

FILED

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

2003 OCT 30 A 11: 07

**SERIES 2
BENEFIT DETERMINATION AND APPEAL**

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 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 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 submit all required forms to the Board within six (6) months to commence his or her disability retirement. 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. 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 Board shall suspend the disability benefit until the statement or financial information are filed. If the refusal continues for sixty (60) days, the Board shall terminate the recipient's right to the disability benefit.

§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.