

**ATTACHMENT E**

**THE PROPOSED DECISION**

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

**In the Matter of the Appeal of Accepting the Late  
Application for Industrial Disability Retirement of:**

**DONALD W. WHITE and  
SIERRA CONSERVATION CENTER, CALIFORNIA DEPARTMENT  
OF CORRECTIONS AND REHABILITATION, Respondents**

**Agency Case No. 2021-0846**

**OAH No. 2022030066**

**PROPOSED DECISION**

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on June 29, 2022, from Sacramento, California.

Maria Cristina Andrade, Staff Attorney, appeared on behalf of Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Respondent Donald W. White (White) represented himself.

Jessica Ambrose, Personnel Officer, represented respondent Sierra Conservation Center, California Department of Corrections and Rehabilitation (CDCR).

Evidence was received, the record closed, and the matter submitted for decision on June 29, 2022.

## **ISSUE**

Did White make an error or omission because of mistake, inadvertence, surprise, or excusable neglect correctable by Government Code section 20160, which would allow CalPERS to accept his late application for industrial disability retirement (IDR)?

## **FACTUAL FINDINGS**

### **Jurisdiction**

1. In a letter dated August 9, 2021, CalPERS refused to accept White's application for IDR due to its late filing, which was not deemed a correctable mistake. White timely appealed CalPERS' decision.

2. On February 28, 2022, Keith Riddle, in his official capacity as Chief of CalPERS' Disability and Survivor Benefits Division, filed the Statement of Issues for purposes of the appeal. This hearing followed.

### **CalPERS' Evidence**

3. White was previously employed by CDCR as a Correctional Officer. By virtue of his employment, White was a state safety member of CalPERS.

## **FIRST IDR APPLICATION**

4. On September 27, 2012, CalPERS received an application for IDR from White. He requested a retirement date of January 13, 2013. He listed his specific disability as "Chronic lumbar sprain/Lumbar Disc, chronic foot strain, left foot" and listed his treating physician as general practitioner David Rollins, M.D.

5. On December 10, 2012, CalPERS received a letter from White, dated November 19, 2012, withdrawing his application for IDR. CalPERS sent White a letter acknowledging that his IDR application was cancelled on April 16, 2013, and advised him of his right to reapply for retirement with a new application.

## **COMMUNICATIONS BETWEEN WHITE AND CALPERS**

6. Over the next seven years, White frequently communicated with CalPERS. Timothy Grigsby, an Associate Governmental Program Analyst at CalPERS, testified at the hearing about CalPERS policies and White's applications. Mr. Grigsby explained CalPERS policies required employees to make contemporaneous records of their communications each time a customer messaged, called, or met with staff. CalPERS stored these time-stamped records in a customer's "Touch Point Report." Records cannot be altered after entry.

7. White's next IDR communications after 2012 arose in February 2015, when he made an appointment to meet with staff to discuss his disability and service retirement options. Records from his May 2015 meeting indicate that White discussed community property issues, rather than IDR.

8. On July 9, 2018, White sent a message to CalPERS, stating:

I am considering a Service Retirement, however I believe that I meet the requirements for [industrial] disability retirement. I submitted paper work in 2012/2013 for industrial disability but decided not to pursue it at the time (wasn't over 50)

I believe that service retirement [benefits] me more at this time than industrial disability. However I have been informed by my attorney that I can retire with service credit pending industrial disability and [receive] service credit with half my income being tax free due to industrial disability. Is this true?

CalPERS responded to White's message on July 18, 2018, and informed White that he was eligible for service retirement pending IDR, in which he would receive service retirement benefits while waiting for approval of his IDR. Additionally, CalPERS confirmed IDR retirees receive 50 percent of their final compensation tax-free.

9. On July 23, 2018, White participated in retirement counseling with CalPERS. Notes from CalPERS employee See Ng document that they discussed service retirement and IDR options. Specifically, Ng "advised [White about] processing timeframe of 4 months from a completed retirement package" and "advised [White] to submit all required doc[uments] within 21 days."

### **SERVICE RETIREMENT APPLICATION**

10. On October 29, 2019, White visited a CalPERS regional office to submit a Service Retirement Election Application. In his application, White selected November

20, 2019, as his retirement date. CalPERS acknowledged receipt of his application the same day and advised White:

You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To apply for a disability retirement, you must complete a Disability Retirement Election Application.

White also requested estimates of his retirement allowance under service retirement and IDR, which CalPERS sent him on November 11, 2019.

11. On December 16, 2019, CalPERS sent White a letter notifying him that it processed his service retirement application. The letter further stated that, "If you want to change your retirement date or cancel your retirement application, you must make the request within 30 days of the issuance of your first retirement check or your choice becomes irrevocable."

### **POST-RETIREMENT COMMUNICATIONS**

12. On October 12, 2020, White called CalPERS to inquire about disability retirement. CalPERS staff Angela Barraza sent White a copy of Publication 35, "A Guide to Completing Your CALPERS Disability Retirement Election Application" (PUB 35), and further instructed him that "he will need to include a statement as to why he did not apply for IDR at the time he applied" for his service retirement.

PUB 35 sets forth the eligibility requirements for the different types of disability retirement, the deadlines to apply, as well as detailed instructions for completing the Disability Retirement Election Application. It also includes a blank copy of the application form. The form asks applicants to provide medical information from their

“treating physician(s)” in Section 4. There is a distinct section for applicants who have filed a workers’ compensation insurance claim for an injury or illness. Additionally, PUB 35 contains a copy of the Physician’s Report on Disability form, which states “This form must be completed by a physician/medical specialist who specializes in your disabling condition.”

PUB 35 directs applicants on when they may apply for IDR:

If you have a disabling injury or illness that prevents you from performing your usual job duties with your current employer for a permanent or extended duration (one that is expected to last for at least 12 consecutive months or will result in death), you may be eligible for a disability or [IDR].

You may apply for a disability or [IDR]:

- While you are in CalPERS-covered employment; or
- Within four months of separation from CalPERS-covered employment; or
- At any time, if you “separated” from or left your job because of a disability and you have remained disabled since then; or
- While on military or approved leave.

PUB 35 further instructs applicants on deadlines for submissions:

If we receive an **incomplete** application package, you will only have **21 calendar days** to provide us with any remaining documents—even if your employer or doctor is causing the delay.

If you do not provide all the needed documents within **21 calendar days**, CalPERS will **cancel your application**.

If your application is canceled, and you believe you are still eligible for a disability retirement, you will need to **submit a new application** package to start the process over again.

In the section titled, "Workers' Compensation," PUB 35 provides:

If you have a workers' compensation claim, you should not wait until your condition is "permanent and stationary" under workers' compensation requirements to submit your application. Delaying your application for retirement may affect important benefits you may be entitled to receive.

A workers' compensation award does not automatically entitle you to a CalPERS [IDR]. Medical evidence will be required to show that you meet the CalPERS definition of disability. If you do, your workers' compensation award for the same illness or injury may be used as evidence that your condition is job-related.

13. On April 5, 2021, CalPERS staff member Kevin Harris called White and assisted him in completing a disability retirement application. In the Touch Point record, Mr. Harris recorded telling White "the farthest he can go back is [nine] months but if he wants he can put his original retirement date since he is getting his retirement reclassified."

## **SECOND IDR APPLICATION**

14. On April 26, 2021, CalPERS received White's Disability Retirement Election Application. In the application, White selected Service Pending IDR and listed his retirement date as November 20, 2019. He listed his disability as "Chronic Lumbar Sprain/Chronic Knee Pain/Blood Pres/Sleep Disturbance." In other areas of the application, White wrote "I had to retire earlier than I wanted with service credit due to chronic pain" and "I kept getting denied to be seen by surgeons for years due to work comp." For his treating physician, White listed a pain management physician, Jeff Jones, M.D.

15. On May 27, 2021, CalPERS sent White and CDCR letters regarding White's request to change his retirement selection. From both White and CDCR, CalPERS sought additional information to determine if a correctable mistake was made. CalPERS stated:

In general, a member cannot change their retirement status after they retire or refund their contributions (Government Code section 20340). An exception can be made if the error or omission was because of a mistake, inadvertence, surprise, or excusable neglect. No exception can be made for a mistake caused by a member's failure to make an inquiry that would be made by a reasonable person in like or similar circumstances (Government Code section 20160).

16. On June 10, 2021, Pam Cassaretto, Return to Work Coordinator at Sierra Conservation Center, submitted a response on CDCR's behalf. In the letter, Ms. Cassaretto wrote that White had not notified CDCR about his disabling condition and

was not off work for a disabling medical condition since 2013. At hearing, she testified that she later found a doctor's note for White dated October 24, 2019, which removed him from work until his November 20, 2019 retirement. She further explained that CDCR did not engage in an interactive process with White and provide him information about disability retirement because he was off work with an injury for less than 30 days. CDCR does not take a position for or against CalPERS accepting White's late application.

17. On June 16, 2021, CalPERS received a response from White. White wrote about his efforts to find a Workers' Compensation surgeon for his knee in October 2019. In response to CalPERS's question about why he did not apply for IDR earlier, White wrote, in relevant part:

At the time I received the letter dated Oct 29, 2019, I was in the process of trying to see an approved state fund surgeon regarding my knee, I started this process with a number of different doctors, sometimes waiting months, only to be turned down at the last moment by the physicians due to various reasons, sometimes because my original injuries were old and sometimes due to the doctors not wanting to deal with state fund.

[¶] ... [¶]

Upon contacting CalPERS, I was informed that I could apply for Service credit retirement or industrial disability retirement, however to apply for industrial disability retirement, I only had 30 days to complete the doctors portion of the package or my disability retirement would be

denied and I would not be able to apply for industrial disability at a later time. I was also in the process of still attempting to see an Orthopedic Surgeon.

[¶] ... [¶]

I was advised by my attorney to immediately apply for service credit retirement and then I would have up to two years to change to industrial disability after being examined by the appropriate doctors and to take any test they might require.

White further acknowledged he had been aware of his ability to apply for IDR since 2012. He wrote that he had received information from CalPERS regarding IDR before he retired:

Yes. However I was informed that if I did not have the Physicians Report on Disability section filled out within 30 days of submitting my industrial disability application, it would be denied and I would not be able to apply again. I had a difficult time getting an appointment with a state fund approved orthopedic surgeon in coordination with a case doctor. I actually started trying to get in to see a doctor for almost two years before I finally couldn't do my job anymore.

18. On August 9, 2021, Mr. Riddle sent White a letter on behalf of CalPERS explaining that it canceled his disability retirement application because it was late. Mr. Riddle listed six communications between White and CalPERS from July 2018 through April 2021, as evidence that "suggests [White] had knowledge of the application

process and, therefore, [CalPERS was] unable to establish that a correctable mistake was made.”

19. On September 4, 2021, White sent a letter appealing the cancelation of his application. He wrote, in relevant part:

It is true that I did have knowledge of the application process, however my delay in [filing] an application was not due to neglect on my part. My delay in [filing] for [IDR] was due to State Fund not being able to provide me with an orthopedic surgeon in a timely manner in order to determine the full extent of my injuries.

[¶] ... [¶]

In regards to my situation, I was informed by CalPERS that normally there is a nine-month time period to apply for industrial disability after service credit retirement. However, I was also informed that there are special circumstances that may extend the nine-month limit.

I was advised by my work comp attorney to immediately apply for service credit retirement in order to receive a pay check while waiting to see a surgeon and then I would have up to two years to change to industrial disability after being examined by the appropriate doctors and to take any test they might require.

## **White's Evidence**

20. White knew he could apply for IDR since 2012, but felt confused about the deadline to apply based on a statement by his workers' compensation attorney. He also thinks CalPERS was unclear about the deadlines and provided him with too much paperwork. Additionally, he assumed that only a workers' compensation doctor could fill out the application's treating physician section.

21. White hired an attorney, Doug Penney, to represent him in a workers' compensation matter concerning his knee injury. White recalls that Mr. Penney recommended he apply for service pending disability retirement. However, he also said that Mr. Penney told him that he had two years to apply for reclassification to IDR after he service retired. White knew that Mr. Penney's practice did not include disability retirement appeals. He did not hire Mr. Penney to do any work related to his CalPERS retirement applications.

22. White thinks CalPERS is responsible for his late application based on three employee statements. First, he recalls that someone told him that he could not reapply for disability retirement if his application was canceled. Second, he believes that a CalPERS employee corroborated Mr. Penney's statement that he had two years to apply for disability retirement after service retirement. Third, he remembers someone told him that he had nine months to reclassify his retirement selection after he applied, but that period could be extended for certain exceptions. When White pressed the employee about what the exceptions were, the employee was uncertain. White does not know which employees made these statements, when each statement was made, or the context in which the statements arose.

23. At hearing, White disputed the accuracy of the CalPERS Touch Point records. He argued that employees choose what they record and would not document that they had to ask a supervisor a question. For White, this explains why the communication records do not include the above statements. White further contends that the Touch Point record of his December 26, 2019 complaint substantiates his point that CalPERS employees provided him with inconsistent information.

24. White agrees that CalPERS never told him that his application had to be completed by a workers' compensation doctor. He assumed this because CalPERS and the State Compensation Insurance Fund (SCIF) are both state agencies. He wishes he had known in October 2019 that his personal doctor could have filled out the treating physician portion of the application. However, he had not sought treatment from his personal doctor for his knee. White used workers' compensation doctors for various injuries over the years and thought it complicated matters to see his personal physician for a work-related injury. When he retired, White had an October 24, 2019 note from the Spine and Nerve Diagnostic Center that he was awaiting consultation with a surgeon and should be off work until December 4, 2019. According to White, his application was late because SCIF made him wait to see an orthopedic surgeon.

## **Analysis**

25. Government Code section 21154 sets forth the timeline for filing an IDR application:

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. . . .

26. Here, White concedes that his second application for IDR was not filed timely in accordance with section 21154. He did not file his application while in state service, while absent on military service, or within four months after discontinuing his state service or while on an approved leave of absence. (Gov. Code, § 21154, subds. (a)-(c).) Section 21154, subdivision (d) is inapplicable to White, who ceased being a CalPERS member when he service retired in November 2019. (Gov. Code, § 20340, subd. (a) [“A person ceases to be a member: (a) Upon retirement, except while participating in reduced worktime for partial service retirement”].) Thus, for CalPERS to accept his late application, White must demonstrate the existence of a correctable mistake under Government Code section 20160.

27. Government Code section 20160, subdivision (a), allows for correction of an error if (1) a party seeks correction within a reasonable time after discovery, not to exceed six months; (2) the error resulted from mistake, surprise, or excusable neglect; and (3) the error was not caused by the failure to make an inquiry that a reasonable person could make in similar circumstances. As detailed below, White’s late application does not satisfy these requirements.

28. The evidence shows that White was aware of his IDR eligibility for more than eight and a half years before his late application. He first applied for IDR in 2012, before choosing to withdraw his application and reapply in the future. In the years that followed, White communicated frequently with CalPERS staff via online messaging,

phone calls, and in-person meetings to seek information and answer his questions. In July 2018, White told CalPERS that service retirement benefited him more than IDR, and CalPERS provided him with information about his IDR eligibility and benefits. In October 2019, CalPERS reminded White he could apply for IDR and instructed him to complete a separate application. The next month, CalPERS provided White with compensation estimates under both service retirement and IDR. After processing his service retirement application in December 2019, CalPERS informed White that he needed to cancel his application within 30 days of his first retirement check, "or [his] choice becomes irrevocable." Yet White waited 17 months after his retirement to request a change to IDR.

29. Moreover, CalPERS sent White the PUB 35 in October 2020. This document specifically instructed White not to delay his IDR application based on the pendency of any worker's compensation matter. It clearly outlines the deadlines to apply for IDR and service pending IDR, which White claimed were unclear. Nevertheless, White did not submit his second IDR application in a timely manner after receiving the PUB 35.

30. White argues that he was misled by his attorney about the IDR application deadline. Even if White's worker's compensation attorney told him he had two years to reclassify his retirement, White concedes that the attorney did not represent him for purposes of any CalPERS application and White knew his attorney did not practice in the area of disability retirement. Although White relied on this bad advice to his detriment, he did not seek correction within a reasonable time after discovery and the error was not one that a reasonable person would have made without asking CalPERS for exact deadlines. His neglect was not excusable.

31. Additionally, White faults CalPERS staff for providing him information that he found confusing and inconsistent. However, the Touch Point records do not support White's recollections and the staff members had no motive to be untruthful in their contemporaneously recorded notes. White's memories of the conversations were vague, without context, and unsubstantiated by any documentation. The only instance where White's recollection aligns with the Touch Point records is on the April 5, 2021 record which states CalPERS staff member Kevin Harris told White that "the farthest he can go back is [nine] months[.]" Yet White could not have relied on this conversation in failing to submit his IDR application 16 months earlier. Additionally, the statements White asserts that CalPERS staff made directly contradict the PUB 35. At a minimum, faced with such a perceived inconsistency, a reasonable person would have made an inquiry to obtain greater clarification from CalPERS, rather than assume he would be granted an exception.

32. White's delay in seeing a SCIF surgeon for his knee does not provide grounds to correct his mistake. He contends he needed a SCIF orthopedic surgeon to complete his IDR application. However, the forms plainly request only a "treating physician," and do not require the treating physician to work within the workers' compensation system. Indeed, White's 2021 IDR application does even not list a SCIF orthopedic surgeon. Additionally, White's knee condition, for which he sought SCIF treatment, was not the sole basis for his claimed disability. He did not explain why he could not provide a treating physician in October 2019 for his lumbar sprain, blood pressure, or sleep disturbances issues.

33. In sum, White failed to demonstrate that he timely addressed his misconceptions about the IDR application. Thus, CalPERS appropriately determined

that his late application for IDR could not be accepted under Government Code section 20160.

## LEGAL CONCLUSIONS

1. Under Government Code section 20160, White has the burden of proving by a preponderance of the evidence that CalPERS should accept his late-filed application for IDR. (Evid. Code, § 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) 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.)

2. Government Code section 20160, subdivision (a), provides that:

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.

3. Based on the Factual Findings as a whole, and specifically, Factual Findings 25 through 33, White did not establish that his failure to file for IDR in a timely manner constituted an error or omission correctable under Government Code section 20160. Consequently, his late application for IDR was properly refused.

## **ORDER**

The appeal of respondent Donald W. White is DENIED. CalPERS' decision to refuse White's late IDR application is AFFIRMED.

DATE: July 25, 2022

*Jessica Wall*

Jessica Wall (Jul 25, 2022 08:22 PDT)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings