

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

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Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED  
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: WV Consolidated Public Retirement Board TITLE NUMBER: 162

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 2

TITLE OF RULE BEING AMENDED: Benefit Determination and Appeal

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) House Bill 2652

SECTION §64-2-2(b), PASSED ON April 13, 2013

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE  
FOLLOWING DATE: June 1, 2013

*Ross Taylor*

Authorized Signature

*Jeffrey E. Fleck*

**TITLE 162  
LEGISLATIVE RULE  
CONSOLIDATED PUBLIC RETIREMENT BOARD**

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**SERIES 2  
BENEFIT DETERMINATION AND APPEAL**

STATE

**§ 162-2-1. General.**

1.1. Scope. – This rule addresses the processes by which a member of the retirement systems administered by the West Virginia Consolidated Public Retirement Board may apply for and be granted disability retirement, and the manner in which appeals from the disability determinations of the Board and other appeals may be presented for administrative resolution.

1.2. Authority. – W. Va. Code § 5-10D-1.

1.3. Filing Date. – May 28, 2013.

1.4. Effective Date. – June 1, 2013.

**§ 162-2-2. Disability Application.**

2.1. An individual or an individual's employer on behalf of the individual, if permitted, seeking disability retirement benefits shall apply to the Consolidated Public Retirement Board and, unless disability retirement is decided by the Governor of the State of West Virginia pursuant to statutory authority, the Board shall, as part of its initial review, decide the applicant's eligibility for disability retirement. The application shall be upon a form adopted by the Board. The employing agency shall, upon a form adopted by the Board, state the agency's position as to whether or not the disability is work related.

2.2. In the event that an individual or that individual's employer on behalf of the individual has applied for and been denied disability retirement by the Board, neither the individual nor the employer may file another application for disability retirement with the Board until the passage of one year from the date of the Board's last denial. Notwithstanding the minimum one year reapplication period, the Board may, in its sole discretion, agree to waive the minimum one year reapplication period for an individual or that individual's employer on behalf of the individual if waiver of the reapplication period is requested by the individual or that individual's employer on a form approved by the Board. The individual or that individual's employer shall demonstrate to the satisfaction of the Board, through medical records, reports or other reliable evidence, that the individual has suffered a new or substantial worsening of his or her medical condition since the Board's most recent denial of his or her application for disability retirement.

2.3. After a member receives either a lump sum distribution of contributions or the initial payment of a retirement benefit from the retirement system in which the member was or is a participant, the member is not eligible to apply for or receive disability retirement benefits.

2.4. When an application for disability retirement has been submitted by a member of the Public Employees Retirement System or the Teachers' Retirement System who is ultimately determined by the Consolidated Public Retirement Board to have met all the disability requirements, including an affirmative

opinion by a Board approved physician, but who dies before the application is approved by the Board, the Board shall process the disability application and pay benefits as though the applicant were still alive and elected a 100% Joint & Survivor disability annuity naming his or her surviving spouse. If the member was not married at the time of his or her death, the named beneficiary or beneficiaries shall be paid in accordance with his or her pre-retirement beneficiary form.

### **§ 162-2-3. Disability Medical Reports.**

3.1. The applicant and the employing agency shall furnish all current and relevant medical reports in their possession, including a report from a physician, to the Board. The applicant shall obtain any additional information requested by the Board and shall complete any other forms and answer any other questions from the Board as may be appropriate. The Board shall only consider a medical report if the author of the report is a physician licensed in West Virginia or the jurisdiction in which he or she is located. At the request of the Board the applicant may be examined by an independent physician appropriate to the nature of the claimed disability. The cost of this examination shall be paid by the Board. These reports shall state a clear and understandable opinion as to whether or not the applicant is disabled as defined by then current applicable West Virginia law. The Board shall employ the faculty and staff of the Marshall University School of Medicine, the West Virginia University School of Medicine, or the West Virginia School of Osteopathic Medicine, whenever appropriate.

#### 3.2. Disability Definitions

3.2.a. For members of the Public Employees Retirement System, "totally and permanently incapacitated for employment" means a member's inability to engage in substantial gainful activity by reason of any medically determined physical or mental impairment that can be expected to result in death, or has lasted and can be expected to last for a continuous period of not less than twelve months. In order for a member of the Public Employees Retirement System to be eligible to be retired by the Board on account of the incapacity, the evidence must demonstrate that as a result of the impairment, the member's incapacity is so severe that on a probably permanent basis, he or she is not only unable to perform his or her previous state employment, but also cannot, considering his or her age, education and work experience, engage in any other kind of substantial gainful employment which exists in the state, regardless of whether: (A) the work exists in the immediate area in which the member lives; (B) a specific job vacancy exists; or (C) the member would be hired if he or she applied for work. Evidence demonstrating that the member has been awarded disability benefits by the Social Security Administration shall be considered by any Board selected physician in his or her examination of the member.

3.2.b. For members of the Teachers' Retirement System, "mentally or physically incapacitated for service" means a member's inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death, or has lasted and can be expected to last for a continuous period of not less than twelve months. In order for a member of the Teachers' Retirement System to be eligible to be retired by the Board on account of the incapacity, the evidence must demonstrate that the member's incapacity is so severe that he or she is likely to be permanently unable to perform the duties of the position which the member occupied immediately prior to his or her disabling illness or injury. Evidence demonstrating that the member has been awarded disability benefits by the Social Security Administration shall be considered by any Board selected physician in his or her examination of the member.

3.3. The member shall cooperate fully with the Board in the scheduling of the examinations, and shall appear at the time and place for scheduled examinations requested by the Board. The Board may deny the

disability application if the member fails to cooperate fully in the examination process. Further, the Board shall provide advance notice to the member that should he or she fail to appear at the time and place for scheduled examinations requested by the Board, the Board may hold the member responsible for some or all fees charged by the physician's office for that scheduled exam.

**§ 162-2-4. Initial Determination.**

4.1. The Executive Director of the Board or his or her designee, and two staff members appointed by the Executive Director, constitute the Staff Review Committee. The Staff Review Committee shall review all reports and other evidence from all sources and shall make a recommendation consistent with the evidence, the applicable Laws and Rules and the purpose of the individual retirement system to the Board Review Committee, comprised of at least three Board members and appointed by the Board. Based on information submitted by the Board Review Committee, the full Board shall then consider the recommendations of the Board Review Committee and is free to make any finding consistent with the facts. If the applicant is not granted disability retirement benefits, the Board shall inform the applicant in writing of its decision and the basis for the decision. The notification shall state, with specificity, the action which the applicant may take to pursue an administrative appeal of the Board's denial of the disability application.

4.2. Following Board approval of a disability retirement, an applicant of a defined benefit retirement system shall submit all required forms to the Board within six (6) months to commence his or her disability retirement annuity. If the applicant fails to meet this requirement, the disability award terminates and the member shall file a new application for disability retirement. All medical examination costs associated with the new application process are the sole responsibility of the member.

**§ 162-2-5. Second Review.**

5.1. If the Board does not grant disability retirement benefits upon the Board's initial review of the applicant's disability retirement application, the applicant has two options. Within sixty (60) days of receipt of the notice of denial from the Board, the applicant may request an additional examination by another physician chosen by the Board at the applicant's expense and thereafter submit additional medical information, or the applicant may appeal the Board's decision to a hearing officer appointed by the Board as stated in section 6 of this rule.

5.2. If additional medical information is obtained, the Staff Review Committee shall review the new information concerning disability retirement benefits. The application should include all reports and other evidence, as well as any new information. The Staff Review Committee shall make a second recommendation to the Board Review Committee either to grant or not to grant disability retirement benefits. The Board Review Committee may adopt the new recommendation of the Staff Review Committee, remand the application for further study, or make any other recommendation consistent with the facts. Based on information submitted by the Board Review Committee, the full Board shall then consider the current recommendations and shall make any finding consistent with the facts.

**§ 162-2-6. Appeal of the Decision.**

6.1. If the Board rejects the application on two (2) occasions, the Board shall notify the applicant in writing within ten (10) days from the date of rejection of the opportunity for a hearing before an independent hearing officer appointed by the Board.

6.2. Upon receipt of the Board's second rejection of the applicant's disability retirement application, the applicant has ninety (90) days within which to file a written request for an administrative appeal before an independent hearing officer appointed by the Board. An applicant who fails to request a timely appeal waives any further administrative appeal rights.

6.3. The Board shall not hear appeals directly, but shall appoint hearing officers who will make complete and independent reviews of the disability applications and then make recommendations to the Board. All hearing officers appointed by the Board must be attorneys licensed to practice law in the State of West Virginia.

6.3.1. Within sixty (60) days of receipt of the notice from the applicant of the desire to appeal the decision, the hearing officer shall schedule a time and place to hear the appeal and give the applicant ten (10) business days written notice of the hearing.

6.3.2. At the hearing, the applicant may appear pro se or may be represented by counsel or a lay representative. Counsel for the Board may also appear at any hearing held pursuant to this rule. Witnesses or written evidence may be submitted by both parties.

6.3.3. The rules of evidence shall not strictly apply, and the applicant has the right to any and all relevant documents, subject to any confidentiality and disclosure limitations set forth in federal and state law, in the possession of the Consolidated Public Retirement Board.

6.3.4. The hearing officer may subpoena documents and witnesses if the information is relevant and reasonable in order for the hearing officer to make a recommendation on the appeal. The interests of justice and fair play shall guide procedure before the hearing officer.

6.3.5. The Board shall cause the certified court reporter to retain but not transcribe a stenographic recording of the hearing which is the official record of the hearing. Transcripts requested by the applicant prior to appeal to circuit court shall be at the applicant's expense, with the original provided to the hearing officer and a copy to the applicant. Upon appeal to a circuit court, the recording shall be transcribed at the Board's expense.

6.3.6. The hearing officer shall, within sixty (60) days of receiving all documents, prepare formal findings, stating the reasons for the findings, in clear language, and noting all medical and other evidence considered.

6.3.7. After proper notice, the hearing officer shall present the information at the next regular meeting of the Consolidated Public Retirement Board. The staff on behalf of the Board shall notify the applicant of the date, time, and place that the appeal will be acted upon by the Board.

6.4. The Board, in open session, shall then make a decision based on the recommendation of the hearing officer and accept the recommendation unless there is an abuse of discretion in finding or the finding is contrary to law. The Board staff and the applicant also have the right to propose a final order.

6.5. The Board's final decision shall be sent, by certified mail, to the applicant and his or her counsel.

**§ 162-2-7. Other Appeals.**

7.1. Any other type of appeal other than for disability retirement benefits shall be considered by the staff of the Consolidated Public Retirement Board. If the Board's staff does not grant the request, the staff shall notify the applicant in writing stating the reasons for the denial and informing him or her of his or her right to appeal to the Board.

7.2. The applicant has ninety (90) days upon receipt of the written denial within which to file a written request for an administrative appeal. If the applicant appeals the decision of the staff, the staff shall refer the appeal to a hearing officer appointed by the Board.

7.2.1. Within sixty (60) days of the receipt of notice from the applicant of the desire to appeal the denial, the hearing officer shall schedule a time and place to hear the appeal and give the applicant ten (10) business days written notice of the hearing.

7.2.2. At any hearing conducted pursuant to this rule, the applicant may appear pro se, or may be represented by counsel or by a lay representative. Counsel for the Board may also appear at any hearing held pursuant to this rule. Witnesses or written evidence may be submitted by both parties.

7.2.3. The rules of evidence shall not strictly apply and the applicant has the right to any and all relevant documents in the possession of the Consolidated Public Retirement Board subject to any confidentiality or disclosure limitations set forth in federal or state law.

7.2.4. The hearing officer may subpoena documents and witnesses if the information is relevant and reasonable in order for the hearing officer to arrive at a finding of fact and to make a recommendation on the appeal. The interest of justice and fair play shall guide proceedings before the hearing officer.

7.2.5. The Board shall cause the certified court reporter to retain but not transcribe a stenographic recording of the hearing which is the official record of the hearing. Transcripts requested by the applicant prior to appeal to circuit court shall be at the applicant's expense, with the original provided to the hearing officer and a copy to the applicant. Upon appeal to circuit court, the recording shall be transcribed at the Board's expense.

7.2.6. The hearing officer shall within sixty (60) days of receiving all documents and evidentiary testimony, prepare formal findings of fact and conclusions of law, in which he or she states the reasons for his or her findings, and noting with specificity the evidence considered in reaching a recommendation.

7.2.7. Following written notice and tender of the hearing officer's recommended decision to all parties, the hearing officer shall present his or her recommended decision to the Board at its next regularly scheduled meeting. The staff of the Board shall notify the applicant and counsel for the Board of the date, time and place of the Board's meeting during which the appeal and the recommended decision will be presented to the Board by the hearing officer. Any party has the right to submit, in writing, a proposed final order to the hearing officer for consideration prior to presentation of the matter to the Board.

7.3. The Board shall take action, in open session, on the recommendation of the hearing officer on any appeal held pursuant to this rule. Presentation of the matter shall be made by the hearing officer, and no additional oral argument is permitted.

7.3.1. The Board shall accept the recommendation of the hearing officer unless an abuse of discretion is found to have occurred, or unless the recommendation is found to be based upon an error in facts or

contrary to law. The Board's final decision shall be sent, by certified mail, to the applicant and his or her counsel.

7.4. An applicant who fails to request a timely appeal waives any further administrative appeal rights.

**§ 162-2-8. Appeal Denied.**

8.1. If an appeal is denied in whole or in part by the Board pursuant to sections 6 or 7 of this rule and a final decision is issued, an applicant may request a transcript of the appeal hearing, with the cost to be paid by the applicant. An individual aggrieved by a final decision of the Board has a right of appeal to the Circuit Court of Kanawha County pursuant to W. Va. Code §29A-5-4.

**§ 162-2-9. Annual Statement.**

9.1. The Board may require a disability benefit recipient awarded a disability retirement under the provisions of this rule to file an annual statement of earnings and any other financial information required by the Board. If a disability recipient refuses to file the statement or financial information as requested by the Board, the Board shall suspend the disability benefit until the statement or financial information is filed. If the refusal continues for one (1) year, the Board shall terminate the recipient's right to the disability benefit.

**§ 162-2-10. Errors.**

10.1. Each level of review is presumed to cure all errors in procedure of any prior level, and no right to remand to cure procedural errors exists, but each level of review shall make an independent determination upon the facts.