

**ATTACHMENT A**

**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:**

**DWAYNE J. MAY and CITY OF RIVERSIDE, Respondents**

**Agency Case No. 2022-0623**

**OAH No. 2023010325**

**PROPOSED DECISION**

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on April 11, 2023, by teleconference and videoconference from Sacramento, California.

Nhung Dao, Attorney at Law, represented the California Public Employees' Retirement System (CalPERS).

Dwayne J. May (May) appeared and represented himself.

Tricia Audoma, Supervisor of the Worker's Compensation Division, Human Resources Department, City of Riverside (city), appeared on behalf of the city.

Evidence was received, the record closed, and the matter submitted for decision on April 11, 2023.

## **ISSUE**

Did May make an error or omission as a result 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. May was previously employed by the city as a police lieutenant. By virtue of that employment, he was a local safety member of CalPERS.
2. On September 20, 2021, CalPERS received May's application for IDR. In a letter dated June 29, 2022, CalPERS refused to accept May's application for IDR due to its late filing, which was not deemed a correctable mistake. May timely appealed CalPERS' decision.
3. On January 12, 2023, Keith Riddle, in his official capacity as Chief of CalPERS' Disability and Survivor Benefits Division, signed and thereafter filed the Statement of Issues for purposes of the appeal. The matter was then set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

## **CalPERS' Evidence**

### **DISABILITY RETIREMENT VS. INDUSTRIAL DISABILITY RETIREMENT**

4. When a CalPERS member suffers a disabling injury or illness that prevents them from performing their usual duties permanently or for an extended period of time, they may apply for Disability Retirement (DR). When the disabling injury or illness is work-related, the member may apply for IDR.

5. CalPERS members may also apply for Service Retirement (SR) pending DR or IDR. In those cases, an eligibility determination regarding the SR portion of the member's application is usually made prior to an eligibility determination regarding the DR or IDR portions of the application. When a member is approved for SR and later determined to be eligible for DR or IDR, they may request to change their retirement payment option.

### **MAY'S APPLICATIONS AND COMMUNICATIONS WITH CALPERS**

6. On March 11, 2020, May applied for SR, with a requested effective retirement date of April 3, 2020. On April 15, 2020, he contacted CalPERS to inquire about applying for DR benefits. CalPERS mailed May a publication entitled "A Guide to Completing Your CalPERS Disability Retirement Election Application," which is also known as the PUB 35. On April 28, 2020, May called CalPERS to request another copy of the PUB 35 because the one he received was incomplete. CalPERS sent him another copy, which May acknowledges receiving.

7. The following language appears on page three of the PUB 35:

Before you fill out the application, you should review the general disability retirement information in the "Disability

Retirement and Industrial Disability Retirement” section of this publication. This will help you determine what type of retirement applies to you, what steps you need to take, and what information CalPERS will need to process your request.

8. The “Disability Retirement and Industrial Disability Retirement” section appears on page five of the PUB 35. The following language appears under the heading “Eligibility Requirements for Disability Retirement”:

There is no minimum age requirement for disability retirement. The cause of your disability does not need to be related to your employment. If you retire, you will receive a monthly retirement payment for the rest of your life, or until you recover from your disabling injury or illness.

9. The following language appears under the heading “Eligibility Requirements for Industrial Disability Retirement”:

An industrial disability means that you are unable to perform the usual duties of your job with your current employer because of a job-related injury or illness. If your application for industrial disability retirement is approved, you will receive a monthly retirement payment for the rest of your life, or until you recover from your disabling injury or illness.

10. On June 1, 2020, May’s SR application was approved, and CalPERS sent him a First Payment Acknowledgement Letter informing him of his monthly retirement

amount, effective retirement date, and beneficiary/survivor information. May retired from service with an effective retirement date of May 29, 2020.

11. On June 5, 2020, May called CalPERS to request assistance completing a DR application. CalPERS staff explained the documents that are required to be submitted with the application and advised May of the timeframe to submit the required documents.

12. On June 22, 2020, CalPERS received May's SR pending DR application. Because May was already receiving SR benefits, CalPERS processed a SR vs. DR comparison to see if he would receive additional benefits if his DR application was approved. CalPERS concluded that given his age and years of service at retirement, there would be no difference between SR and DR benefits. CalPERS sent May a letter that same day informing him that DR would not be additionally beneficial to him, and that he would continue to receive his SR benefits. The letter also advised May that if he still wished to continue to pursue DR, he needed to contact CalPERS within 30 days.

13. On July 16, 2021, May contacted CalPERS to discuss his DR application. He indicated that when he applied for DR, he meant to apply for IDR but checked the wrong box on the application by mistake. May was advised that since his DR application had already been denied because DR would be of no additional benefit to him, he would need to submit a new IDR application.

14. On August 13, 2021, May contacted CalPERS seeking help filling out his IDR application. CalPERS staff reviewed the forms with May, explained what documents were needed to process his IDR application, and explained the timeline for the processing of the application.

15. On September 20, 2021, CalPERS received May's IDR application. He claimed disability based on an orthopedic (lumbar spine) condition. By letter dated September 28, 2021, CalPERS informed May of the following:

In general, a member cannot change their retirement status after they retire or refund their contributions (Government Code 20340). An exception can be made if the error or omission was the result of mistake, inadvertence, surprise, or excusable neglect. However, 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 20160).

#### **TESTIMONY OF TIMOTHY GRIGSBY**

16. Timothy Grigsby has been employed by CalPERS since September 2016. He presently serves as a Staff Services Manager I in the Disability Survivor Benefits Division (DSBD). He is the CalPERS employee who is most familiar with May's application for IDR and the reason for its denial.

17. Application for DR and IDR must be made when a member is in state service, absent on military service, or physically or mentally incapacitated. Additionally, a member may apply for DR or IDR within four months after discontinuance of state service. May retired from service with the city effective May 29, 2020. He ceased to be a CalPERS member as of that date. In the absence of one of the other three exceptions, he was therefore required to submit his application for IDR within four months of discontinuation of service with the city. His IDR application was deemed late because it was received over one year after the discontinuation of his service with the city.

18. CalPERS determined that May was aware of his right to apply for IDR when he contacted CalPERS and was provided multiple copies of the PUB 35. Consequently, CalPERS concluded that it could not accept May's application for IDR because a correctable mistake had not been made when he applied for SR. May and the city were notified of CalPERS's decision by letter dated June 29, 2022. May appealed the decision on June 30, 2022.

### **May's Evidence**

19. May testified at hearing. He suffers from degenerative discs in his back and cannot sit, stand, kneel, or lie down for extended periods of time without experiencing discomfort. At the time that he submitted his SR application, he was under the care of a physician, but it had yet to be determined whether his back injury was permanently disabling. A final physician's report on the extent of May's disability was not drafted until May 2021. The exact cause of the injury is unknown, though May believes it was likely caused by an on-duty traffic collision in 2008.

20. After filing his SR application, May was advised by city staff that he should have filed for SR pending DR with CalPERS due to his medical condition that was still under evaluation. He was told that the city's worker's compensation unit and CalPERS would coordinate with each other to share medical reports pertaining to his injury. His understanding was that after he submitted the application, his role in the process was complete.

21. When May filed his application, CalPERS regional offices were closed due to the COVID-19 pandemic. The communication he had with CalPERS representatives occurred by telephone. The first time he received the PUB 35 from CalPERS it was incomplete. Specifically, it did not include the application itself.



22. On June 5, 2020, he called CalPERS for assistance completing the application. He did not know the difference between DR and IDR and he relied on CalPERS representatives to assist him with the process. He explained that he was being medically evaluated for a potential injury to his lower back, the cause of which was at that time still unknown. The CalPERS representatives that he spoke with did not tell him to check the box on the application for IDR. In fact, in multiple conversations with several different CalPERS representatives, there was no distinction drawn between DR and IDR.

23. May was told that a final determination on his eligibility for DR would take four to six months. Shortly after retiring, he and his wife went on a cross-country vacation and did not return home until late October 2020. May was comfortable doing so because he did not anticipate hearing from CalPERS for several months.

24. On July 1, 2020, CalPERS sent May the letter informing him that his DR application was being denied because DR would not be of any additional benefit to him. The letter advised May that if he still wished to further pursue DR, he had 30 days to follow up with CalPERS. However, due to his vacation, May did not receive the letter until returning home in late October. By the time he opened the letter, the 30-day window had already passed. He waited so long to file his IDR application because he was waiting to receive medical documentation in support of his disability.

25. Ms. Audoma also testified at hearing. She indicated that the city would not object if CalPERS accepted May's late application for IDR.

## **Analysis**

26. Pursuant to Government Code section 21154, application for DR or IDR "shall be made only (a) while the member is in state service, or (b) while the members

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 discontinuance of state service to the time of application or motion.”

27. CalPERS received May’s IDR application on September 20, 2021. May acknowledges the application was not timely in accordance with Government Code section 21154. He did not file the application while still in state service, within four months after discontinuance of state service, or while on military leave. Additionally, subdivision (d) does not apply to the circumstances at issue, because May ceased being a CalPERS “member” when he service retired effective May 29, 2020. (See 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 May’s late application for disability retirement, he must demonstrate the existence of a correctable mistake as described in Government Code section 20160.

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

Subject to subdivisions (c) and (d) the board may, in its discretion and upon 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.

29. May testified that he did not know the difference between DR and IDR when he submitted his application. He was forced to complete the process remotely because CalPERS regional offices were closed due to the COVID-19 pandemic. He found the process confusing because CalPERS employees did not distinguish between the two types of retirement. He contends that he meant to apply for IDR when he submitted his DR application before going on vacation in 2020, and as such, his IDR application should be considered timely.

30. On multiple occasions, May was provided with information, instructions, and documentation to timely file for DR and IDR. He was aware he had the option to apply for DR or IDR as early as April 2020. He was provided written guidance and

instructions from CalPERS regarding several retirement options, including the option to file for SR pending DR and SR pending IDR. It was not CalPERS' responsibility to ensure that he checked the correct box on his application, particularly when the information at his disposal clearly explained the differences between DR and IDR.

31. The courts have recognized that "pension statutes are to be liberally interpreted in favor of the applicant so as to effectuate, rather than defeat, their avowed purpose of providing benefits for the employee and his family." (*Button v. Bd. of Admin.* (1981) 122 Cal.App.3d 730, 737, quoting *Campbell v. Bd. of Admin.* (1980) 103 Cal.App.3d 565, 571.) However, when all the evidence is considered, May did not establish that he submitted his late IDR application due to a correctable mistake. Notwithstanding the instructions contained in the PUB 35 that he acknowledged receiving, he waited approximately 16 months after his service retirement and nearly a year after learning that he made a mistake on the application to submit his IDR application. Thus, CalPERS appropriately determined that his late application for IDR could not be accepted pursuant to Government Code section 20160.

## **LEGAL CONCLUSIONS**

1. May has the burden of proving by a preponderance of the evidence that his late-filed application for IDR should be accepted pursuant to Government Code section 20160. (Evid. Code, § 500 ["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"]; *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 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 and Legal Conclusions as a whole, and Factual Findings 26 through 31 in particular, May did not establish that the facts surrounding his failure to timely file for IDR constituted an error or omission correctable pursuant to Government Code section 20160. Consequently, his late IDR application was properly rejected.

## **ORDER**

The appeal of respondent Dwayne J. May is DENIED. CalPERS's decision to reject respondent Dwayne J. May's late industrial disability retirement application is AFFIRMED.

DATE: May 5, 2023

*Matthew Block*

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings