

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 28, 2002

TO: **LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

FROM: **West Virginia Consolidated Public Retirement Board
State Capitol Complex
Building 5, Room 1000
1900 Kanawha Boulevard, East
Charleston, WV 25305**

LEGISLATIVE RULE TITLE: Title 162, Series 2; Consolidated Public Retirement Board; Benefit Determination and Appeal

1. Authorizing statute(s) citation: W. Va. Code § 5-10D-1
2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
May 30, 2003

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- b. What other notice, including advertising, did you give of the hearing?

Written notice, along with a copy of the proposed rule amendments, were forwarded to various members of the WV Deputy Sheriffs Association, WV Association of Counties, WV Municipal League, WV Federation of Teachers, WV Education Association, AFSCME, USWA, Laborers Union, SEIU, UMWA, to Board Physician Dr. John Walden, and to PERSA for review and circulation to their potentially interested members. Copies were also provided to the Chairs of the House and Senate Committees on Pension and Retirements.

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- c. Date of Public Hearing(s) *or* Public Comment Period ended: July 1, 2003
- d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

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- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 28, 2003

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Terasa Robertson, Acting Executive Director
WV Consolidated Public Retirement Board
State Capitol Complex
Building 5, Room 1000
1900 Kanawha Boulevard, East
Charleston, WV 25305
(304) 558-3570
(304) 558-1395 (fax)
trobertson@gwmail.state.wv.us

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Karen S. Copeland, Membership Manager
WV Consolidated Public Retirement Board
State Capitol Complex
Building 5, Room 1000
1900 Kanawha Boulevard, East
Charleston, WV 25305
(304) 558-3570
(304) 558-6337 (fax)
kcopeland@gwmail.state.wv.us

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:
- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.
 - b. Date of hearing or comment period:
 - c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?
 - d. Attach findings and determinations and reasons:

State of West Virginia
Consolidated Public Retirement Board

Capitol Complex, Building 5, Room 1000, Charleston, West Virginia 25305-0720
Telephone: 304-558-3570 or 800-654-4406 Fax: 304-558-6337

BRIEF SUMMARY OF PROPOSED AMENDMENT TO TITLE 162, SERIES 2

The West Virginia Consolidated Public Retirement Board (Board), as administrator of the State's several pension plans, proposes certain amendatory changes to the provisions of Title 162, Series 2, of the West Virginia Code of State Regulations. Specifically, the Board proposes an amendment of WVCSR §162-2-3 to set forth the requirement that disability applicants cooperate fully with the Board in the scheduling of disability examinations, and to WVCSR §162-2-4 to require that disability applicants file all required forms to the Board in a timely manner to commence their disability benefit. The Board also proposes new language requiring disability recipients file an annual statement of earnings and any other financial information required by the Board.

Other non-substantial changes are also sought to ensure clarity of the disability process.

**State of West Virginia
Consolidated Public Retirement Board**

Capitol Complex, Building 5, Room 1000, Charleston, West Virginia 25305-0720
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**STATEMENT OF CIRCUMSTANCES REQUIRING
PROPOSAL AND PROMULGATION OF PROPOSED RULE CHANGES TO SERIES 2
OF TITLE 162 OF THE WV CODE OF STATE REGULATIONS**

As statutory administrator of the State's several pension plans, the West Virginia Consolidated Public Retirement Board proposes amendatory additions to Title 162, Series 2 of the West Virginia Code of State Regulations. Currently, the statutory provisions and legislative rules that govern disability determinations under the Public Employees Retirement System (PERS), the Teachers Retirement System (TRS), and the Deputy Sheriff Retirement System (DSRS) do not contain provisions that require disability applicants to cooperate fully with the Board in the scheduling of disability examinations. The Board also proposes amendatory language to require disability applicants file all required forms to the Board in a timely manner to commence their disability benefit. These rule changes have been determined to be necessary and appropriate because of the difficulties in which the Board has encountered processing disability retirement applications for members of the above stated pension plans.

Additionally, the Board proposes amendatory language requiring disability recipients to file an annual statement of earnings and any other financial information required by the Board. Current statutory provisions of the Public Employees Retirement System require that in order to be retired on the basis of disability, the member must be totally and permanently incapacitated from employment. This rule change will allow the Board to monitor continued disability status for disability retirants of the PERS and total duty disability retirants under the DSRS.

Other non-substantial changes are also sought to ensure clarity of the disability process.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 162 (Series 2) Benefit Determination and Appeal

Type of Rule: X Legislative Interpretive Procedural

Agency: The State of West Virginia Consolidated Public Retirement Board

Address: 1900 Kanawha Boulevard, East, Building 5, Room 1000, Capitol Complex
Charleston, West Virginia 25305

1. Effect of Proposed rule:

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST		Possible			
PERSONAL SERVICES	Marginal				
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER	Increased litigation				

2. Explanation of Above Estimates:

The rule changes impacting post disability retirement procedures are expected to help monitor disability retirement claims and uncover benefit abuses occurring due to recovery following disability retirement. Some increase in administrative cost should be more than offset by benefit savings. Rule changes regarding timing and application requirements should help reduce overall administrative costs related to duplication of expenses currently experienced due to application delays. Rule changes in respect to charging applicants for expenses occurred for missed examinations are vague and require additional rules and procedures to be adopted. Because of the vague provisions, the change greatly increases the potential for future litigation if any expenses are charged to applicants under the provision.

Rule Title: Title 162 (Series 2) Benefit Determination and Appeal

3. Objectives of These Rules:

To provide specific application deadlines and procedures during the disability retirement application process which should reduce duplication of expenses due to application delays currently being experienced. To provide the ability to monitor disability retirees on an annual basis to help prevent benefit abuses and monitor possible recovery from disability following retirement thus reducing overall disability benefit costs. To allow for the recovery from the applicant certain medical expenses incurred when an applicant fails to complete scheduled medical examinations for disability retirement.

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

Administrative cost increases should be more than offset by benefit cost savings due to the prevention of benefit abuses for ongoing disability retirees. Vague provisions regarding recovery of medical costs from certain applicants due to unspecified circumstances greatly increases exposure to future litigation if it is ever applied and exposes State Government to the costs of such litigation.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

Administrative cost increases should be more than offset by benefit cost savings due to the prevention of benefit abuses for ongoing disability retirees. Vague provisions regarding recovery of medical costs from certain applicants due to unspecified circumstances greatly increases exposure to future litigation if it is ever applied and exposes employers to the costs of such litigation.

C. Economic Impact on Citizens/Public at Large:

None.

Date: May 29, 2003

Signature of Agency Head and/or Authorized Representative:

Harry W. Mandel

Harry W. Mandel
Member, American Academy of Actuaries
Board Actuary, WVCPRB

TITLE 162
LEGISLATIVE RULE
CONSOLIDATED PUBLIC RETIREMENT BOARD

SERIES 2
BENEFIT DETERMINATION AND APPEAL

FILED

JUL 28 P 2:45

OFFICE WEST VIRGINIA
SECRETARY OF STATE**§162-2-1. General.**

1.1. Scope. -- The scope of this Rule involves the determination of eligibility, benefits, and appeal rights to the Board not previously adopted by the Board as they relate to the several Retirement Systems.

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

1.3. Filing Date. --

1.4. Effective Date. --

§162-2-2. Disability Application.

2.1. An individual 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.

§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 the report of the treating physician and/or other professional 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

licensed practitioner of his or her profession 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 professional 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 establishes a presumption, rebuttable by medical evidence or opinion to the contrary, that the member suffers from a total and probably permanent incapacity under the Public Employees Retirement System.

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 establishes a presumption, rebuttable by medical evidence or opinion to the contrary, that the member suffers from a mental or physical incapacitation for service under the Teachers Retirement System.

3.3. The member shall cooperate fully with the Board in the scheduling of the examinations, and shall appear at such time and place for scheduled examinations as requested by the Board. Failure to cooperate fully in the examination process may result, in the Board's discretion, in the denial of the disability application. Further, should the member fail to appear at such time and place for scheduled examinations requested by the Board, he or she may be held 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 and two staff members appointed by him or her 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 the reason why benefits were denied as well as what additional action may be taken by the applicant.

4.2. Following Board approval of a disability retirement, an applicant shall be required to submit all required forms to the Board within six (6) months to commence their disability retirement. If the applicant fails to meet this requirement, the disability award shall terminate and the member shall be required to file a new application for disability retirement. All medical examination costs associated with the new application process will be 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. The applicant may, within sixty (60) days of receipt of the notice of denial from the Board, request an additional examination by another appropriate medical professional 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 162-2-6 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 a hearing officer who will make a complete and independent review of the disability application and then make recommendations to the Board. The hearing officer hired by the Board shall be an attorney who has a license to practice law in the State of West Virginia. The hearing officer shall conduct the hearing. Within sixty (60) days 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) days written notice of the hearing. At the hearing, the applicant may represent himself or

herself or may be represented by counsel or a representative and witnesses or written evidence may be submitted by both parties. 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. 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. The Board shall retain but not transcribe a stenographic recording of the hearing which is the official record of the hearing. 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. 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. 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 applicant also has the right to propose a final order.

§162-2-7. Other Appeals.

7.1. Any other type of appeal other than for disability retirement benefits shall be considered by the Board's staff of the Consolidated Public Retirement Board. If the Board's staff does not believe that the request should be granted, 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. If the applicant appeals the decision of the staff, the staff shall refer the appeal to the hearing officer hired by the Board. Within sixty (60) days of the 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) days written notice of the hearing. The applicant may represent himself or herself or may be represented by counsel or another representative and witnesses or written evidence may be submitted by both parties at this hearing. 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. 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. The Board shall retain but not transcribe a stenographic recording of the hearing which is the official record of the hearing. The hearing officer shall within sixty (60) days of receiving all documents prepare formal finding stating the reasons for the findings. The hearing officer shall prepare a final recommendation in clear language, and noting all evidence considered. Thereafter, the finding and recommendation of the hearing officer shall be presented at the next regularly scheduled meeting of the Consolidated Public Retirement Board. The Board's staff shall notify the applicant of the date, time, and place that the appeal will be acted upon by the Board. The applicant also has the right to propose and submit a final order for consideration by the Board. The Board, in open session, shall then make a decision on the findings and recommendation of the hearing officer and accept the recommendation unless the Board finds that the hearing officer has abused his or her discretion in the findings, or the findings are contrary to law.

§162-2-8. Appeal Denied.

8.1. If an appeal is denied in whole or in part by the Board pursuant to Sections 162-2-6 and 162-2-7 of this rule (a final decision), 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

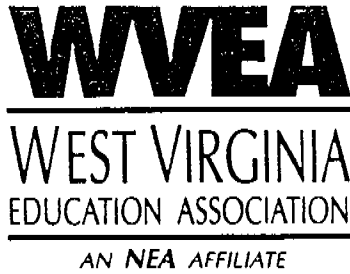
Kanawha County pursuant to W. Va. Code §29A-5-4.

§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 disability benefit shall be suspended until the statement or financial information are filed. If the refusal continues for sixty (60) days, the recipient's right to the disability benefit shall be terminated.

§162-2-10. Errors.

~~9.1.~~ 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.



Tom Lange, President
David A. Haney, Executive Director

June 9, 2003

Teresa Robertson, Acting Executive Director
West Virginia Consolidated Public Retirement Board
Capitol Complex, Building 5, Suite 1000
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Director Robertson:

The following is a comment related to proposed amendments to Title 162 of the *West Virginia Code of State Regulations* related to the West Virginia Consolidated Public Retirement Board. The comment may not relate directly to an underlined portion of the bill, however, I understand that the Board indicated at the last meeting that comments to other sections would be entertained.

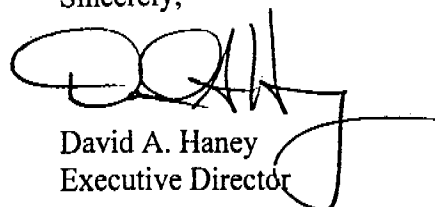
§162-2-3 and §162-2-4

We recommend establishing a rebuttable presumption that a disability applicant is disabled for purposes of the CPRB statutes if he/she has been found to be disabled pursuant to the social security rules.

The definition of disability found in §162-2-3.2 is nearly identical to that found in the social security regulations. Therefore, a finding of disability under those regulations denotes that medical evidence of disability meets the disability standard for both systems. Substantial financial savings to the CPRB can be realized if these applicants are presumed to be disabled by the committee set out in §16-2-4 rather than being routinely sent for medical examination at Board expense. The presumption would only apply if the applicant had previously applied for social security and nothing in the regulation should require the applicant to apply for social security prior to applying for retirement disability. By making the presumption rebuttable, the Board is protected. If there is reason to believe that the applicant would not qualify for disability, he/she could be referred for medical examination.

Thank you for your attention to these comments made on behalf of the members of the West Virginia Education Association. If you have any questions or need additional information, please let me know.

Sincerely,



David A. Haney
Executive Director

JUN 16 2003

DAH/b

State of West Virginia
Consolidated Public Retirement Board

Capitol Complex, Building 5, Room 1000, Charleston, West Virginia 25305-0720
Telephone: 304-558-3570 or 800-654-4406 Fax: 304-558-6337

COMMENTS RECEIVED
TITLE 162, SERIES 2

The West Virginia Consolidated Public Retirement Board (Board) received public comment from David A. Haney, Executive Director, West Virginia Education Association. Mr. Haney suggested incorporating language to set forth establishing a rebuttable presumption that a disability applicant is disabled for the purposes of the CPRB statutes if he/she has been found to be disabled pursuant to the Social Security Administration rules.

Board Members and Staff agree that substantial financial savings can be realized by the Board if these applicants are presumed to be disabled by the Board committee rather than being routinely sent for medical examinations at Board expense. Should there be reason to believe that the applicant would not qualify for disability under CPRB statutes, he/she would be referred for medical examination. Additional language has been incorporated into the final proposed rule at 3.2.a. relating to members of the Public Employee Retirement System, and at 3.2.b. relating to members of the Teachers' Retirement System to accomplish this recommendation.