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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 459
OREGON PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

09/24/2021 9:18 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Revision to disability rules to clarify PERS' standards and practices; provide improved guidance to members.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/25/2021 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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Filed By:
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Rules Coordinator

NEED FOR THE RULE(S):

Revision to disability rules to clarify PERS' standards and practices, and to provide improved guidance to members applying for a disability retirement allowance (Tier 1 and 2) or disability benefit (OPSRP).

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

ORS 238.320 - 238.345, ORS 238.650, ORS 238A.235, ORS 238A.450

These documents are available on the Internet at: https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx

FISCAL AND ECONOMIC IMPACT:

There are no discrete costs attributable to the rules.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

None.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The rules do not affect small businesses and therefore small businesses were not involved in the development of the rules.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

A public hearing will be held and the PERS Board solicits input on rules from any interested or affected parties.

RULES PROPOSED:

459-015-0001, 459-015-0005, 459-015-0010, 459-015-0025, 459-015-0050, 459-076-0001, 459-076-0005, 459-076-0010, 459-076-0025, 459-076-0050

AMEND: 459-015-0001

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. Staff have identified several common issues in the disability application and periodic review processes where improved clarity in the rules would provide better guidance to members regarding PERS' standards and practices. These include clarifications regarding how and when PERS treats business income as earned income; how PERS calculates years of service when evaluating disability eligibility; how a member's receipt of unemployment benefits impacts disability eligibility; and the medical and financial information PERS requires during a member's periodic review.

CHANGES TO RULE:

459-015-0001

Definitions ¶¶

The words and phrases used in this division have the same meaning given them in ORS Chapter 238 and OAR 459-005-0001. Additional terms are defined as follows unless the context requires otherwise.¶¶

(1) "Any work for which qualified" means a job, not necessarily the last or usual job, which the applicant for a disability retirement allowance:¶¶

(a) Is physically and psychologically capable of performing.; and¶¶

(b) Has, or may obtain with reasonable training, the knowledge, skills and abilities, to perform the job.;¶¶

(2) "Certified vocational consultant" means a person who satisfies the criteria set forth under either of the following:¶¶

(a) A Master's Degree in vocational rehabilitation, and one year of experience in performing vocation evaluations or developing individualized return-to-work plans; or a Bachelor's Degree and two years of such experience. All degrees must have been earned at an accredited institution; or¶¶

(b) Accredited as a Certified Rehabilitation Counselor (CRC) by the Commission on Rehabilitation Counselor Certification; as a Certified Disability Management Specialist (CDMS) by the Certification of Disability Management Specialists Commission; or a Certified Vocational Evaluation Specialist (CVE) or a Certified Work Adjustment Specialist (CWA) by the Commission on Certification of Work Adjustment and Vocational Evaluation Specialists.¶¶

(3) "Confidential information" means information of a personal nature such that disclosure would constitute an unreasonable invasion of privacy as defined by state law.¶¶

(4) "Date an application for disability retirement is filed" means the receipt date as determined pursuant to OAR 459-005-0220.¶¶

(5) "Date of disability" means the later of:¶¶

(a) The date an active member ceased to work because of inability to perform any work for which qualified due to injury or disease; or¶¶

(b) The date an inactive member became unable to perform any work for which qualified provided such inability occurred within six months after the date of separation from service.¶¶

(6) "Date of separation from service" means the later of: the last day worked or the last day of paid leave with a

PERS participating employer.¶

(7) "Date of termination" means the date a member terminates from employment such that an employee/employer relationship no longer exists.¶

(8) "Earned income" means income that includes, but is not limited to:¶

(a) Salary or wages received as an employee;¶

(b) Self-employment income from:¶

(A) Services industry;¶

(B) Sales;¶

(C) Assembly or manufacturing;¶

(D) Consulting;¶

(E) Property management;¶

(F) Gambling, other than income from sweepstakes, lotteries, bingo, keno, or slot machines;¶

(G) Hobby income; or¶

(H) Book advances.¶

(c) "Earned income" does not include:¶

(A) Investment income;¶

(B) Rent; and¶

(C) Royalties.¶

(d) Earned income is deemed to be received by the member on the date it is issued by the payer, except retroactive payments included in ORS 238.008 shall be deemed to be received by the member during the period for which the payment is allocated.¶

(e) Earned income includes the net profits of any business entity owned solely or jointly by a member and for which the member materially participates in the business, as defined by the Internal Revenue Service under 26 CFR 1.469-5T, as in effect on July 1, 2021.¶

(9) "Effective date of disability retirement" means the first day of the month following the date of disability in which all of the following has been met:¶

(a) The member is paid no salary from a participating employer, and¶

(b) The member does not receive paid leave from a participating employer except for any lump sum payment for accrued vacation leave or compensatory time.¶

(10) "Extended duration" means a period of not less than 90 consecutive calendar days, unless the disability is expected to result in the death of the disabled member in less than 90 days.¶

(11) "Granted service" means that portion of creditable service used solely to calculate a disability retirement allowance under ORS 238.320 that is not performed or earned.¶

(12) "Independent medical exam" means an exam or exams conducted by a physician chosen by PERS for purposes other than treatment which results in the issuance of a report or reports based on those exams, giving an opinion regarding the claimed injury or disease.¶

(13) "Material contributing cause" means the efficient, dominant, and proximate cause of the disability, without which the member would not be disabled.¶

(14) "Monthly salary" means "salary" as defined in ORS 238.005 that is earned in the last full calendar month of employment, and includes employer payments under ORS 238A.335 and differential wage payments as defined in OAR 459-005-0001.¶

(a) Retroactive payments or payments made due to clerical errors, paid in accordance with ORS 238.005, are allocated to the period the salary was earned or should have been earned.¶

(b) Payments of salary paid within 31 days of separation are allocated to the period the salary was earned and should be considered as paid on the last date of employment.¶

(15) "Monthly salary received" means the greater of the monthly salary paid for the last full calendar month of:¶

(a) Employment before the date of disability; or¶

(b) Differential wage payments made before the date of disability. This subsection is effective January 1, 2009.¶

(16) "Normal retirement age" means the age at which a member can retire without a reduced benefit as set forth

under ORS 238.005 and 238.280.¶

(17) "Performance of duty" means whatever an employee may be directed, required or reasonably expected to do in connection with his or her employment, and not solely the duties particular to his or her position.¶

(18) "Periodic review" means a review of a member receiving a disability retirement allowance to determine whether or not a continued allowance is warranted.¶

(19) ~~"Physician" means a medical doctor~~ "capacity evaluation" means a comprehensive and objective evaluation performed by a physician, physical therapist, or occupational therapist to determine a member's physical or functional capacity to perform work. The evaluation may include an analysis of the member's ability to perform a specified job based on a position description and the member's abilities or limitations.¶

(20) "Physician" means a doctor of medicine, a doctor of osteopathy, a doctor of oral surgery, a chiropractic doctor, a naturopathic doctor, a doctor of podiatric medicine, or a doctor of psychology practicing only within the purview of their license issued by the designated authority of a state.¶

~~(201)~~ "Pre-existing condition" means a condition that was not sustained in actual performance of duty in a qualifying position with a participating employer.¶

~~(212)~~ "Protected health information" means health information created or received by a health care provider, health plan, or health care clearinghouse, where an individual has a reasonable belief that the information can identify the individual, which relates to:¶

(a) The past, present, or future physical or mental health of an individual;¶

(b) The provision of health care to an individual; or¶

(c) The past, present, or future payment for the provision of health care to an individual.¶

~~(223)~~ "Similar in compensation" means salary or other earned income, excluding overtime, equaling at least 80% of the monthly salary.¶

~~(234)~~ "Total disability" means the inability to perform any work for which qualified for an extended duration due to physical or mental incapacitation.¶

~~(245)~~ "Training or vocational rehabilitation program" means a comprehensive, coordinated program, usually state or federally funded, to train and assist individuals with disabilities in securing gainful employment commensurate with their abilities and capabilities.¶

~~(256)~~ "Vocational evaluation" means an evaluation conducted by a certified vocational consultant, to determine the ability of an applicant to perform any work for which they are qualified.¶

~~(267)~~ "Work related stress" means conditions or disabilities resulting from, but not limited to:¶

(a) Change of employment duties;¶

(b) Conflicts with supervisors;¶

(c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;¶

(d) Relationships with supervisors, coworkers, or the public;¶

(e) Specific or general job dissatisfaction;¶

(f) Work load pressures;¶

(g) Subjective perceptions of employment conditions or environment;¶

(h) Loss of job or demotion for whatever reason;¶

(i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;¶

(j) Objective or subjective stresses of employment; or¶

(k) Personnel decisions.

Statutory/Other Authority: ORS 238.650

Statutes/Other Implemented: ORS 238.320 - 238.345

AMEND: 459-015-0005

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. Staff have identified several common issues in the disability application and periodic review processes where improved clarity in the rules would provide better guidance to members regarding PERS' standards and practices. These include clarifications regarding how and when PERS treats business income as earned income; how PERS calculates years of service when evaluating disability eligibility; how a member's receipt of unemployment benefits impacts disability eligibility; and the medical and financial information PERS requires during a member's periodic review.

CHANGES TO RULE:

459-015-0005

Eligibility for Disability Retirement Allowances ¶

- (1) A member must be totally, not partially, disabled and unable to perform any work for which qualified for an extended duration to be eligible for a disability retirement allowance. ¶
- (2) In determining a member's eligibility for a disability retirement allowance, the burden of proof is upon the applicant. The Board is not required to prove whether the applicant is or is not eligible for a disability retirement allowance. ¶
- (3) Eligibility requirements for duty disabilities. ¶
 - (a) To be eligible for a duty disability a member must prove: ¶
 - (A) The mental or physical incapacitation arose out of and in the course of duty and was not intentionally self-inflicted; and ¶
 - (B) The on the job injury must be the material contributing cause of the disability even if the member has a pre-existing condition. ¶
 - (b) For work related stress to be considered the material contributing cause of the disability all of the following criteria must be met: ¶
 - (A) The employment conditions producing the work-related stress exist in a real and objective sense; ¶
 - (B) The employment conditions producing the work-related stress are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles; ¶
 - (C) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community; and ¶
 - (D) There is evidence that the work-related stress arose out of and in the course of employment. ¶
 - (4) Eligibility requirements for non-duty disabilities. A member applying for non-duty disability retirement must have a minimum of 10 years of employment in a PERS qualifying position ~~as~~. Years of employment are calculated pursuant to ORS 238.320(6) as follows: ¶
 - (a) Members with no prior service credit under ORS 238.442 receive: ¶
 - (A) One year of employment for each 12-month period or major fraction thereof, calculated from the date on which the member begins the six-month waiting period required for establishing membership under ORS 238.015 to the date of disability; and ¶
 - (B) Up to 90 days for sick leave used after the date of disability. No other leave of absence after the date of disability will count toward years of employment. ¶
 - (b) Members with prior service credit under ORS 238.442 receive: ¶
 - (A) One year of employment for each year of prior service credit; and ¶
 - (B) One year of employment for any minor fraction of a year of prior service, if continuous as certified by the

employer and for which no prior service credit was granted; and¶

(C) One year of employment for each 12-month period or major fraction thereof, calculated from the date on which membership is established in the system to the date of disability; and¶

(D) Up to 90 days for sick leave used after the date of disability. No other leave of absence after the date of disability will count toward years of employment. ¶

(5) A member's disability retirement allowance shall be calculated based on: ¶

(a) Creditable service; and ¶

(b) Granted service if the member had not attained: ¶

(A) Age 55 if the last qualifying position was as a police officer or a firefighter. ¶

(B) Age 58 if the last qualifying position was as other than a police officer or firefighter. ¶

(6) Granted service is: ¶

(a) Not included in the calculation of increased benefits payable under ORS 238.364. ¶

(b) Included in the calculation of increased benefits payable under ORS 238.366. ¶

(7) Termination of membership. Disability retirement allowances are available only to PERS members. Former PERS members who have terminated their membership pursuant to ORS 238.095 are not eligible to receive PERS disability retirement allowances.

Statutory/Other Authority: ORS 238.650

Statutes/Other Implemented: ORS 238.320 - 238.345

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. The proposed revisions also include two notable substantive changes to PERS' disability standards. First, staff have proposed that the specialist requirement for mental and emotional disorders in OAR 459-015-0010 and 459-076-0010 be modified to require either a supportive psychiatrist or doctor of psychology. The current standard requires a second supportive physician when the mental health provider is a psychologist. In many cases, the second physician does not participate in the member's mental health treatment and thus the standard adds complexity for members but is not particularly useful in evaluating the member's disabling condition. The proposed revision reduces the complexity for members while still complying with PERS' statutory requirements for establishing eligibility.

CHANGES TO RULE:

459-015-0010

Criteria for Granting and Denying Disability Retirement Allowances ¶¶

(1) PERS shall determine eligibility for disability retirement allowances based on an applicant's capacity and qualifications as set forth below.¶¶

(2) Medical documentation is required by PERS. Each disability retirement applicant shall supply any treating or consulting physician's examination report or other medical information requested by PERS. PERS may base its determination on either a treating or consulting physician's medical examination report or have the applicant examined by one or more physicians selected by PERS, or both.¶¶

(23) All claims of a disability must be supported by at least one physician's report, resulting from a ~~phys~~medical examination, documenting how the injury or disease incapacitates the member. A physician assistant's examination report will be accepted as a physician's report when signed by a supervising physician who has examined the member.¶¶

(34) In addition, a disability retirement applicant shall be required to furnish the following:¶¶

(a) For claims of mental or emotional disorder, at least one report ~~of examination by a psychiatrist or at least one report of evaluation by a psychologist when accompanied by a report of physical examination by a treating or consulting physician~~ by a treating or consulting psychiatrist or doctor of psychology;¶¶

(b) For claims of orthopedic injury or disease, at least one report of a treating or consulting orthopedic or physical medicine and rehabilitation specialist;¶¶

(c) For claims of neurological or neurosurgical injury or disease, at least one report of a treating or consulting neurologist or neurosurgeon;¶¶

(d) For claims of fibromyalgia, at least one ~~report of a treating or consulting rheumatologist~~ documented diagnosis by a rheumatologist, and at least one report of a treating or consulting rheumatologist or physical medicine and rehabilitation specialist; and¶¶

(e) Any other specialized physician's report that PERS deems necessary.¶¶

(45) To demonstrate that he or she is unable to perform any work for which qualified, as defined in OAR 459-015-0001(1), the applicant shall document how the injury or disease incapacitates the applicant. The standard is subjective (that is, whether the applicant is actually incapacitated) not objective (that is, whether a "normal" member would have been incapacitated by the same events).¶¶

(a) In determining what work for which a member is qualified, the following factors shall be considered:¶¶

(A) Previous employment experience;¶¶

(B) Formal education;¶¶

(C) Formal training;¶¶

(D) Transferable skills;¶¶

(E) Age; and ¶

(F) Physical or mental impairment. ¶

(b) In determining what work for which a member is qualified, PERS may request, at PERS' expense, a vocational evaluation be done by a vocational consultant who is fully certified as set forth in OAR 459-015-0001(2). ¶

(c) The inability of the applicant to perform the duties of his or her last job, in itself, does not satisfy the criterion. ¶

~~(5d)~~ An applicant's receipt of weekly unemployment insurance benefits after the date of disability shall create a rebuttable presumption that the member was able, available, and willing to perform any work for which qualified during the week for which the applicant received the benefits. ¶

~~(6)~~ When there is a dispute among medical experts, more weight will be given to those medical opinions that are both well-reasoned and based on complete information. ¶

~~(6Z)~~ The Board may deny any application or discontinue any disability retirement allowance if an applicant: ¶

(a) Refuses to submit to an independent medical or vocational examination; or ¶

(b) Refuses to submit to any medical examination or supply a completed application or review form.

Statutory/Other Authority: ORS 238.650

Statutes/Other Implemented: ORS 238.320, ORS 238.335

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. The proposed revisions also include substantive change to OAR 459-015-0025 and OAR 459-076-0025 to expand PERS' use of independent medical examinations, physical capacity evaluations, and vocational evaluations. Staff frequently receive reports that the disability application process can impose financial barriers and hardship for members. This is most often because the member's health insurance will not cover an examination conducted for purposes of evaluating disability eligibility, as opposed to an examination related to medical treatment. Additionally, members who reside in rural areas frequently report an inability to see an appropriate specialist because there are no such specialists in their area. Staff are also increasingly encountering an issue where physicians of certain hospital systems simply refuse to complete PERS' disability forms or provide an opinion as to a member's disability. The revised rule would provide PERS with discretion to arrange independent examinations and evaluations when these situations arise.

CHANGES TO RULE:

459-015-0025

Application Processing - Independent Examinations and Appeals ¶

(1) Following the timely filing of a completed application, PERS may, at its discretion, request an independent medical exam, physical capacity evaluation, or a vocational evaluation. If PERS requests one or more of these exams or evaluations, PERS will pay the reasonable associated expenses. ¶

~~(a) For independent medical exam~~ PERS is not required or obligated to request any examination or evaluation. The burden of proof for eligibility for a disability retirement allowance is upon the applicant, whether or not PERS requests any examination or evaluation. Situations in which PERS may exercise its discretion to request an examination or evaluation include, but are not limited to: ¶

(A) When PERS receives conflicting opinions from two physicians of the same specialty; ¶

(B) When an applicant cannot afford to see a physician of the appropriate specialty under OAR 459-015-0010(4) because; ¶

(i) The applicant does not have health insurance; ¶

(ii) The examination or evaluation will not be covered by the applicant's health insurance; or ¶

(iii) No such physician practices medicine within 50 miles of the applicant's home and the cost of traveling to such a physician would create a financial hardship for the applicant. ¶

(C) When an applicant has been examined by a physician of the appropriate specialty under OAR 459-015-0010(4), but the physician declines to provide an opinion to PERS as to the applicant's claimed disability. ¶

(b) For independent medical exams and physical capacity evaluations, PERS shall inform the applicant in writing and postmarked not less than ten days prior to a scheduled examination or evaluation of the identity of the physician(s) or person or entity selected to examine or evaluate the applicant, together with location, date and time. ¶

~~(b)~~ (c) For vocational evaluations, the vocational consultant or locator service shall inform the applicant of the location, date and time of the scheduled examination. ¶

~~(e)~~ (d) If the applicant fails to meet the scheduled appointment or fails to reschedule the examination within five days of notification, PERS will not reschedule an examination at PERS' expense unless the applicant can demonstrate good cause for having failed to meet the scheduled appointment or reschedule the appointment as required. ¶

~~(e)~~ (e) Good cause includes, but is not limited to: ¶

(A) Physical or mental incapacitation preventing the member from meeting or rescheduling the examination; ¶

(B) Failure of PERS or the vocational consultant or locator service to send the member notice as described above; or ¶

(C) A death in the member's immediate family.¶

(ef) Good cause does not include:¶

(A) A member's refusal to attend the scheduled appointment;¶

(B) A member's failure to meet the appointment with no reason provided; or¶

(C) A member's failure to make appropriate transportation arrangements.¶

(2) When PERS requires an applicant to travel to be examined by a physician, vocational consultant, or other professional, PERS will reimburse the applicant's reasonable transportation costs based on the least costly alternative and on availability. Travel by private vehicle shall be compensated at the rate applicable to travel by unrepresented state employees on state business. Transportation by taxi, bus, rail, or other public carrier shall be paid only upon presentation of receipts from the providers. Lodging and subsistence shall be allowed only when an overnight stay is necessary and shall be paid at the rate applicable to unrepresented state employees traveling on state business. Reimbursements will be reduced by the amount of any penalty assessed by PERS because of a member's failure to meet a scheduled appointment.¶

(3) In the event a member fails to meet a scheduled appointment in accordance with section (1) of this rule, and PERS is assessed a penalty by the service provider for the failure to meet the scheduled appointment, the disability applicant shall bear the cost of the penalty as follows:¶

(a) If the disability application is not approved, by making direct payment to the service provider who assessed the penalty; or¶

(b) If the disability application is approved:¶

(A) By making direct payment to the service provider who assessed the penalty; or¶

(B) By having the amount of the penalty deducted from the monthly disability retirement allowance, as provided for under ORS 238.715, payable to the member until the invoice is satisfied.¶

(4) The Director, or the Director's designee, is hereby authorized to approve or deny a disability retirement application. Upon receipt and review of all necessary documentation, staff shall present applicant's claim to the Director, or the Director's designee, with a recommendation to approve or to deny a disability retirement allowance. The Director, or the Director's designee, may accept or reject the staff's recommendation, or refer the application back to staff for further documentation and review.¶

(a) If the Director, or the Director's designee, approves a disability claim, the staff will notify the applicant and the applicant's employer of such approval.¶

(b) If the disability claim is denied, the staff shall issue an Intent to Deny letter by regular and certified mail, return receipt requested. The denial letter shall advise the applicant that additional information to substantiate the claim, or a request for an extension of 30 days to present additional information, may be submitted to the staff in writing within 30 days of the date of the Intent to Deny letter.¶

(c) An applicant who is otherwise eligible for a service retirement allowance shall have 30 days from the date of the Intent to Deny letter to apply for a service retirement allowance and be entitled to establish an effective date of service retirement for the first of the month that the application for disability retirement allowance was received by PERS.¶

(d) The application for a service retirement allowance as provided for in subsection (c) of this section shall not preclude a disability applicant from requesting a contested case hearing under OAR 459-015-0030.¶

(5) Following the issuance of an Intent to Deny letter, staff will review any additional information which is submitted within 30 days from the issuance of the Intent to Deny letter.¶

(a) If the additional information results in a recommendation to approve the application, staff shall resubmit the application to the Director, or the Director's designee, with the recommendation.¶

(b) If the additional information does not result in a recommendation to approve the application, PERS will issue a final denial letter by regular and certified mail, return receipt requested.¶

(c) If no additional information is received, PERS will issue a final denial letter by regular and certified mail, return receipt requested.¶

(6) The final denial letter will provide the applicant with notification of the right to request a contested case hearing as provided for in OAR 459-015-0030 and 459-001-0035.¶

(7) PERS will notify the most recent employer of the approval or the denial of an application for a disability retirement allowance, a request for review of the Director's determination, and the Director's final action. Such notification will not contain any confidential information as defined in OAR 459-015-0001(3).

Statutory/Other Authority: ORS 238.650

Statutes/Other Implemented: ORS 238.320, ORS 238.335

AMEND: 459-015-0050

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. Staff have identified several common issues in the disability application and periodic review processes where improved clarity in the rules would provide better guidance to members regarding PERS' standards and practices. These include clarifications regarding how and when PERS treats business income as earned income; how PERS calculates years of service when evaluating disability eligibility; how a member's receipt of unemployment benefits impacts disability eligibility; and the medical and financial information PERS requires during a member's periodic review.

CHANGES TO RULE:

459-015-0050

Periodic Reviews ¶¶

(1) Members receiving a disability retirement allowance are subject to periodic reviews of their disabled status until the member reaches normal retirement age or staff determines that periodic reviews are no longer warranted. ¶¶

(2) Periodic reviews will be used to determine that continued disability retirement allowances are warranted. In recommending the continuance or discontinuance of a disability retirement allowance, PERS will follow the criteria established under OAR 459-015-0005 for the original approved disabling condition or a new medical condition. PERS will also consider the Return to Work provisions of ORS 238.330(3), 238.340, and OAR 459-015-0045. ¶¶

(3) For duty disability, the periodic review will not revisit the original determination that the injury or disease was duty caused, unless there is evidence of misrepresentation or fraud. ¶¶

(4) PERS will establish review dates for each member subject to a periodic review depending on type of disability, extent of disability, ~~and~~ medical reports, and earned income unique to each individual case. ¶¶

(a) The reviews may be medical or vocational in nature, or both. ¶¶

(b) Upon review, PERS may accept or require: ¶¶

(A) New treating or consulting physician or specialist reports; ¶¶

(B) Updated physician or specialist reports; ¶¶

(C) Independent medical or vocational examinations; or ¶¶

(D) Employment and wage information, including but not limited to, tax returns or information from the State Employment Department. ¶¶

(c) PERS may immediately discontinue the disability retirement allowance of any person who ~~refuse~~fails to provide current medical evidence; submit requested employment, wage, income, or tax information; or refuses to submit to an medical or vocational examination. ¶¶

(A) If the disability claim is discontinued, the staff shall issue an Intent to Discontinue letter by regular and certified mail, return receipt requested. The discontinuation letter shall advise the applicant that additional information to substantiate the claim, or a request for an extension of 30 days to present additional information, may be submitted to the staff in writing within 30 days of the date of the Intent to Discontinue letter. ¶¶

(B) Following the issuance of an Intent to Discontinue letter, staff will review any additional information which is submitted within 30 days. ¶¶

(i) If the additional information results in a recommendation to approve the application, staff shall resubmit the application to the Director, or the Director's designee, with the recommendation. ¶¶

(ii) If the additional information does not result in a recommendation to approve the application, PERS will issue a final discontinuation letter by regular and certified mail, return receipt requested. ¶¶

(C) If no additional information is received within 30 days, PERS will issue a final discontinuation letter by regular

and certified mail, return receipt requested.¶

(D) The final discontinuation letter will provide the applicant with notification of the right to request a contested case hearing as provided for in OAR 459-015-0030 and 459-001-0035.¶

(5) The member has the burden to prove continuing eligibility for a disability retirement allowance.¶

(6) The Director, or the Director's designee, may approve or deny the continuance of a disability retirement allowance.

Statutory/Other Authority: ORS 238.650

Statutes/Other Implemented: ORS 238.320, ORS 238.335

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. Staff have identified several common issues in the disability application and periodic review processes where improved clarity in the rules would provide better guidance to members regarding PERS' standards and practices. These include clarifications regarding how and when PERS treats business income as earned income; how PERS calculates years of service when evaluating disability eligibility; how a member's receipt of unemployment benefits impacts disability eligibility; and the medical and financial information PERS requires during a member's periodic review.

CHANGES TO RULE:

459-076-0001

Definitions ¶¶

The words and phrases used in this division have the same meaning given them in ORS Chapter 238A and OAR 459-070-0001. Additional terms are defined as follows unless the context requires otherwise.¶¶

(1) "Any work for which qualified" means a job, not necessarily the last or usual job, which the applicant for disability benefits:¶¶

(a) Is physically and psychologically capable of performing; and¶¶

(b) Has, or may obtain with reasonable training, the knowledge, skills and abilities, to perform the job.¶¶

(2) "Certified vocational consultant" means a person who satisfies the criteria set forth under either of the following:¶¶

(a) A Master's Degree in vocational rehabilitation, and one year of experience in performing vocation evaluations or developing individualized return-to-work plans; or a Bachelor's Degree and two years of such experience. All degrees must have been earned at an accredited institution; or¶¶

(b) Accredited as a Certified Rehabilitation Counselor (CRC) by the Commission on Rehabilitation Counselor Certification; as a Certified Disability Management Specialist (CDMS) by the Certification of Disability Management Specialists Commission; or a Certified Vocational Evaluation Specialist (CVE) or a Certified Work Adjustment Specialist (CWA) by the Commission on Certification of Work Adjustment and Vocational Evaluation Specialists.¶¶

(3) "Confidential information" means information of a personal nature such that disclosure would constitute an unreasonable invasion of privacy as defined by state law.¶¶

(4) "Date an application for a disability benefit is filed" means the receipt date as determined pursuant to OAR 459-005-0220.¶¶

(5) "Date of disability" means the date an active member ceased to work because of inability to perform any work for which qualified due to injury or disease.¶¶

(6) "Date of separation from service" means the later of: the last day worked or the last day of paid leave with a PERS participating employer.¶¶

(7) "Date of termination" means the date a member terminates from employment such that an employee/employer relationship no longer exists.¶¶

(8) "Earned income" includes, but is not limited to:¶¶

(a) Salary or wages received as an employee;¶¶

(b) Self-employment income from:¶¶

(A) Services industry;¶¶

(B) Sales;¶¶

(C) Assembly or manufacturing;¶¶

(D) Consulting;¶¶

- (E) Property management;¶
- (F) Gambling, other than income from sweepstakes, lotteries, bingo, keno, or slot machines;¶
- (G) Hobby income; or¶
- (H) Book advances.¶
- (c) "Earned income" does not include:¶
 - (A) Investment income;¶
 - (B) Rent; and¶
 - (C) Royalties.¶
- (d) Earned income is deemed to be received by the member on the date it is issued by the payer, except retroactive payments included in ORS 238.008 shall be deemed to be received by the member during the period for which the payment is allocated.¶
- (e) Earned income includes the net profits of any business entity owned solely or jointly by a member and for which the member materially participates in the business, as defined by the Internal Revenue Service under 26 CFR 1.469-5T, as in effect on July 1, 2021.¶
- (9) "Effective date of disability benefit" means the first day of the month following the date of disability, in which:¶
 - (a) The member is paid no salary from a participating employer; and¶
 - (b) The member does not receive paid leave from a participating employer, except for any lump sum payment for accrued vacation leave or compensatory time.¶
- (10) "Extended duration" means a period of not less than 90 consecutive calendar days unless the disability is expected to result in the death of the disabled member in less than 90 days.¶
- (11) "Independent medical exam" means an exam or exams conducted by a physician chosen by PERS for purposes other than for treatment which results in the issuance of a report or reports based on those exams, giving an opinion regarding the claimed injury or disease.¶
- (12) "Material contributing cause" means the efficient, dominant, and proximate cause of the disability, without which the member would not be disabled.¶
- (13) "Monthly salary" means salary as defined in ORS 238A.005 that is earned in the last full calendar month of employment and includes a differential wage payment, as defined in OAR 459-005-0001.¶
 - (a) Retroactive payments or payments made due to clerical errors, paid in accordance with ORS 238A.005, are allocated to the period the salary was earned or should have been earned.¶
 - (b) Payments of salary paid within 31 days of separation are allocated to the period the salary was earned and should be considered as paid on the last date of employment.¶
- (14) "Monthly salary received" means the greater of the salary paid for the last full calendar month of:¶
 - (a) Employment before the date of disability; or¶
 - (b) Differential wage payments made before the date of disability. This subsection is effective January 1, 2009.¶
- (15) "Performance of duty" means whatever an employee may be directed, required or reasonably expected to do in connection with his or her employment, and not solely the duties particular to his or her position.¶
- (16) "Periodic review" means a review of a member receiving a disability benefit to determine whether or not a continued benefit is warranted.¶
- ~~(17) "Physician" means a medical doctor.~~ capacities evaluation" means a comprehensive and objective evaluation performed by a physician, physical therapist, or occupational therapist to determine a member's physical or functional capacity to perform work. The evaluation may include an analysis of the member's ability to perform a specified job based on a position description and the member's abilities or limitations.¶
- (18) "Physician" means a doctor of medicine, a doctor of osteopathy, a doctor of oral surgery, a chiropractic doctor, a naturopathic doctor, a doctor of podiatric medicine, or a doctor of psychology practicing only within the purview of their license issued by the designated authority of a state.¶
- (189) "Pre-existing condition" means a condition that was not sustained in actual performance of duty in a qualifying position with a participating employer.¶
- ~~(1920)~~ "Protected health information" means health information created or received by a health care provider, health plan, or health care clearinghouse, where an individual has a reasonable belief that the information can

identify the individual, which relates to:¶¶

(a) The past, present, or future physical or mental health of an individual;¶¶

(b) The provision of health care to an individual; or¶¶

(c) The past, present, or future payment for the provision of health care to an individual.¶¶

(201) "Total disability" means the inability to perform any work for which qualified for an extended duration due to physical or mental incapacitation.¶¶

(212) "Vocational evaluation" means an evaluation conducted by a certified vocational consultant, to determine the ability of an applicant to perform any work for which they are qualified.¶¶

(223) "Work related stress" means conditions or disabilities resulting from, but not limited to:¶¶

(a) Change of employment duties;¶¶

(b) Conflicts with supervisors;¶¶

(c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;¶¶

(d) Relationships with supervisors, coworkers, or the public;¶¶

(e) Specific or general job dissatisfaction;¶¶

(f) Work load pressures;¶¶

(g) Subjective perceptions of employment conditions or environment;¶¶

(h) Loss of job or demotion for whatever reason;¶¶

(i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;¶¶

(j) Objective or subjective stresses of employment; or¶¶

(k) Personnel decisions.

Statutory/Other Authority: ORS 238A.450

Statutes/Other Implemented: ORS 238A.235

AMEND: 459-076-0005

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. Staff have identified several common issues in the disability application and periodic review processes where improved clarity in the rules would provide better guidance to members regarding PERS' standards and practices. These include clarifications regarding how and when PERS treats business income as earned income; how PERS calculates years of service when evaluating disability eligibility; how a member's receipt of unemployment benefits impacts disability eligibility; and the medical and financial information PERS requires during a member's periodic review.

CHANGES TO RULE:

459-076-0005

Eligibility for Disability Benefits ¶¶

- (1) ~~An active member~~ member who was an active member as of the date of disability must be totally, not partially, disabled and unable to perform any work for which qualified for an extended duration to be eligible for a disability benefit. ¶¶
- (2) A member with disabilities arising after the member's date of termination from a qualifying position(s) is not eligible for a disability benefit. ¶¶
- (3) In determining a member's eligibility for disability benefits, the burden of proof is upon the applicant. The Board is not required to prove whether the applicant is or is not eligible for disability benefits. ¶¶
- (4) Eligibility requirements for duty disabilities. ¶¶
 - (a) To be eligible for a duty disability a member must prove: ¶¶
 - (A) The mental or physical incapacitation arose out of and in the course of duty and was not intentionally self-inflicted; and ¶¶
 - (B) The on the job injury must be the material contributing cause of the disability, even if the member has a pre-existing condition. ¶¶
 - (b) For work related stress to be considered the material contributing cause of the disability all of the following criteria must be met: ¶¶
 - (A) The employment conditions producing the work related stress exist in a real and objective sense; ¶¶
 - (B) The employment conditions producing the work related stress are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles; ¶¶
 - (C) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community; and ¶¶
 - (D) There is evidence that the work related stress arose out of and in the course of employment. ¶¶
- (5) Eligibility requirements for non-duty disabilities. A member applying for non-duty disability benefits must meet the 10 or more years of service requirements pursuant to ORS 238A.235(2)(a) or (b). ¶¶
- (6) Termination of OPSRP membership. Disability benefits are available only to ~~active OPSRP Pension Program members~~. ~~Former OPSRP Pension Program members who have not terminated membership pursuant to ORS 238A.110 are not eligible to receive OPSRP disability benefit.~~ ¶¶
- (7) Return to work. If a member who is receiving a disability benefit becomes employed or receives earned income, the member's disability benefit will be terminated, effective the first of the month following employment or issuance of earned income. PERS will invoice the member for, or recover under ORS 238.715, any overpayment of benefits. ¶¶
- (8) PERS may contact other public or private agencies, such as the Oregon Employment Department, the Oregon

Department of Revenue, or the U.S. Internal Revenue Service to obtain employment information. ¶

(9) Upon request by PERS, a member must provide PERS with a copy of the member's federal income tax returns, together with copies of IRS forms W-2.

Statutory/Other Authority: ORS 238A.120, ORS 238A.450

Statutes/Other Implemented: ORS 238A.140, ORS 238A.235

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. The proposed revisions also include two notable substantive changes to PERS' disability standards. First, staff have proposed that the specialist requirement for mental and emotional disorders in OAR 459-015-0010 and 459-076-0010 be modified to require either a supportive psychiatrist or doctor of psychology. The current standard requires a second supportive physician when the mental health provider is a psychologist. In many cases, the second physician does not participate in the member's mental health treatment and thus the standard adds complexity for members but is not particularly useful in evaluating the member's disabling condition. The proposed revision reduces the complexity for members while still complying with PERS' statutory requirements for establishing eligibility.

CHANGES TO RULE:

459-076-0010

Criteria for Granting and Denying Disability Benefits ¶

(1) PERS shall determine eligibility for disability benefits based on an applicant's capacity and qualifications as set forth below.¶

(2) Medical documentation is required by PERS. Each disability benefit applicant shall supply any treating or consulting physician's examination report or other medical information requested by PERS. PERS may base its determination on either a treating or consulting physician's medical examination report or have the applicant examined by one or more physicians selected by PERS, or both.¶

(23) All claims of a disability must be supported by at least one physician's report, resulting from a ~~phys~~medical examination, documenting how the injury or disease incapacitates the member. A physician assistant's examination report will be accepted as a physician's report when signed by a supervising physician who has examined the member.¶

(34) In addition, a disability benefit applicant shall be required to furnish the following:¶

(a) For claims of mental or emotional disorder, at least one report of ~~examination by a psychiatrist or at least one report of evaluation by a psychologist when accompanied by a report of physical examination by a treating or consulting physician~~ a treating or consulting psychiatrist or doctor of psychology;¶

(b) For claims of orthopedic injury or disease, at least one report of a treating or consulting orthopedic or physical medicine and rehabilitation specialist;¶

(c) For claims of neurological or neurosurgical injury or disease, at least one report of a treating or consulting neurologist or neurosurgeon;¶

(d) For claims of fibromyalgia, at least one ~~report of a treating or consulting rheumatologist~~ documented diagnosis by a rheumatologist, and at least one report of a treating or consulting rheumatologist or physical medicine and rehabilitation specialist; and¶

(e) Any other specialized physician's report PERS deems necessary.¶

(45) To demonstrate that he or she is unable to perform any work for which qualified, as defined in OAR 459-076-0001(1), the applicant shall document how the injury or disease incapacitates the applicant. The standard is subjective (that is, whether the applicant is actually incapacitated) not objective (that is, whether a "normal" member would have been incapacitated by the same events).¶

(a) In determining what work for which a member is qualified, the following factors shall be considered:¶

(A) Previous employment experience;¶

(B) Formal education;¶

(C) Formal training;¶

(D) Transferable skills;¶

(E) Age; and ¶

(F) Physical or mental impairment. ¶

~~(b) In determining what work for which a member is qualified, PERS may request, at PERS' expense, a vocational evaluation be done by a vocational consultant who is fully certified as set forth in OAR 459-076-0001(2). ¶~~

(c) The inability of the applicant to perform the duties of his or her last job, in itself, does not satisfy the criterion. ¶

(5d) An applicant's receipt of weekly unemployment insurance benefits after the date of disability shall create a rebuttable presumption that the member was able, available, and willing to perform any work for which qualified during the week for which the applicant received the benefits. ¶

(6) When there is a dispute among medical experts, more weight will be given to those medical opinions that are both well-reasoned and based on complete information. ¶

(6Z) The Board may deny any application or discontinue any disability benefit if an applicant: ¶

(a) Refuse Fails to submit to an independent medical exam, physical capacity evaluation, or vocational examination; or ¶

(b) Refuse Fails to submit to any medical examination or supply a completed application or review form.

Statutory/Other Authority: ORS 238A.450

Statutes/Other Implemented: ORS 238A.235

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. The proposed revisions also include substantive change to OAR 459-015-0025 and OAR 459-076-0025 to expand PERS' use of independent medical examinations, physical capacity evaluations, and vocational evaluations. Staff frequently receive reports that the disability application process can impose financial barriers and hardship for members. This is most often because the member's health insurance will not cover an examination conducted for purposes of evaluating disability eligibility, as opposed to an examination related to medical treatment. Additionally, members who reside in rural areas frequently report an inability to see an appropriate specialist because there are no such specialists in their area. Staff are also increasingly encountering an issue where physicians of certain hospital systems simply refuse to complete PERS' disability forms or provide an opinion as to a member's disability. The revised rule would provide PERS with discretion to arrange independent examinations and evaluations when these situations arise.

CHANGES TO RULE:

459-076-0025

Application Processing - Independent Examinations and Appeals ¶

(1) Following the timely filing of a completed application, PERS may, at its discretion, request an independent medical exam, physical capacity evaluation, or a vocational evaluation. If PERS requests one or more of these exams or evaluations, PERS will pay the reasonable associated expenses. ¶

~~(a) For independent medical exam~~ PERS is not required or obligated to request any examination or evaluation. The burden of proof for eligibility for a disability benefit is upon the applicant, whether or not PERS requests any examination or evaluation. Situations in which PERS may exercise its discretion to request an examination or evaluation include, but are not limited to: ¶

(A) When PERS receives conflicting opinions from two physicians of the same specialty; ¶

(B) When an applicant cannot afford to see a physician of the appropriate specialty under OAR 459-076-0010(4) because; ¶

(i) The applicant does not have health insurance; ¶

(ii) The examination or evaluation will not be covered by the applicant's health insurance; or ¶

(iii) No such physician practices medicine within 50 miles of the applicant's home and the cost of traveling to such a physician would create a financial hardship for the applicant. ¶

(C) When an applicant has been examined by a physician of the appropriate specialty under OAR 459-076-0010(4), but the physician declines to provide an opinion to PERS as to the applicant's claimed disability. ¶

~~(b) For independent medical exams and physical capacity evaluations,~~ PERS will inform the applicant in writing and postmarked not less than ~~10~~ten days ~~before~~prior to a scheduled examination or evaluation, of the identity of the ~~physician(s)~~person or entity selected to examine or evaluate the applicant, together with location, date and time. ¶

~~(b)c~~ For vocational evaluations, the vocational consultant or locator service shall inform the applicant of the location, date and time of the scheduled examination. ¶

~~(ed)~~ If the applicant fails to meet the scheduled appointment or fails to reschedule the examination within five days of notification, PERS will not reschedule an examination at PERS' expense unless the applicant can demonstrate good cause for having failed to meet the scheduled appointment or reschedule the appointment as required. ¶

~~(de)~~ Good cause includes, but is not limited to: ¶

(A) Physical or mental incapacitation preventing the member from meeting or rescheduling the examination; ¶

(B) Failure of PERS or the vocational consultant or locator service to send the member notice as described above; or. ¶

(C) A death in the member's immediate family.¶

(ef) Good cause does not include:¶

(A) A member's refusal to attend the scheduled appointment;¶

(B) A member's failure to meet the appointment with no reason provided; or¶

(C) A member's failure to make appropriate transportation arrangements.¶

(2) When PERS requires an applicant to travel to be examined by a physician, vocational consultant, or other professional, PERS will reimburse the applicant's reasonable transportation costs based on the least costly alternative and on availability. Travel by private vehicle will be compensated at the rate applicable to travel by unrepresented state employees on state business. Transportation by taxi, bus, rail, or other public carrier will be paid only upon presentation of receipts from the providers. Lodging and subsistence will be allowed only when a stop-over is necessary and will be paid at the rate applicable to unrepresented state employees traveling on state business. Reimbursements will be reduced by the amount of any penalty assessed PERS because of a member's failure to meet a scheduled appointment.¶

(3) In the event a member fails to meet a scheduled examination in accordance with section (1) of this rule, and PERS is assessed a penalty by the service provider for the failure to meet the scheduled appointment, the disability applicant will bear the cost of the penalty as follows:¶

(a) If the disability application is not approved, by making direct payment to the service provider who assessed the penalty; or¶

(b) If the disability application is approved:¶

(A) By making direct payment to the service provider who assessed the penalty; or¶

(B) By having the amount of the penalty deducted from the monthly disability benefit, as provided for under ORS 238.715, payable to the member until the invoice is satisfied.¶

(4) The Director, or the Director's designee, is hereby authorized to approve or deny a disability benefit application. Upon receipt and review of all necessary documentation, staff will present applicant's claim to the Director, or the Director's designee, with a recommendation to approve or to deny a disability benefit. The Director, or the Director's designee, may accept or reject the staff's recommendation, or refer the application back to staff for further documentation and review.¶

(a) If the disability claim is approved, the staff will notify the applicant and the applicant's employer of such approval.¶

(b) If the disability claim is denied, the staff will issue an Intent to Deny letter by regular and certified mail, return receipt requested. The Intent to Deny letter will advise the applicant that additional information to substantiate the claim, or a request for an extension of 30 days to present additional information, may be submitted to the staff in writing within 30 days of the date of the Intent to Deny letter.¶

(5) Following the issuance of an Intent to Deny letter, staff will review any additional information submitted within 30 days from the issuance of the Intent to Deny letter.¶

(a) If the additional information results in a recommendation to approve the application, staff will resubmit the application to the Director, or the Director's designee, with the recommendation.¶

(b) If the additional information does not result in a recommendation to approve the application, PERS will issue a final denial letter by regular and certified mail, return receipt requested.¶

(c) If no additional information is received, PERS will issue a final denial letter by regular and certified mail, return receipt requested.¶

(6) The final denial letter will provide the applicant with notification of the right to request a contested case hearing as provided for in OAR 459-015-0030 and 459-001-0035.¶

(7) A contested case hearing on the denial of disability benefits shall be conducted according to OAR 459-015-0030, 459-015-0035, and 459-015-0040.¶

(8) PERS will notify the most recent employer of the approval or the denial of an application for a disability benefit, a request for review of the Director's determination, and the Director's final action. Such notification will not contain any confidential information as defined in OAR 459-076-0001(3).

Statutory/Other Authority: ORS 238A.450

Statutes/Other Implemented: ORS 238A.235

AMEND: 459-076-0050

RULE SUMMARY: PERS administers two disability programs—one for the Chapter 238 Plan and another for the OPSRP Pension Plan. The statutory standards for both programs are similar, but not identical. PERS works to administer the two programs in parallel to the extent permitted by statute, as unified standards and practices are more cost-effective to administer and easier for members to understand. Staff have identified several common issues in the disability application and periodic review processes where improved clarity in the rules would provide better guidance to members regarding PERS' standards and practices. These include clarifications regarding how and when PERS treats business income as earned income; how PERS calculates years of service when evaluating disability eligibility; how a member's receipt of unemployment benefits impacts disability eligibility; and the medical and financial information PERS requires during a member's periodic review.

CHANGES TO RULE:

459-076-0050

Periodic Reviews ¶¶

- (1) Members receiving a disability benefit are subject to periodic reviews of their disabled status until the member reaches normal retirement age or staff determines that periodic reviews are no longer warranted. ¶¶
- (2) Periodic reviews will be used to determine that continued disability benefits are warranted. In recommending the continuance or discontinuance of a disability benefit, PERS will follow the criteria established under OAR 459-076-0005 for the original approved disabling condition or a new medical condition. If a member receiving a disability benefit becomes employed, the member's disability benefit will be terminated as provided in OAR 459-076-0005. ¶¶
- (3) For a duty disability, the periodic review will not revisit the original determination that the injury or disease was duty caused, unless there is evidence of misrepresentation or fraud. ¶¶
- (4) PERS will establish review dates for each member subject to a periodic review depending on type of disability, extent of disability, and medical reports unique to each individual case: ¶¶
 - (a) The reviews may be medical or vocational in nature, or both; ¶¶
 - (b) Upon review, PERS may accept or require: ¶¶
 - (A) New treating or consulting physician or specialist reports; ¶¶
 - (B) Updated physician or specialist reports; ¶¶
 - (C) Independent medical or vocational examinations; or ¶¶
 - (D) Employment and wage information, including but not limited to, tax returns or information from the State Employment Department. ¶¶
 - (c) PERS may immediately discontinue the disability benefit of any person who ~~refuse~~fails to provide current medical evidence; submit requested employment, wage, income, or tax information; or refuses to submit to a medical or vocational examination: ¶¶
 - (A) If the disability claim is discontinued, the staff shall issue an Intent to Discontinue letter by regular and certified mail, return receipt requested. The ~~d~~Intent to Discontinuation letter shall advise the applicant that additional information to substantiate the claim, or a request for an extension of 30 days to present additional information, may be submitted to the staff in writing within 30 days of the date of the Intent to Discontinue letter; ¶¶
 - (B) Following the issuance of an Intent to Discontinue letter, staff will review any additional information which is submitted within 30 days: ¶¶
 - (i) If the additional information results in a recommendation to ~~approve the application~~continue the disability benefit, staff shall resubmit the ~~application~~disability claim to the Director, or the Director's designee, with the recommendation; ¶¶
 - (ii) If the additional information does not result in a recommendation to ~~approve the application~~continue the disability benefit, PERS will issue a final discontinuation letter by regular and certified mail, return receipt

requested.¶

(C) If no additional information is received within 30 days, PERS will issue a final discontinuation letter by regular and certified mail, return receipt requested;¶

(D) The final discontinuation letter will provide the applicant with notification of the right to request a contested case hearing as provided for in OAR 459-015-0030 and 459-001-0035.¶

(5) The member has the burden to prove continuing eligibility for a disability benefit.¶

(6) The Director, or Director's designee, may approve or deny the continuance of a disability benefit.

Statutory/Other Authority: ORS 238A.450

Statutes/Other Implemented: ORS 23A8.235