ATTACHMENT E

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

In the Matter of the Accepting the Late Application for Disability Retirement of:

VERA ELLIOTT,
Respondent,

and,

DEPARTMENT OF CORRECTIONS AND REHABILITATION – SIERRA CONSERVATION CENTER,
Respondent.

Case No. 2016-0810
OAH No. 2016090875

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 18, 2017, in Sacramento, California.

Rory J. Coffey, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Vera Elliott (respondent) represented herself, with the assistance of her husband, Robert Stogsdill.

No appearance was made by or on behalf of respondent California Department of Corrections and Rehabilitation, Sierra Conservation Center (CDCR). At the hearing, CalPERS established that CDCR was properly served with the Statement of Issues and Notice of Hearing. This matter proceeded as a default against respondent CDCR under Government Code section 11520.1

1All further statutory references are to the Government Code unless otherwise specified.
Evidence was received, the record was closed, and the matter was submitted for decision on April 18, 2017.

ISSUE

This appeal is limited to the issue of whether respondent made a mistake which was the result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code section 20160, which would entitle her to retroactively change her retirement status from service retirement to disability retirement.

FACTUAL FINDINGS

1. Respondent was employed by CDCR as a Correctional Officer. By virtue of her employment, respondent was a safety member of CalPERS. Respondent had the minimum service credit necessary to qualify for service retirement. Respondent retired for service effective December 3, 2009.

2. On or about February 23, 2010, respondent filed an application requesting a change in retirement status from service retirement to disability retirement. In her application, respondent described her specific disability as:

   Right knee unstable injury occurred 3/27/2007 while locking inmate in holding cell inmate attempted to leave pushing door against my knee

(Missing punctuation in original.)

Respondent attached a letter dated February 23, 2010, to her application which stated, in part:

I retired from state service on December 3, 2009 due to continued complications from a knee injury I sustained from my position as a Correctional Officer. I was advised by the Return to Work Coordinator that there was no advantage to disability retirement over service retirement.

My attorney, who has been handling my Worker's Compensation Claim has advised me that this was not true and I should have filed for disability retirement.
3. CalPERS makes available to its members in its regional offices and on its website, "A Guide to Completing Your CalPERS Disability Retirement Application." (Guide). This publication was available to respondent at the time she filed for a change from service retirement to disability retirement. On page three of the Guide, it states, in part:

You should apply for your disability or industrial disability retirement as soon as you believe you are unable to perform your job because of an illness or injury that is expected to be permanent or expected to last longer than six months. Once your Disability Retirement Election Application and other required information are received at CalPERS, we can begin by processing your retirement application.

(Bold and italics in original.)

Page four of the Guide provides member responsibilities in filing a disability retirement application:

- Review the materials and information in this publication carefully – before you complete any forms.
- Visit our Web site at www.calpers.ca.gov for additional information and helpful tips to get you started.
- You must submit a complete application package – which means you provide us all the required forms and other documentation we need to begin processing your request.
- Make sure your employer and your doctor complete any forms in a timely manner. Let them know you have a deadline to meet.
- If you submit an incomplete application package, you will only have 30 calendar days to provide us any remaining documents – even if your employer or doctor is causing the delay.
- If you do not provide all the needed documents within this time period, CalPERS will cancel your application.

4. On April 2, 2013, respondent resubmitted her application requesting a change in retirement status from service to disability retirement. In a letter attached to her application, respondent stated that she had not received a response from CalPERS on her previous application submittal in February 2010.
5. On May 29, 2013, CalPERS sent respondent a letter requesting that respondent provide a completed “Physician’s Report on Disability” form, and a “Workers Compensation Carrier Request” form. The letter stated that if the forms were not received within 30 days from the date of the letter, her application would be cancelled. On July 1, 2013, CalPERS sent respondent a letter notifying her that her application for disability retirement was cancelled, and any future request for disability retirement would require a new application.

6. On March 23, 2015, respondent submitted a new application for disability retirement. In her application, respondent described her specific disabilities as:

Right knee unstable injury cause by inmate 3/27/2007 Bilateral lumbar herniation, lumbar disc disease, trochanteric bursitis work related reported 09/29/09

(Missing punctuation in original.)

Respondent attached a letter dated March 18, 2015, to her disability application. She stated, in part:

I decided to retire from state service in December 2009 due to continued complications from a knee and hip injuries suffered while working as a Correctional Officer. Since my retirement I have continued problems with my knee and hip and sought medical treatment to resolve my problems.

I was evaluated by Dr Greenwell in 2014 and he found I had bilateral herniated disk in my back. Treatment resolved my hip pain and it was thought that the herniated disk was the problem causing the hip pain. The State of California Division of Worker’s Compensation sent me to their medical evaluator for another opinion. I was given an orthopedic evaluation by Michael A Sommer on January 21, 2015 who concluded that the medical conditions were work related and if I had not retired I would not have been able to continue to work as a Correctional Officer and would have required Vocational Rehabilitation.

(Missing punctuation in original.)

7. On July 10, 2015, CalPERS sent a letter to respondent informing her that her disability application had been received, and that “[i]n general, the Government Code does not allow a change in status after the person’s membership ceases when they retire or refund their contributions. An exception can be made if due to excusable inadvertence, oversight, or mistake of fact or law on the part of the claimant. However, no exception can be made for a mistake caused by the claimant’s neglect of a legal duty, error in judgment or change in the claimant’s circumstances.” CalPERS requested additional information from respondent to
In response to CalPERS’ questions, respondent asserted the following: (1) she did not know the extent of her injuries when she applied for service retirement in December 2009; (2) when she filed for service retirement, she discussed disability retirement with CDCR’s return to work coordinator and a CalPERS specialist, and “was told there was no difference between the two since I had worked enough time to retire.” Respondent was not aware of the difference until she was told by her attorney; (3) CalPERS’ request for a Physician’s Report of Disability was difficult for respondent to complete because she could not find a doctor who would accept her case and who would accept payment from Worker’s Compensation; and (4) her medical reports were provided by Worker’s Compensation to CalPERS.

8. On August 3, 2015, CalPERS sent a letter to CDCR requesting information regarding respondent’s disability application. CDCR responded on August 18, 2015, indicating that respondent’s official personnel file was no longer available due to CDCR’s records retention schedule, and that it concurred that respondent’s request for disability retirement was untimely. CDCR also indicated that it had no records of correspondence from 2010 to 2015 from CalPERS involving respondent. CDCR also attached a letter dated March 4, 2010, from its Return to Work Coordinator, Ann Gordon to respondent. Ms. Gordon stated to respondent, in part:

I am in receipt of your CalPERS Disability Retirement forms. At this time I would like to address the untrue statement you made to CalPERS relative to my non-advise of this option. You stated that I advised you that there was no advantage to disability retirement over service retirement. Ms. Elliott you know you NEVER spoke to me about your retirement. If you had I most certainly would have advised you of the options to file for Service Pending Disability Retirement – as I do every employee who qualifies for said benefit.

9. On May 10, 2016, CalPERS notified respondent via letter that it could not accept respondent’s late application because she was unable to establish that a correctable mistake was made within the meaning of section 20160. Respondent timely appealed CalPERS’ denial, and the matter was set for an evidentiary hearing pursuant to section 11500 et seq.

Respondent’s Evidence

10. Respondent’s husband, Robert Stogsdill, testified on respondent’s behalf. He conceded that respondent did not read the CalPERS Guide described in Finding 3. He asserted that respondent received poor information from her employer and CalPERS regarding disability retirement. He also asserted that after respondent’s worker’s
compensation doctor decided not to treat her, respondent could not find a doctor to complete the Physician’s Report of Disability form required by CalPERS.

11. Mr. Stogsdill asserted that he and respondent finally gathered all of the requirement documents for a complete packet to CalPERS. They waited for a CalPERS analyst to review respondent’s application. He was “surprised” that the time frames were violated. He stated that had respondent read the CalPERS Guide, “that would have been helpful.” In addition, Mr. Stogsdill asserted that respondent was “surprised” that she had a herniated disc.

12. Other than Mr. Stogsdill’s direct testimony, respondent presented no other evidence that any error or omission related to her disability application was the result of mistake, inadvertence, surprise, or excusable neglect.

Discussion

13. Respondent’s injury occurred on March 27, 2007. She service-retired on December 3, 2009, and waited until February 23, 2010, to submit her application for a change in retirement status to disability retirement. Her application was incomplete, and was subsequently cancelled by CalPERS. Respondent re-submitted her application on April 2, 2013, which was again incomplete, and was cancelled by CalPERS. Respondent resubmitted a new application on March 23, 2015, citing additional specific disabilities. Respondent asserted that she had difficulties in finding a doctor that would accept her as a worker’s compensation patient, and therefore could not complete the Physician’s Report on Disability form in a timely manner. Respondent’s argument is unpersuasive, as respondent did not need a worker’s compensation doctor to evaluate her condition under CalPERS’ disability standards. Respondent could have seen her general practitioner or an orthopedic doctor under her own medical insurance to evaluate her knee at the time she filed her CalPERS disability application.

14. Respondent also asserted that the delay in her application was due to surprise, in that she was surprised to learn that she needed to comply with application deadlines. Respondent’s argument is unpersuasive. Respondent could have, at any time, referred to the CalPERS Guide, which would have informed her of critical information regarding her disability retirement application. She admitted that she did not read it, and if she did, she conceded that it would have been helpful.

15. Moreover, respondent asserted that her failure to timely file her application was the result of surprise, in that she was surprised to learn that she had a herniated disc in 2014, and that this was a correctable mistake. However, respondent did not present documentation or other evidence that her delayed diagnosis of a herniated disc was an unforeseeable consequence of her knee injury, causing surprise seven years later. Even if an exception can be made for a mistake caused by surprise, respondent did not establish that she made her request within six months of learning of her herniated disc.
16. The evidence taken as a whole did not establish that respondent’s failure to timely submit her application for disability retirement was the result of mistake, inadvertence, surprise or excusable neglect within the meaning of section 20160.

LEGAL CONCLUSIONS

Applicable Statutes

1. Section 20026 states:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

2. Section 20160 provides criteria for corrections of errors or omissions of CalPERS members. Subdivision (a) provides that CalPERS may correct errors or omissions of its members if all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an “error or omission” correctable under this section.
Subdivision (b) states:

Subject to subdivisions (c) and (d), the board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

Subdivision (c) states:

The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

Subdivision (d) states:

The party seeking the correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

3. Section 20340 provides, in pertinent part, that a person ceases to be a member upon retirement.

4. Section 21150 provides, in part:

(a) 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, regardless of age, unless the person has elected to become subject to Section 21076, 21076.5, or 21077.

5. Section 21151 provides, in part:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.
6. Section 21154 provides, in pertinent part:

The application shall be made only (a) while the member is in state service . . . (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion.

7. Section 21252, subdivision (a) provides, in pertinent part:

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.

8. Section 21453 provides, in pertinent part:

An election, revocation, or change of election shall be made within 30 calendar days after the making of the first payment on account of any retirement allowance or, in the event of a change of retirement status after retirement, within 30 calendar days after the making of the first payment on account of any retirement allowance following the change in retirement status. "Change in retirement status" includes, but it not limited to, change from service to disability retirement . . . .

[¶] . . . [¶]

This section shall not be construed to authorize a member to change his or her retirement status after the election, revocation, or change of election provided in this section.

9. Cause exists to deny respondent's filing of a late application for a change in retirement status from service to disability retirement, pursuant to section 21453. To establish a change in retirement status, respondent had the burden to present documentation or other evidence establishing the right to correction pursuant to section 20160. As set forth in Findings 13 to 16, respondent did not demonstrate that her failure to timely file her disability retirement application was the result of mistake, inadvertence, surprise, or excusable neglect correctable by section 20160. Respondent's appeal of CalPERS' determination that section 20160 did not apply to excuse her late application by reason of mistake must, therefore, be denied.
ORDER

Respondent Vera Elliott’s appeal of CalPERS’ determination that section 20160 does not apply to excuse her late application by reason of mistake is DENIED.

DATED: May 12, 2017

[Signature]

DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings