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

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

KATHERINE E. LAMBERT,
Respondent,

and

CALIFORNIA DEPARTMENT OF PUBLIC HEALTH,
Respondent.

PROPOSED DECISION

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on February 4, 2019, in Sacramento, California.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Katherine Lambert (respondent) appeared and represented herself.

There was no appearance by or on behalf of respondent California Department of Public Health (CDPH). At hearing, CalPERS established that CDPH was properly served with the Statement of Issues and Notice of Hearing and Amended Statement of Issues. This matter therefore proceeded as a default against CDPH under Government Code section 11520.1

Evidence was received and the record was held open for the parties to submit additional documents: respondent to file and serve her resume, and CalPERS to file and

1 All further statutory references are to the Government Code unless otherwise specified.
serve supplemental pages for Exhibit 16, by close of business February 13, 2019. Thereafter, CalPERS and respondent could file and serve an objection to the additional documents, and respondent could file and serve a Closing Brief, by close of business February 20, 2019. On February 11, 2019, CalPERS submitted supplemental pages for Exhibit 16, and requested the supplemental pages be marked Exhibit 22; the request was granted. CalPERS also submitted, at respondent’s request, respondent’s resume, marked Exhibit R, and Closing Brief, marked Exhibit S. On February 12, 2019, CalPERS submitted a letter, declaring no objection to respondent’s resume. Exhibit R was admitted. The matter was submitted for decision on February 20, 2019.

ISSUE

Did respondent make a mistake which was the result of inadvertence, mistake, surprise or excusable neglect correctable by section 20160, which would entitle her to retroactively change her retirement status from service retirement to disability retirement?

FACTUAL FINDINGS

1. On October 11, 2018, Anthony Suine, Chief, Benefit Services Division, CalPERS, in his official capacity, made and filed the Statement of Issues in this matter. On January 11, 2019, Mr. Suine, in his official capacity, made and filed the Amended Statement of Issues in this matter.

2. At all times relevant, respondent was employed by CDPH as a Staff Services Analyst. By virtue of her employment, respondent was a state miscellaneous member of CalPERS subject to Government Code section 21150. Respondent has earned the minimum service credit necessary to qualify for retirement.

3. On July 27, 2007, respondent contacted CalPERS and requested information about disability retirement. CalPERS mailed respondent A Guide to Completing Your CalPERS Disability Retirement Election Application (Disability Retirement Guide). On August 14, 2007, respondent telephoned CalPERS and asked about filing for retirement. CalPERS informed respondent she was too young for service retirement, but she could file for disability retirement at any time, if she had a disabiling condition. On February 18, 2009, CalPERS submitted a written Closing Brief at hearing, which was marked Exhibit 21.

CalPERS counsel offered to assist respondent in submitting documents to OAH, so respondent would not have to create an OAH account to upload her documents.
respondent contacted CalPERS and again requested information about disability retirement. CalPERS mailed respondent another Disability Retirement Guide.

4. On March 28, 2009, respondent submitted an application for industrial disability retirement (Application 1) to CalPERS, claiming a disabling psychological condition of Post-Traumatic Stress Disorder (PTSD). On May 27, 2009, CalPERS notified respondent that Application 1 was cancelled, because it was incomplete.

Application 2


6. On July 1, 2015, respondent submitted an application for service retirement (Application 2) to CalPERS, with an effective date of July 1, 2015. CalPERS approved Application 2, and respondent has received service retirement benefits since July 1, 2015.

Application 3

7. Also on July 1, 2015, respondent telephoned CalPERS, and asked questions about disability retirement. CalPERS informed respondent of the process for a service pending disability application. On July 7, 2015, respondent contacted CalPERS, and asked how she could change her service retirement to a disability retirement application. CalPERS again informed respondent of the process for filing a service pending disability retirement. On July 10, 2015, respondent contacted CalPERS, and asked when she could submit a disability retirement application. CalPERS informed respondent she could apply for disability retirement at any time, if she had a disabling condition, supported by medical records, and her disabling condition had been continuous from her last date of employment to the present.


9. On November 17, 2017, respondent submitted an application for disability retirement (Application 3) to CalPERS, with a requested retirement date of June 30, 2015. Respondent claimed disability on the basis of PTSD. On January 23, 2018, CalPERS notified respondent that Application 3 was cancelled, because her treating physicians
determined that the duration of her disability was less than 12 months, which rendered her ineligible for disability retirement.

**Application 4**

10. On April 24, 2018, respondent submitted an application for industrial disability retirement (Application 4) to CalPERS, with a requested retirement date of July 1, 2015. Respondent claimed disability on the basis of PTSD.

11. On July 12, 2018, CalPERS notified respondent that her request to change from service to disability retirement was denied, because respondent had knowledge of the application process, and no correctable mistake was made, as defined by section 20160.

**Respondent’s Evidence**

12. On November 17, 2005, respondent was working for the California Highway Patrol (CHP) as a dispatcher. She received an emergency call from an officer who had just been shot. The officer died. Respondent felt traumatized by the event and filed a worker’s compensation claim, which was settled in October 2009; respondent never returned to work for the CHP.


14. In February 2010, respondent started work for the CDPH as a Program Technician II. She was later promoted to a Staff Services Analyst.


16. On November 17, 2017, respondent submitted a disability (PTSD, anxiety disorder, fibromyalgia, herniated discs - pelvic bone, carpel tunnel, depression, gastric bypass surgery complications, spine problems, ulcers, several abdominal surgeries) retirement application – Application 3. Respondent submitted two Physician’s Reports on Disability, from Drs. Maria J. Caparas, M.D., psychiatrist, and David S. Chang, D.O., internal medicine and primary care, with Application 3. On December 2, 2017, CalPERS requested an updated Physician’s Report on Disability from respondent, because Drs. Caparas and Chang, estimated the duration of respondent’s disability to be less than 12 months (i.e., not continuous). Respondent provided a new Physician’s Report on Disability
from Dr. Chang, but again, Dr. Chang reported the estimated duration of respondent's disability to be less than 12 months. On January 23, 2018, CalPERS denied Application 3.

17. On April 24, 2018, respondent submitted a disability (PTSD) retirement application – Application 4. On July 12, 2018, CalPERS denied Application 4, as untimely, and because respondent’s failure to timely file was not as a result of inadvertence, mistake, surprise, or excusable neglect.

18. Respondent alleges that she completed and filed, or meant to file a disability retirement application on or about July 1, 2015, along with her service retirement application. However, a few days before this hearing, respondent found her signed 2015 disability retirement application in her storage unit with other retirement paperwork. Respondent alleges that she made a mistake by not filing the July 1, 2015 disability retirement application, and she should be permitted to backdate the application. Respondent alleges her failure to timely file the signed 2015 disability retirement application was a result of distraction/disorientation due to problems related to her own medical conditions, caring for her sister, and her sister’s impending death. At hearing, respondent offered a letter, dated January 30, 2019, from Marc Miller, Ph.D., psychologist, who treated respondent in 2005, for her CHP worker’s compensation injury, and then again began treating respondent on March 13, 2018. Dr. Miller’s unsigned letter describes respondent’s major life-changing events and diagnoses her with PTSD. He concludes: ‘[e]ver since moving into her sister’s as her caretaker for her battle with cancer... Ms. Lambert was completely incapable of having the presence of mind to fill out the application for Disability in a timely manner.”

Discussion

19. On July 1, 2015, respondent filed for service retirement, with an effective date of July 1, 2015. Pursuant to section 21154, respondent had four months to file a disability retirement application: November 1, 2015. Pursuant to section 21252, subdivision (a), respondent had up to nine months to submit an application for disability retirement, with the caveat: “the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application for retirement was submitted to the board.” Therefore, the deadline for her to file a disability retirement application, pursuant to section 21252, was April 1, 2016. Any retirement application filed began nine months could only be accepted if the application met the requirements of section 20160.

20. Respondent alleges she made a mistake by forgetting to file her signed 2015 disability retirement application. However, on this point, respondent’s testimony is not compelling. First, if respondent believed she had submitted a disability retirement application on July 1, 2015, then she would not have needed to: (1) file additional disability retirement applications on November 17, 2017 (Application 3) or April 24, 2018 (Application 4); or (2) contact CalPERS for information on how to file a disability retirement application after July 1, 2015. Yet, between July 1, 2015 and April 1, 2016, respondent
sought and received information from CalPERS on four occasions, and received one Disability Retirement Guide.

21. Second, respondent offered an unsigned letter from Dr. Miller to support her defense of mistake. Dr. Miller concludes that: "[e]ver since moving into her sister's as her caretaker for her battle with cancer . . . Ms. Lambert was completely incapable of having the presence of mind to fill out the application for Disability in a timely manner." However, Dr. Miller was not treating respondent during the period she moved in with her sister (i.e., in 2016 until her sister's death in February 2017.) Rather, he treated respondent in 2005 and then again in March 2018. In fact, during the period respondent lived with her sister, she was being treated by Dr. Caparas, who signed a sworn Physician's Report on Disability in 2017, declaring respondent's psychological condition was not permanent, or of an extended duration, and not expected to last at least 12 consecutive months.

22. In addition, by July 1, 2015, respondent had received enough information from CalPERS to be aware of the required documentation for a disability retirement application. From July 27, 2007, to July 1, 2015, respondent had sought and received information from CalPERS on three occasions, and received two Disability Retirement Guides. She had already filed one non-compliant disability retirement application, on March 28, 2009, and communicated with CalPERS before Application 1 was cancelled.

23. In substance, respondent's claim for disability retirement is based upon a diagnosis of PTSD, from 2005. Applications 1, 3, and 4 identify PTSD as respondent's medical condition. In 2017, CalPERS evaluated Application 3 on the merits, reviewing several Physician's Reports on Disability submitted by respondent. However, Drs. Caparas and Chang both estimated the duration of respondent's disability to be less than 12 months (i.e., not permanent or of an extended duration, which is expected to last at least 12 consecutive months; and not continuously disabling from the date respondent discontinued state service to the present). On December 2, 2017, CalPERS requested an updated Physician's Report on Disability from respondent; and respondent provided a new Physician's Report on Disability from Dr. Chang. Again, Dr. Chang reported the estimated duration of respondent's disability to be less than 12 months. On January 23, 2018, CalPERS denied Application 3, because respondent was not eligible for disability retirement based upon her PTSD. Respondent did not appeal from this denial.

24. Ultimately, respondent began receiving information from CalPERS about disability retirement as early as July 27, 2007. Between July 27, 2007, through April 24, 2018, CalPERS mailed respondent the Disability Retirement Guide six times; responded to respondent's telephone calls regarding disability retirement 10 times; and counseled respondent in-person regarding disability retirement at least once. During the same period, respondent filed four retirement applications, engaging CalPERS in an ongoing dialogue regarding the requirements for disability retirement. Also, in 2017, CalPERS evaluated respondent's case on the merits, but respondent was unable to provide competent medical evidence to support her medical conditions.
25. When all the evidence is considered, respondent failed to show any mistake correctable by section 20160. Consequently, respondent failed to establish that she should be allowed to file her untimely disability retirement application.

LEGAL CONCLUSIONS

1. Section 20026 provides:

“[d]isability” 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 evidence.”

2. Section 21154 sets forth when a CalPERS member may file an application for disability retirement. In relevant part, it provides:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion . . .

3. Section 21252, subdivision (a), set forth the conditions under which a member, who has ceased to be employed in state service, may apply for retirement.

A member’s written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. The effective date of a written application for retirement submitted to the board more than nine months after the member’s discontinuance of state service shall be determined in accordance with Section 20160.
4. Section 20160 sets forth the conditions under which the Board may, in its discretion, correct any errors or omissions of a retired member. In relevant part, it provides:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

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

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

(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.

(c) 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.

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

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same
that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

5. Here, respondent filed an application for service retirement on July 1, 2015, and she retired the same date. Between July 27, 2007, through April 24, 2018, CalPERS mailed respondent a Disability Retirement Guide six times; responded to respondent’s telephone calls regarding disability retirement 10 times; and counseled respondent in-person regarding disability retirement at least once. During the same period, respondent filed four retirement applications, engaging CalPERS in an ongoing dialogue regarding the requirements for disability retirement. In sum, respondent’s disability retirement applications have either: failed to be timely filed or to provide medically competent evidence to support her eligibility. In addition, respondent failed to show any mistake correctable by section 20160. When all the evidence is considered, respondent failed to establish that she should be allowed to file her untimely disability retirement application.

ORDER

The request of respondent Katherine Lambert to file a late disability retirement application is DENIED.

DATED: March 15, 2019

ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings