percent job share during the 2006-07 school year.

15. According to Mr. Coen, CalSTRS uses "raw data" to determine whether a member was employed full-time or part-time. That data consists of the member's earnings and their service credit from the school. Here, CalSTRS "look[ed] at a snapshot" of member's employment history and did not consider her intent to return to employment after utilizing disability benefits. While Mr. Coen testified that

and the decline in her health attributable to that illness limited her ability to work full-time.

member's employment status was not based only on the hours she worked in the school year before filing for disability benefits, CalSTRS did not identify the length of time it considered as part of the "snapshot."

16. Mr. Coen never investigated why member was previously classified as a full-time teacher when respondent began receiving his allowance. He relied on the determination made by a 2020 audit that, based on the above information, member was a part-time teacher, and thus any prior decision to the contrary constituted a "system error." CalSTRS further argued that member accepted that she was a part-time teacher because she did not contest her final compensation amount over the three months she received disability benefits prior to her death.

Respondent's Evidence

17. Respondent appealed CalSTRS's determination because he does not believe that an error occurred in calculating his option benefit from December 2010 through March 2020, and thus there was no overpayment. He disputes CalSTRS's right to reclassify member from a full-time teacher (earnable final compensation) to a part-time teacher (earned final compensation) ten years after her death. He further believes that classifying member as a part-time teacher dishonors her legacy because but for her breast cancer diagnosis, she would have been working full-time in the years before her death. Respondent's arguments also present additional affirmative defenses about the notice CalSTRS had about member's employment status, the impact of the delay on his ability to present a defense, and equitable issues.

MEMBER'S WORK HISTORY

18. In respondent's testimony and letters to CalSTRS, he provided details about member's work history and the timeline of CalSTRS's efforts to collect

overpayments. Member began teaching at Carleton P. Lightfoot Elementary School during the final semesters of her teaching credential program at California State University, San Bernadino. On May 7, 1999, she was hired as a short-term full-time substitute teacher. That fall, she became a full-time salaried teacher with her own second grade classroom. She continued teaching full-time until her daughter's birth in Spring 2002 and then took maternity leave.

19. In Summer 2002 or 2003, another teacher at Carleton P. Lightfoot Elementary School adopted an infant and could not return to full-time. The school principal, Ms. Marlen, asked member to do a temporary job share with the other teacher for a couple years so that both teachers could be retained by the school rather than hiring substitute teachers. The expectation was that they would both return to full-time status thereafter.

20. According to respondent, this situation worked well until Spring 2005, when member found a lump in her right breast. She was misdiagnosed with a cyst and her health began to decline. Based on her poor health, member decided to continue the job share rather than returning to full-time as planned. That fall, she was diagnosed with Stage III breast cancer. She underwent extensive, painful treatments, including a double mastectomy, radiation, and chemotherapy. Member's breast cancer treatments continued for years, and she returned to teaching as much as her health would allow during periods of remission. She was diagnosed with Stage IV cancer in February 2008 and stopped teaching shortly thereafter. Because of her many treatments over the years, she had exhausted her available sick leave.

21. In early 2010, respondent had been injured through his work in law enforcement and was receiving only 50 percent of his regular income. To help the family afford necessary expenses, member applied for disability benefits in February

2010. She did not retire because she hoped to recover and return to teaching. That June, she had a seizure and learned that the cancer had spread to her brain. By December 2010, member had transitioned to hospice care. She passed away on December 19, 2010, at age 39.

22. In December 2010, "Patricia," a CalSTRS disability case analyst, contacted respondent about member's case and determining her benefits. According to respondent, Patricia spoke with him and employees at the District and determined that based on member's unique situation, she qualified as a full-time teacher and her benefits should be calculated based on earnable final compensation. He received a letter from CalSTRS in January 2011, telling him that "additional information [was] received from the member's employer(s) that [] resulted in an adjustment to [his] benefit" and he had been underpaid \$338.95 from December 20, 2010, through January 31, 2011. Based on his conversations with Patricia, respondent is confident that the decision to designate member as a full-time teacher was intentionally made and underwent multiple levels of approval at CalSTRS.

NOTICE OF CORRECTION AND OVERPAYMENT

23. For over nine years, respondent received his allowance without issue.⁴ In April 2020, his allowance was reduced without notice. For three months, he tried to

⁴ Respondent made a passing reference in his testimony to how CalSTRS knew about the calculation used in determining his option benefit as early as February 2011, when it made a correction to his daughter's benefits. (See *Moreno v. California State Teachers' Retirement System* (2020) 52 Cal.App.5th 547, 552, as modified (July 21, 2020), review denied (Sept. 16, 2020) [discussing constructive notice in the context of Education Code section 22008].) The issue of whether CalSTRS had constructive notice

find out the reason behind the change, but no one could tell him why. He requested the documentation underlying the change but received nothing. In July 2020, he received the first notification from CalSTRS about why it reduced his allowance. The letter told him that he had been overpaid \$26,369.02. CalSTRS wrote it would contact him within 60 days to let him know whether the collectable amount would be adjusted, but he was left to worry for another five months before CalSTRS provided clarification.

24. Respondent encountered difficulty trying to prepare for his appeal. He has moved out of California and struggled to find documents based on the amount of time that has passed since CalSTRS's initial determination. The entire ordeal has caused respondent significant stress. He feels that CalSTRS has "put [him] through hell" and made him relive some of his life's most painful memories based on a calculation that was not made in error. Respondent is a retired police officer with a disability and uses the monthly allowance to pay for his daughter's college expenses. The amount that CalSTRS seeks to collect is a significant amount of money to him based on his income and expenses.

Analysis

25. Throughout the appeal process, CalSTRS has taken the position that its determination of error is unassailable, and it need not provide evidence regarding why it made one decision about member's employment status in 2010, only to reverse course in 2020. When respondent sought additional information and documents about

in February 2011 was not meaningfully discussed at hearing and thus will not be a ground upon which the matter is decided.

who made the decision in 2010 and the facts underlying that decision, he was met with the conclusory explanation that using earned final compensation for benefit calculation was "*correct*" and using earnable final compensation was "*incorrect*."

26. Because CalSTRS assumed that respondent had the burden of proving his entitlement to the amount it deems an overpayment, it did not provide evidence about the exact factors and formula used to determine whether a member is a part-time or full-time teacher. The opaque formula Mr. Coen described uses the member's earnings and service credit, as well as a "snapshot" of the member's employment history. Without information on what requirements must be met to classify a teacher as full-time, it is impossible to know if there was an error in calculating respondent's option benefit in 2010.

27. Here, CalSTRS appears to have determined that member was a part-time teacher based on the hours she worked when she was ill with breast cancer. For instance, Ms. Marlen's certification regarding member's part-time hours referred to the 2007–08 school year. Similarly, the April 2021 emails reference the school years 2006–08, each of which followed member's 2005 breast cancer diagnosis. CalSTRS did not provide evidence that it considered the totality of member's employment with the District, prior to her cancer diagnosis, in accessing her employment status. Additionally, CalSTRS did not provide statutes or precedent allowing it to penalize a member with a medical condition like cancer by reducing benefits based on a reduced workload set to accommodate that medical condition. Because CalSTRS did not provide sufficient evidence that would allow review of its 2010 determination and 2020 reversal, it has not carried its burden.

28. Finally, CalSTRS's argument that respondent cannot challenge member's classification as a part-time teacher because she waived the issue is unpersuasive.

Member was awarded disability benefits three months before she died, after the cancer had spread to her brain and shortly before she entered hospice. CalSTRS did not provide statute or precedent that requires respondent to be bound by member's medical or physical inability to contest that determination.

LEGAL CONCLUSIONS

Burden of Proof

1. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) Thus, the party asserting a claim or making charges has the burden of proof in administrative proceedings. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) Put another way, there is a built-in bias in favor of the status quo; the party seeking to change the status quo usually has the burden of proving the change is appropriate. (*Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1388.)

2. The burden of proof requires proof by a preponderance of the evidence, unless otherwise provided by law. (Evid. Code, § 115.) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

3. In this case, although CalSTRS filed a Statement of Issues, CalSTRS is seeking to change the status quo and modify respondent's option benefit. Thus, CalSTRS has the burden of proving there was an error that requires reducing respondent's option benefit and recouping overpayments. Only then does respondent bear the burden with respect to any defense he may have against repayment. (Evid.

Code, § 500.) Both parties must prove their burdens by a preponderance of the evidence.

Applicable Statutes

4. This case is governed by the Teachers' Retirement Law (TRL), Education Code section 22000 et seq. CalSTRS and the Teachers' Retirement plan are administered by the Teachers' Retirement Board (Board). (Ed. Code, § 22200, subd. (a).) The Board "shall set policy and shall have the sole power and authority to hear and determine all facts pertaining to application for benefits under the plan or any matters pertaining to administration of the plan and the system." (Ed. Code, § 22201, subd. (a).)

5. The Board, CalSTRS officers, and its employees are required to discharge their respective duties with respect to the Teachers' Retirement Plan solely in the interest of its members and beneficiaries and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims." (Ed. Code, § 22250, subd. (b).)

MODIFIED RETIREMENT ALLOWANCE

6. A member who retires because of a disability receives an "annual allowance equal to 50 percent of final compensation payable in monthly installments." (Ed. Code, § 24106, subd. (a).)⁵ "Final compensation" is defined as:

⁵ All the following references to the Education Code refer to the sections that existed at the time that respondent began accruing his option benefit on December 20, 2010.

the highest average annual compensation earnable by a member during any period of three consecutive school years while an active member of the Defined Benefit Program or time during which he or she was not a member but for which the member has received credit under the Defined Benefit Program,

(Ed. Code, § 22134, subd. (a).) "The compensation earnable for periods of part-time service shall be adjusted by the ratio that part-time service bears to full-time service."

(Ed. Code, § 22134, subd. (f).) To aid CalSTRS in its determinations, employing agencies and county superintendents must provide CalSTRS with requested information about members and beneficiaries. (Ed. Code, § 22455.)

7. Upon retirement, a CalSTRS member may choose an unmodified allowance or "an actuarially modified disability retirement allowance." (Ed. Code, § 24332, subd (a), formerly Ed. Code, § 24301, subd. (a).) A modified allowance selection provides "an actuarially modified retirement allowance payable throughout the life of the member and the member's option beneficiary or beneficiaries . . ." (Ed. Code, § 24300.1, subd. (a).) Relevant here, the 50 percent beneficiary option provided that a "modified retirement allowance shall be paid to the member and upon the death of the member, 50 percent of the modified allowance shall continue to be paid to the option beneficiary." (*Id.*, at subd. (a)(3).)

8. A disability retirement allowance becomes effective once all the following conditions are met: (1) the member files the application with CalSTRS; (2) the effective date is later than the last day of compensable service; and (3) the effective date is no earlier than the first day of the month that CalSTRS receives the application. (Ed. Code, § 24105, subd. (a).)

CORRECTION OF ERRORS

9. The Board "may correct all actions taken as a result of errors or omissions of the employer or this system." (Ed. Code, § 22308, subd. (c).) However, the Board's right to commence recovery for an incorrect payment expires three years from the date the incorrect payment was made if CalSTRS is responsible for the error. (Ed. Code, § 22008, subd. (b).) A three-year statute of limitations applies in situations where an incorrect payment is made due to lack of information or inaccurate information about member eligibility, and that period begins with discovery of the incorrect payment. (Ed. Code, § 22008, subd. (c).)

10. Education Code section 24616 authorizes the Board to recover overpayments from subsequent benefits:

Any overpayment made to or on behalf of any member, former member, or beneficiary . . . shall be deducted from any subsequent benefit that may be payable under either the Defined Benefit Program, the Defined Benefit Supplement Program, or the Cash Balance Benefit Program. These deductions shall be permitted concurrently with any suit for restitution, and recovery of overpayment by adjustment shall reduce by the amount of the recovery the extent of liability for restitution.

The Board's ability to recover is limited to no more than five percent of the corrected monthly allowance if CalSTRS is responsible for the error. (Ed. Code, § 24617, subd. (a).)

Proof of Overpayment

11. As set forth in the Factual Findings and Legal Conclusions as a whole, and specifically Factual Findings 25 through 28, CalSTRS did not provide sufficient evidence to prove by a preponderance of the evidence that member was a part-time teacher, such that using earnable final compensation was an error and respondent was overpaid. Accordingly, CalSTRS has not met its burden of proving it erred in calculating respondent's option benefit that was paid from December 20, 2010, through March 2020 and it is entitled to recoup the overpayments made over the last three years.

Affirmative Defenses

12. At hearing, respondent raised arguments resembling constructive notice, equitable estoppel, laches, and denial of due process. Given the conclusion that CalSTRS did not carry its burden in showing a right to collect overpayment, it is unnecessary to decide respondent's additional arguments.

ORDER

The appeal of respondent Darryl Bolke is GRANTED.

DATE: September 8, 2022

Jessica Wall

Jessica Wall (Sep 8, 2022 10:17 PDT)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings