

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

MARLENE BISTANY,	:	Docket No. CR-17-074
<i>Petitioner</i>	:	
	:	Date: January 20, 2023
v.	:	
	:	
LAWRENCE RETIREMENT	:	
BOARD,	:	
<i>Respondent.</i>	:	

Appearance for Petitioner:

Marlene Bistany, *pro se*
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Methuen, MA 01844

Appearance for Respondent:

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Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioner applied for accidental disability, but her application neglected to include a Physician’s Statement. That was not provided until over seven months later. An applicant’s effective retirement date is calculated based on when their application is “filed.” Here, the Lawrence Retirement Board properly considered the Petitioner’s application “filed” when she submitted the Physician’s Statement, and not when it received the initial application. Thus, the Board properly calculated her effective retirement date.

DECISION

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Marlene Bistany, filed an appeal disagreeing with the Lawrence Retirement Board’s (“LRB”) determination of her effective

retirement date. LRB concluded her date of retirement should be December 1, 2015, but the Petitioner believes it should be April 1, 2015. The LRB informed her of its decision in a letter dated February 6, 2017. On February 21, 2017, she timely filed her notice of appeal.

The parties submitted pre-hearing memoranda and exhibits. Thereafter, a scheduling order issued advising the parties that the matter would be decided without a hearing. *See* 801 Code Mass. Reg. § 1.01(10)(c). In September 2019, the Petitioner submitted a supplemental memorandum with additional exhibits; the LRB also submitted a memorandum of law in October 2019. Thereafter the record was closed.

FINDINGS OF FACT

The parties submitted a total of 35 exhibits, which I now admit into evidence.¹

Based on the exhibits submitted into evidence, I make the following findings of fact:

1. The Petitioner was a police officer with the City of Lawrence. (Exhibit 28.)
2. She was injured on duty in 2007. (Exhibit 30.)
3. She did not file her application for disability retirement until 2015. (Exhibit 4.)
4. Ultimately, the LRB approved her application for accidental disability. (Exhibit 14.)
5. However, the process was not smooth.
6. Before the process began, LRB Executive Director, Diane Cockroft, sent the Petitioner a letter. Enclosed was the application the Petitioner had to fill out, the physician's statement for her treating doctor, and the employer's statement. The letter indicated that these were "necessary forms which must be completed and returned to our office to start

¹ The Petitioner submitted 26 exhibits with her pre-hearing memorandum. The Board submitted five exhibits with its memorandum. Then, the Petitioner submitted an additional four exhibits with her supplemental memorandum of law. Neither party raised any objections to admitting any of the documents.

- the [process].” (Exhibit 29.)
7. The LRB received the initial application packet on October 28, 2015. (Exhibit 4.)
 8. Among the exhibits admitted into evidence is a Physician’s Statement by Dr. Stephen Friedberg dated October 13, 2015. (Exhibit 2.)
 9. Someone had clearly asked Dr. Friedberg to fill out the physician’s statement, but nothing in the record indicates that this statement was ever sent to, or received by, the LRB.
 10. In March, 2016, the Petitioner’s attorney sent the LRB a disability evaluation services report opining the Petitioner was disabled. This was not, however, the equivalent of the Physician’s Statement nor was it even the same form. (Exhibit 6.)
 11. The Petitioner’s counsel must have followed up with the LRB because, in May 2016, Ms. Cockroft e-mailed with the Petitioner’s attorney:

I called your office again after receiving a second request to process [the Petitioner’s] retirement application. Please be advised that I cannot process [the Petitioner’s] disability retirement application without a recent treating physician’s form. I have yet to receive one from her doctor and I do not have her medical records. I’ve attached one that you can send your client.

(Exhibits 8 and 20.)
 12. Ultimately, someone sent the LRB a Physician’s Statement by Dr. Robert Pennell. The LRB received it on June 8, 2016. (Exhibit 9.)
 13. That finally triggered the process which resulted in the Petitioner’s application being approved.
 14. PERAC notified the Petitioner of her approval, with an effective date of retirement of December 1, 2015. (Exhibit 31).
 15. The Petitioner’s counsel disputed this date. In response, the LRB explained that it

considered the Petitioner’s application filed and completed upon receipt of the Physician’s Statement:

[H]er application was considered complete and filed when the Board received her Treating Physician Statement Pertaining to a Member’s Application for Disability (“Physician Statement”) retirement on July 8, 2016. Clearly, the latter of these three dates would be six (6) months prior to the Application’s filing, and since the Physician Statement was executed on July 1, 2016, the Board generously in its discretion used that date as the filing date. Accordingly, [the Petitioner’s] effective retirement date was correctly established as December 1, 2015.

(Exhibit 16.)²

- 16. The LRB issued a formal decisional letter on February 6, 2017. (Exhibit 18.)
- 17. On February 21, 2017, the Petitioner filed a timely appeal. (Exhibit 27.)

CONCLUSION AND ORDER

“The Petitioner has the burden of proving by a preponderance of the evidence that the [Retirement Board] has applied the law and or its regulations incorrectly or has been culpable in perpetrating a correctible administrative mistake.” *Byrne v. Mass. Teachers’ Ret. Sys.*, Docket No. CR-15-609 (Div. Admin. Law App., Jan. 6, 2018).

The retirement application process is governed, initially, by statute. G.L. c. 32, § 7(1) instructs that a service member seeking accidental disability, “upon his written application on a prescribed form filed with the board and his respective employer. . . shall be retired for accidental disability as of a date which shall be specified in such application [and which] shall be not less than fifteen days nor more than four months after the filing of such application.” Once retired, the member begins to receive his allowance as of the “effective retirement date.” G.L. c. 32, § 7(2). “The effective retirement date of an employee retiring for accidental disability is the

² As noted above, Dr. Pennell’s statement was received on June 8, 2016. The “July” date appears to be a typographical error.

latest among three options: ‘the date the injury was sustained,’ ‘the date six months prior to the filing of the written [retirement] application,’ or ‘the date for which [the employee] last received regular compensation for his employment.’ *Alexander v. State Bd of Ret.*, CR-19-452 (Div. Admin. Law App., Nov. 5, 2021) *quoting* G.L. c. 32, § 7(2).

In this case, the parties agree the Petitioner’s effective retirement date is six months prior to filing the written application. The only dispute is when the application was considered filed. Either it was considered filed on the date the LBR first received it, October 28, 2015, or the date in which the LBR received the Physician’s Statement, June 8, 2016. If the former, the Petitioner’s effective retirement date would be over seven months earlier, resulting in some additional financial compensation.

The statute is silent as to what the application must contain. To fill in those gaps, the Public Employee Retirement Administration Commission (“PERAC”) has promulgated regulations that govern this process. *See generally* 840 Code Mass. Regs. § 10.00 *et seq.* All applications “shall consist of the forms prescribed by 840 CMR 10.06 and shall be considered filed as of the date upon which the applicant completes and submits all the required forms to the retirement board.” 840 Code Mass. Regs. § 10.06. The regulations then provide a list of additional things that “shall” be filed with the application, including “[a] certificate from a licensed medical doctor.” 840 Code Mass. Regs. § 10.06(1)(b).

PERAC further explains it will set the “date of application” “when it receives your completed *Member’s Application for Disability Retirement*, including the signed *Authorizations* and *Regional Medical Panel Selection Form*, and your *Physician’s Statement*.” *See* Disability Application Glossary of Terms, (2009), <https://www.mass.gov/doc/disability-application-glossary-of-terms/download>. In a policy memo, PERAC instructs that an “applicant must file ‘A

certificate from a licensed medical doctor' [and that] obtaining the document is the responsibility of the applicant and the cost of such is incurred by the applicant." PERAC Memo #30/2008.

The regulations make clear that the Physician's Statement is a part of the application, and that the application is not considered filed until that (and every other item listed in § 10.06(1)) is received by the Board. PERAC's memos and other instructions emphasize this point. The LRB was simply effectuating a properly promulgated regulation:

PERAC has authority to promulgate rules and more generally to "efficient[ly] adminis[ter] the public employee retirement system." It is well within its power to require adherence to a form Physician's Statement, including an explanatory narrative . . . The development of a standard form to be used for the Physician's Statement, including the requirement of a narrative report addressing the issues listed in the instructions, is "well within the bounds of the [agency's] mandate from the Legislature."

Hickey v. Medford Ret. Bd., CR-08-0380 (CRAB, Feb. 16 2012) (citations omitted). Without the Physician's Statement, "[t]he Board was thus not required to further process the application[.]"

Happy v. Worcester Reg. Ret. Sys., CR-13-0281 (Div. Admin. Law App., Aug. 15, 2014).

Accordingly, the Petitioner's application was not "filed" until the LRB finally received the Physician's Statement on June 8, 2006.

The Petitioner's first argument to the contrary is an uncorroborated assertion that she filed Dr. Friedberg's statement with her original application. But there is no evidence to support that and the e-mail exchanges between the LRB and Petitioner's counsel clearly demonstrate the Board had not received what it needed. Indeed, in the correspondence, Petitioner's counsel never even suggested he had already submitted the necessary documents, *i.e.* Dr. Friedberg's statement, which indicates Dr. Friedberg's statement was probably not included in the original application. Instead, counsel had Dr. Pennell fill out a new statement when he was later notified

the Board was still missing information. The Petitioner bears the burden in this case, and her evidentiary submissions do not support her position.

The Petitioner's other argument is that it was LRB's obligation to obtain the Physician's Statement. She refers to the introduction to the member's application for disability retirement, which states that the retirement board will "[r]equest information from your employer, your personal physician, and the other physicians, hospitals, and insurance companies that you identified on your application." (Exhibit 19.) It then adds that "You may, if you wish, submit the Physician's Statement to your primary treating physician. If you choose to do so, let your retirement board know so that duplication of effort can be avoided." (Exhibit 19.) I agree this language is confusing and potentially contradictory to other statements quoted above.³ The Petitioner's interpretation of this language is plausible—that the Board will take on the onus of obtaining the Physician's Statement. Given the regulations and PERAC's policy memos, the language seems to be an inartful way of saying that a Board may ultimately seek additional information from these entities. Regardless, the Board's *ability* to request information from the primary treating physician in no way vitiates the member's *obligation* to furnish a Physician's Statement. The fact remains that the LRB did not receive the Physician's Statement until June 2016, regardless of whose responsibility it was to obtain it.

Accordingly, the Petitioner's application was not "filed" until she submitted the Physician's statement. The Board's decision is **affirmed**.

³ PERAC may want to consider revising the application to make clear the applicant has the responsibility of obtaining this information.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate