94-411 MAINE STATE RETIREMENT SYSTEM

Chapter 506: ELIGIBILITY FOR DISABILITY RETIREMENT BENEFITS

SUMMARY: This chapter sets forth the standards and processes for determining eligibility for disability retirement benefits.

SECTION 1. DEFINITIONS

1. Consistent with the person's training, education, or experience. The phrase "consistent with the person's training, education, or experience" has the same meaning as "qualified by training, education or experience." A member may be qualified by training, education, or experience to engage in an activity even if the member has not previously engaged in it or has not engaged in it for pay. The fact that the member may need additional training for a specific position does not mean that the position is inconsistent with the member's training, education, or experience.

2. Continuous creditable service. "Continuous creditable service" means a period of membership service that occurs without any break in excess of 30 days. A period of leave under the federal Family Medical Leave Act where the member returned to the employment position at the end of the leave period does not constitute a break in membership service.

3. Date of incapacity. "Date of incapacity" means the date when a member stopped performing the essential functions of the member's employment position due to functional limitations caused by a mental or physical condition.

4. Employment position. "Employment position" means the position in which the member is employed at the time the member becomes incapacitated or a position that is made available to the member by the member's employer that is of comparable stature and equal or greater compensation and benefits and located within a reasonable commuting distance from the member's residence.

5. Existed before membership. A condition "existed before membership" if, as of the member's initial membership date, the condition:

    A. Had been diagnosed by a health care provider;

    B. Reasonably should have been diagnosed by a health care provider based on the member's medical records and symptoms and the results any additional tests the provider reasonably should have requested;

    C. Had exhibited some, but not all signs and symptoms necessary for a diagnosis, but later manifested all such signs and symptoms and was diagnosed; or

    D. Was directly caused by another condition that was diagnosed or reasonably should have been diagnosed~~existed~~ before membership ~~as defined in this subsection 5~~.

6. Incapacity. "Incapacity" means unable to perform the essential functions of the member's employment position with reasonable accommodation due to functional limitations caused by a mental or physical condition.

7. In service. A member is "in service" if the member has not terminated employment and is receiving compensation for rendering services, including through the use of the member's own accrued leave time.

8. Mental or physical condition. A condition affecting the member mentally or physically that is medically diagnosable.

9. Permanent. "Permanent" means ~~unlikely to improve in the foreseeable future, after pursuing reasonable and appropriate treatment options, to the point where the member is able to~~:

   A. the incapacity is likely to continue for the foreseeable future~~perform the essential functions of the employment position with reasonable accommodations~~; ~~or~~

   B. the member has reasonably pursued appropriate treatment options; and

   C. those treatment options have not resolved the incapacity~~after the incapacity has continued for two years, engage in any substantially gainful activity~~.

10. Reasonable accommodation. "Reasonable accommodation" has the same meaning as that phrase does under the federal Americans with Disabilities Act.

11. Reasonable commuting distance. The phrase "reasonable commuting distance" means a distance of less than 60 miles that would be reasonable for the member to commute based on the facts and circumstances, including the cost of commuting, the compensation of the employment position, the member's commuting history, and typical commuting distances where the member resides.

12. Substantially gainful activity. "Substantially gainful activity" means any combination of activities, tasks, or efforts, with any reasonable accommodations, for which the member is qualified by training, education, or experience that would generate annual income in an amount in excess of the substantially gainful activity amount in the labor market for the member's state or residence.

13. Substantially gainful activity amount. "Substantially gainful activity amount" means $20,000 or 80% of the member's average final compensation, whichever is greater, adjusted by any cost of living adjustments required by statute or rule.

SECTION 2. INITIAL ELIGIBILITY

1. Standards. A member is eligible for disability retirement benefits if the member has a permanent incapacity while in service, subject to the following additional requirements where applicable:

   A. If the member had less than five years of continuous creditable service as of the member's last date in service, the incapacity must not result from a condition that existed before membership unless the incapacity has been caused or substantially aggravated by an injury or accident received in the line of duty from events or circumstances not usually encountered within the scope of the member's employment.

(1) Events or circumstances are usually encountered within the scope of the member's employment if they are described in the job description for the member's position or are otherwise typically encountered one or more times during the career of a person in a position like the member's.

B. If at least two years have passed since the member's date of incapacity, the member must be unable to engage in any substantially gainful activity due to functional limitations caused by the mental or physical condition.

2. Use of the medical review service provider and independent medical examinations.

A. The permanent incapacity may be revealed by an independent medical examination (IME), but the Chief Executive Officer may grant benefits without an IME and, if qualification is clear to a lay person, may grant benefits without use of the medical review service provider.

B. The Chief Executive Officer may deny benefits without use of the medical review service provider or an independent medical examination on non-medical grounds, including:

(1) The applicant was not in service at the time the applicant claims the incapacity began;

(2) The applicant is in an age-restricted plan and performed the essential functions of the employment position ~~-~~after normal retirement age;

(3) The claimed incapacity has existed for more than two years and the applicant has earned more than the substantially gainful activity amount in one or more years during this time;

(4) The applicant is uncooperative or unresponsive in providing essential information needed to process the application; or

(5) The applicant has already been denied benefits on the same condition and last date in service.

C. The Chief Executive Officer may not otherwise deny benefits without an IME unless the IME is waived by the applicant.

3. Determination of inability to perform the essential functions of the employment position with reasonable accommodation.

A. A member is not unable to perform the essential functions of the employment position if the member could do so with one or more reasonable accommodations.

~~A.~~B. When a member is incapacitated by more than one mental or physical condition, any permanent functional limitations caused by the conditions will be considered in totality as part of a whole-person approach to determine whether the limitations make the member unable to perform the essential functions of the employment position with reasonable accommodation.

~~B.~~C. If MainePERS determines that one or more reasonable accommodations would more likely than not allow a member to perform the essential functions of the employment position, MainePERS will communicate the reasonable accommodations in writing to the member and the employer prior to issuing a decision on eligibility for disability retirement, including, where applicable, a request to the employer that it provide the identified reasonable accommodations.

(1) Employer acceptance or refusal. The employer shall inform MainePERS whether it will provide the requested reasonable accommodations. If the employer refuses because the member no longer is employed, the employer shall inform MainePERS whether the employer offered or would have provided the reasonable accommodations if requested during employment. MainePERS will communicate any information received from the employer to the member, and the member will be provided an opportunity to rebut the employer's information.

(2) Member acceptance or refusal. If the member has not terminated employment and the employer will provide the reasonable accommodations, the member shall inform MainePERS whether the member will attempt to perform the essential functions of the employment position with the reasonable accommodations. The member may provide evidence to MainePERS that the employer has refused to make the reasonable accommodations or that they would not permit the member to perform the essential functions of the employment position.

(3) Final determination. After employer or member refusal or the failure of a good faith attempt to perform the essential functions of the employment position with reasonable accommodation, MainePERS shall make a decision on the member's application for disability retirement.

4. Application of disabled veteran presumption. A member seeking application of the disabled veteran presumption based on a determination of individual unemployability must authorize release of information from the U.S. Department of Veterans Affairs as requested by MainePERS in addition to cooperating in providing other essential information needed to process the disability retirement application.

SECTION 3. REVIEWS FOR CONTINUING ELIGIBILITY

1. Scheduling of reviews. A disability retiree may be reviewed for continuing eligibility for disability retirement benefits in the following circumstances:

A. The retiree has not yet had a determination that they are unable to engage in any substantially gainful activity for which they are qualified by training, education or experience and at least two years have passed since the date of the determination that the retiree is eligible for disability retirement benefits; or

B. Earnings or other information about a retiree's activities received by MainePERS show that the retiree may have capacity to engage in substantial gainful activity and at least one year has passed since any previous review.

2. Cooperation with review. A retiree subject to review under subsection 1 must cooperate in providing information to MainePERS, including providing medical records and releases permitting health care providers to provide medical records. An unjustified failure to cooperate

will result in the discontinuance of benefits. If the failure continues for one year, it will result in permanent cessation of benefits.

3. Standard on review. The retiree's eligibility for retirement benefits continues if the retiree is unable to engage in any substantially gainful activity due to functional limitations caused by the mental or physical conditions that were the basis for the initial eligibility determination or by one or more new conditions that arose from the conditions that were the basis for the initial eligibility determination.

4. Rebuttable presumption. A retiree is presumed to be no longer eligible for retirement benefits if the retiree has earned more than the substantially gainful activity amount in one or more years while receiving disability retirement benefits. This presumption may be rebutted by information showing that the standard in subsection 3 is met notwithstanding these earnings.

5. Use of the medical review service provider and independent medical examinations.

    A. The Chief Executive Officer may determine that the retiree continues to be eligible without an IME and, if continuing eligibility is clear to a lay person, may determine that the retiree continues to be eligible without use of the medical review service provider.

    B. The Chief Executive Officer may not determine that the retiree is no longer eligible for retirement benefits without an IME unless the IME is waived by the retiree.

    C. IMEs under this Section are subject to the same reimbursement and waiver requirements as IMEs under Section 2.

STATUTORY AUTHORITY:
5 M.R.S. §§ 17103(4)

94-411 MAINE STATE RETIREMENT SYSTEM

Chapter 507 DETERMINATION OF INABILITY TO ENGAGE IN SUBSTANTIALLY GAINFUL ACTIVITY

SUMMARY: The purpose of this rule is to specify the standards and definitions to be applied in determining under 5 MRSA §§ 17907(2)(B), 17929(2)(B)(1), and 18507(2)(B) and 18529 (2) (B) (1) whether a disability retirement recipient is "unable to engage in any substantially gainful activity."

1. Standards and Related Definitions for Determination.

After the expiration of an initial period as specified by statute, disability benefit recipients continue to receive disability benefits only if they meet certain statutory requirements. One requirement is that the person be "unable to engage in any substantially gainful activity." The following standards govern the determination of a person's inability to engage in any substantially gainful activity under 5 MRSA §§ 17907(2)(B), 17929(2)(B)(1), and §§ 18507(2)(B) and 18529(2)(B)(1).

A. A person shall be determined to be unable to engage in any substantially gainful activity if the person lacks the physical or mental capacity, due to the incapacity for which the person was awarded disability retirement benefits, to perform or participate in any activity or activities, tasks or efforts that are or could be performed in such a manner as to generate remuneration in an amount which is consistent with average final compensation.

(1) For purposes of 5 MRSA §§ 17929(2)(B)(1), 18529(2)(B)(1) and this rule, "consistent with average final compensation" means an amount that, on an annual basis, is at least 80% of the person's average final compensation at retirement adjusted as if §17806 or §18407, whichever is appropriate, had been applicable.

(2) If inability to engage in any substantially gainful activity is being determined under §17907(2)(B) or §18507(2)(B), "substantially gainful activity" has the same meaning as "substantially gainful activity which is consistent with average final compensation as found in §17929(2)(B)(1) or §18529(2)(B)(1) respectively.

(3) Information about the labor market, including information contained in publications of the state and federal Departments of Labor, may be used when consideration of the nature of an employment activity or consideration of the salary level of a particular employment activity is needed. Such information on salary levels,

if not current at the time it is used, should be adjusted by the same inflation factor(s) applied to the disability recipient's average final compensation in subparagraph 1(A)(1) above.

(4) The person is not unable to engage in any substantially gainful activity when the person is engaged in any activity or activities, whether or not remuneration-generating, that demonstrate an ability to engage in substantially gainful activity.

(5) The person is not unable to engage in any substantially gainful activity when the person has the physical or mental capacity to engage in any substantially gainful activity, regardless of whether or not the person does in fact so engage.

(6) If inability to engage in substantially gainful activity is being determined under 17929(2)(B)(1) or 18259(2)(B)(1), the person is not unable to engage in substantially gainful activity if an employer could make reasonable job modifications that would allow the person to engage in substantially gainful activity. “Job modification” means changes to any aspect of work that inhibits a person’s ability due to physical or mental incapacity to perform the duties of a job including but not limited to modifications in the usual job tasks or duties, changes in the way a particular task or duty is usually carried out, changes to the physical environment, provision or allowed use of adaptive equipment and change in the job conditions.

B. If inability to engage in substantially gainful activity is being determined under §17907(2)(B) or §18507(2)(B), the person must also be qualified by training, education or experience to perform the activities, tasks or efforts that comprise the activity or activities against which the person's inability is being evaluated.

(1) "Qualified" means possessing, for purposes of meeting general requirements for employment, including self-employment or other gainful activity, either appropriate training in relevant skills and knowledge, including those that are transferable; or appropriate type and level of education; or appropriate experience.

(2) Such possession is established whenever there is a reasonable expectation that a person with this particular training, education or experience should be able to meet such general requirements.

C. If the person's inability to engage in substantially gainful activity is being determined under §17929(2)(B)(1) or §18529(2)(B)(1), the activity or

activities against which the person's inability is being evaluated must be consistent with the person's training, education or experience.

(1) "Consistent with" means that the activity or activities must bear a logical relationship to the person's previous training, education or experience.

(2) Such a relationship is demonstrated by the possession of appropriate training in relevant skills and knowledge, including those that are transferable; or appropriate type and level of education; or appropriate experience.

2. Application of Standards.

A. The recipient of disability benefits has the ultimate burden of demonstrating that s/he is unable to engage in substantially gainful activity and must make the demonstration of inability against the above standards.

B. When a recipient of disability benefits has at any time since the effective date of disability retirement been engaged in any activity or activities that produces or has produced remuneration that is consistent with the person's average final compensation, a rebuttable presumption is established that all of the applicable standards set forth in Section 1 have been met.

C. When a determination is made by the System that job modification would allow a recipient of disability benefits to engage in substantial gainful activity, the System has the initial burden to identify generally what types of job modifications would allow the member to engage in substantially gainful activity. This will be communicated in writing to the disability recipient prior to or at the time that a decision on the member’s ability to engage in substantially gainful activity is made. The burden then shifts to the member disputing this determination to refute that such modifications would allow the person to engage in substantially gainful activity.

EFFECTIVE DATE OF EMERGENCY RULE: July 9, 1993

EFFECTIVE DATE OF PERMANENT RULE: September 28, 1993

EFFECTIVE DATE (ELECTRONIC CONVERSION): May 5, 1996

NON-SUBSTANTIVE CORRECTIONS: October 3, 1996 - minor format and spelling.

AMENDED: June 7, 1997 - Section 1(A)((6)) and 2(C) added.

94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chapter 509: DETERMINATION OF INABILITY TO PERFORM THE ESSENTIAL FUNCTIONS OF THE EMPLOYMENT POSITION

Summary: The purpose of this rule is to specify the standard and definitions to be applied under 5 MRSA §§ 17921 and 18521 in determining whether a disability applicant is unable to perform the functions of the employment position with reasonable accomodation.

SECTION 1. Standard and Related Definitions

A disability benefit applicant must meet certain statutory requirements under 5 MRSA §§ 17921 and 18521 in order to be eligible to receive disability retirement benefits. One of these requirements is that the applicant must demonstrate that the applicant is unable to perform the essential functions of the employment position with reasonable accomodation. The following standard and definitions govern the determination of whether this requirement is met.

1. A member shall not be considered incapacitated if the employer agrees to make job modifications as defined below that will enable the member to perform the functions of the employment position.

   A. For these purposes, "job modification" means a change or changes to the member's work situation that alters any aspect(s) that, because of the member's physical or mental incapacity, inhibit ability to perform the functions of the employment position. "Job modification" includes but is not limited to modification in the job tasks or functions, change in the way a particular task or function is carried out, change to the physical environment, provision of adaptive equipment, and change in the job conditions.

   B. “Employment position" means the position in which the member is employed at the time the member becomes incapacitated or this position as modified by the member's employer in accordance with (1) above, or a position that is made available to the member by the member's employer that is of comparable stature and equal or greater compensation and benefits to the position in which the member is employed at the time the member becomes incapacitated and whose location is of a reasonable commuting distance and does not require the member to relocate their residence.

SECTION 2. Application of Standard

1. The member who is an applicant for disability retirement benefits has the ultimate burden of demonstrating inability to perform the essential functions of the employment position with reasonable accomodation.

2. When a determination is made by the System that job modification would enable the member to perform the functions of the employment position, the System has the initial

burden to determine generally the job modifications that would enable the member to perform the functions of the employment position. This will be communicated in writing to the applicant and the applicant's employer prior to or at the time that a decision on eligibility for disability retirement benefits is made. If the member disputes the determination, the member then has the burden to demonstrate either that the member has requested the employer to provide the job modifications determined by the System and that the employer has refused to make these job modifications or that the modifications identified by the System would not allow the member to perform the functions of the employment position.

3. In the event that the employer refuses to make the requested modifications, a member must also demonstrate that they have requested the employer to provide a position that the member's disability does not prevent them from performing and that is of comparable stature and equal or greater compensation and benefits to the member's employment position at the time the incapacity arose and that the employer has refused to offer such a position.

STATUTORY AUTHORITY:
5 MRS §§ 17103(4), 17921 and 18521

EFFECTIVE DATE:
June 7, 1997 – filing 97-199
September 20, 2022 – filing 2022-187

94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chapter 512: INDEPENDENT MEDICAL EXAMINATIONS

SUMMARY: This Chapter implements and describes procedures for conducting independent medical examinations under 5 M.R.S. §17106-B(2).

SECTION 1. REIMBURSEMENT FOR INDEPENDENT MEDICAL EXAMINATIONS

Under 5 M.R.S. §17106-B(2), a member's representative who attends the member's independent medical examination is entitled to reimbursement of mileage and, if the representative is a health care provider, a per diem payment. The Maine Public Employees Retirement System ("the System") will make these reimbursements and payments as follows:

1. The member must identify the representative to the System in writing within 30 days after the independent medical examination. Within 60 days after the independent medical examination, the representative must provide the System with the representative's tax identification number by submitting IRS Form W-9 and any other information reasonably necessary to permit reimbursement and payment, if applicable. The member and representative will provide the System with information reasonably necessary to determine mileage and whether the representative is a health care provider.

2. Mileage will be reimbursed at the standard rate set by the Internal Revenue Service.

3. The health care provider per diem rate is set at $300.

SECTION 2. WAIVER OF INDEPENDENT MEDICAL EXAMINATION

A member may waive an independent medical examination pursuant to 5 M.R.S. §17106-B(2) by:

1. Signing a waiver form developed by the System's Chief Executive Officer for that purpose or otherwise clearly communicating a waiver in writing; or

2. On more than one occasion, failing to attend a scheduled independent medical examination or canceling a scheduled independent medical examination after the time at which the independent health care provider imposes a cancellation fee, unless the member reimburses the System for any no-show or cancellation fee or the failure or cancellation was not within the member's control.

STATUTORY AUTHORITY:
5 M.R.S. §§ 17103(4), 17106-B(2)

EFFECTIVE DATE:
May 31, 2022 – filing 2022-099

Second Submission

to the

MainePERS Consensus Based Rule Making
Representative Group

Regarding Proposed Rule Changes to

Ch. 702 - Appeals of the Decision of the Chief Executive Officer

By Sue Hawes, CBRM "Interested Party"
Pending November 4, 2022, request to CEO to join
as "Representative Group" participant

November 14, 2022

As an assigned Interested Party in "webinar only mode" at the MainePERS Consensus Based Rule Making meetings (instead of a participant who can converse and reach consensus with the group effectively during meetings), I proposed, in writing as directed, changes to rule Ch. 702: Appeals of the Decision of the Chief Executive Officer. During the next meeting, the group discussed my ideas. When staff put up roadblocks, I was prevented from asking follow-up questions and unable to make further proposals to address the points based on my experience since December 2017 as a MainePERS Designated Representative for a disabled retiree. Instead of "member centric," the voice of the MainePERS retiree continues to be silenced by MainePERS during rulemaking. See new comments below in *italic*.

A. Within 30 days of a Notice of Appeal, the Appeals Clerk must have proof of service to the Appellant of the Appeal Packet containing the documentation upon which the CEO's adverse decision rests.

Staff indicated that "proof of service" was assumed to be USPS Certified Mail. I use the term loosely. What evidence in the appeal record will show that the Appeal Packet was provided to the member within 30 days? The agency can see that email has been opened by the recipient as discussed with the recent emailed MainePERS member experience surveys. If delivered electronically, there are simple ways to show the Appeal Packet was sent and received. By postal mail, a Certificate of Mailing could suffice if the document is paginated with the appeal assigned page numbers. Staff claims it "hasn't been a problem," however, please see our contrary experience in Attachment A.

B. The Appeals Clerk must use USPS Certified Mail to notice the Appellant of all scheduled pre-hearing conferences, hearings, and all other events subject to default under Ch. 702 Sec. 10. The notice must include language alerting the Appellant of the consequences of default.

Staff indicated that USPS Certified Mail is too cumbersome. However, the greater and more important point of this suggestion is to inform the member that the noticed, scheduled event is subject to default under Ch. 702 Sec. 10. Staff indicated that the agency currently only informs the member of default after the default has already happened. Then MainePERS uses Certified Mail.

*Among the notices of the scheduled administrative pre-conference phone call or hearings in our case (two notice to attorneys and one "*pro se letter"*) none alert the member of the consequences of the failure to appear ("deemed to have abandoned the appeal") nor do the notices warn the member that the Hearing Officer may hold the pre-conference call or administrative hearing without the appellant present. See Ch. 702 Sec. 10.*

And in fact, contrary to the serious nature of default, the longtime MainePERS Appeals Clerk left a disturbing initial voicemail for the Appellant at our second appeal's commencement. See Attachment A.

C. Sec. 14 Change "shall" to "must" in "If new grounds for affirming a decision adverse to the appellant are articulated by the Chief Executive Officer at this stage of the process, the hearing officer shall allow the parties a reasonable time to present additional evidence relevant to the issues raised in the Chief Executive Officer's reconsidered decision." As described in my testimony for the Ch. 702 Public Hearing Rulemaking at the August 8, 2022, Board of Trustees meeting, in our second appeal, the Hearing Officer F. Mark Terison ignored this mandate and did not "allow the parties a reasonable time to present additional evidence relevant to the issues raised in the Chief Executive Officer's reconsidered decision."

Staff indicates again that "shall" is "must," but this does not explain why Mr. Colleran himself changed "shall" to "must" in five (5) locations in the statutes under the system bill (LD 1922) just in January 2022. If "must" is not necessary and "shall" is sufficient for a mandate, why the five statutory changes of exactly that by the agency, and why, during our second appeal, would the Hearing Officer consider the "mandate" subject to interpretation? He not only dispensed with the "mandate" to allow the Appellant to submit additional evidence to rebut new legal grounds in the CEOs reconsidered decision, but the Hearing Officer also ignored the Appellant's request. The Hearing Officer's mishandling of the appeal has led to MainePERS continuing to unlawfully interpret passive income as "earnings from employment."

D. Sec. 6(2)(b) needs the word "medical" removed--not all MainePERS appeals are medical.

The explanation by staff for refusing to remove the word "medical" is not made clear. Staff suggests that MainePERS no longer makes "reconsiderations" by the CEO after an appeal has begun except where new MEDICAL ONLY evidence has been submitted? That has not been our experience in either appeal. In our second appeal (non-medical), the CEO "reconsidered" based upon new (non-medical) evidence. I'd also propose that the word SYSTEM be added as MainePERS System Representative is the job title of the agency's attorney during appeals, not "MainePERS Representative." In our first appeal, the CEO "reconsidered" based upon no hearing and only what I wrote and submitted as evidence for the appeal.

It seems this area of the rule needs work to conform the rule to what is actually happening with Hearing Officers and the CEO during appeals. Our two appeal experiences demonstrate that the appeal process NORMALLY accepts new evidence before and during the administrative hearing, regardless of its nature as medical or non-medical or a new issue to the CEO or not a new issue. However, CMR Sec. 6(2)(b) states only, "If the appellant seeks to introduce new documentary medical evidence on any of the issues previously decided by the Executive Director, the hearing officer will, at the request of the MainePERS Representative, return the appeal to the Executive Director for reconsideration of those issues. The appeal will be stayed pending a reconsidered decision of the issues previously decided by the Executive Director. The Executive Director may submit the new evidence to the Medical Board at a regularly scheduled meeting of the Medical Board."

EMPLOYERS' ROLE IN APPLICATION - QUESTION 4 10/19/22 submission: Rule Chapter 702 Sec. 5(4)
Please state in the rule under Sec. 5(4) that communication between the Appeals Clerk and the employer must be copied to the appellant. *See details in 10/19/2022 submission for our experience.*

With the agency's discretion wide open to approve applications without review by the medical services provider, the following issue is likely to re-occur where essential functions and reasonable accommodation are improperly applied by MainePERS staff. Staff maintain an eye towards approving a benefit based on false representations by MainePERS and the employer so MainePERS can discontinue the benefit in short order. MainePERS creates records in the member file hidden from the member. [redacted]

[redacted] *Essential functions that are just listed on a job description but, in practice, not required, are not essential functions per the ADA standard. According to "The ADA: Your Responsibilities as an Employer," US Equal Employment Opportunity Commission, whether a particular task in an essential function is defined by (1) the actual work experience of present or past employees in the job, (2) the time spent performing a function, (3) the consequences of not requiring that an employee perform a function, and (4) the terms of a collective bargaining agreement. Employers can be forced by MainePERS to accept reasonable accommodations to keep an employee on staff and avoid disability retirement. See Ch. 509.* ***Can MainePERS be relied upon by members and employers to lawfully define and apply essential functions, reasonable accommodations, functional limitations?***

ATTACHMENT A

Here is one simple example demonstrating a MainePERS legal procedural issue from our disabled retiree member experience with MainePERS Appeals Clerk:

Imagine you are an ill MainePERS member applicant or disabled retiree—or in my husband's case, [redacted]. You have just filed an appeal in response to an adverse decision by the CEO. Perhaps your application for the disability retirement benefit has been denied by the CEO. Or perhaps the decision notifies you that the CEO has suddenly ended your monthly disability retirement income—often the only income a MainePERS disabled retiree receives. Or worse, the CEO notifies you that not only is MainePERS ending your income, but the CEO also claims you owe thousands of dollars in backpay.

You file the Notice of Appeal on July 3. Weeks later you receive the following contact from the MainePERS Appeals Clerk in response. The audio file of the voicemail is available. On Friday, July 19th at 11am, the MainePERS Appeals Clerk of **many years tenure** left the following voicemail message for my husband (not his MainePERS Designated Representative or Power of Attorney--both on file at MainePERS) in response to his July 3 Notice of Appeal, "Hi Philip, This is Kim Emery from the retirement system. I'm the Appeals Clerk here and I am calling to set up the preliminary phone call. I am wondering if you could be available next Friday, July 26th for a 9am phone conference. Please get back to me and let me know if that doesn't work for you. My number is 512-3219. And if I don't hear back, I'll assume that works for you and I will send you information about calling into the phone bridge. Thank you very much. Bye-bye."

The Appeals Clerk mailed only the generic "pro se" letter to the Appellant that day, July 19, but she predated the letter June 19–thirty days earlier and weeks before the appeal was filed on July 3rd. The letter did not announce the preliminary conference call scheduled for Friday, the 26th at 9am, and stated nothing about a phone bridge.

Further in our case, when my husband's attorney contacted the Appeals Clerk days later, she reportedly falsely told the attorney that she mailed the Appeal Packet to the appellant. The "pro se" letter also seems to imply in the 5th paragraph that the Appeal Packet (the documentation underlying the CEOs decision) was included with the letter. It was not. Nor did the voicemail from the Appeals Clerk—the only notice he received—mention the consequences of failure to appear for the "phone call" (the pre-hearing conference which is held with the Hearing Officer prior to the hearing).

Submission for the meeting scheduled November 29, 2022, of the
MainePERS Consensus Based Rule Making Representative Group
Regarding Proposed New Rule Chapter 506: Eligibility for Disability Benefits

By Sue Hawes, CBRM "Interested Party"

The purpose of the Consensus Based Rule Making effort is for MainePERS to articulate and disclose its procedures by legally binding rule to ensure transparency, accountability, and consistency across decisions—especially important today considering the "black hole" created by the repeal of the Medical Board law and rule (attached pg. 4-6). The Court has so directed MainePERS in the past!

In the Perr vs MainePERS court decision provided by MainePERS to the CBRM group is a quote from Eitanides v. Crowley, where the Law Court noted that "it is a well-established principle, constitutionally mandated, that in 'delegating power to an administrative agency, the legislative body must spell out its policies in sufficient detail to furnish a guide which will enable those to whom the law is to be applied to reasonably determine their rights thereunder, and **so that the determination of those rights will not be left to the purely arbitrary discretion of the administrator..."** (emphasis added)

The Court found, "As the Petitioner has made clear all along, she has had no idea what the term means or what the agency thinks it means." And, "Ms. Perr had no notice of the Board's interpretation of the statute until she read the final decision." In her case, MainePERS had discontinued her disability benefit due to claiming she was capable of Substantial Gainful Activity (SGA) because she ran an unprofitable business (hobby). The decision was later reversed by the court but at what personal cost to Ms. Perr?

"Earnings" Must Be Defined in the Eligibility Rule

There needs to be a definition of "earnings" in the new rule. "Earnings" according to MainePERS's clandestine interpretations constitute *a far cry from just actual earnings from employment as a lay person might expect by reading the laws and rules.* MainePERS includes imputed income, passive income, extrapolated income potential, volunteer work, and probably other activities as "earnings" or SGA to discontinue benefits.

A disabled retiree could be approaching earnings limitations, but they have no idea that passive income is being included, for example, when suddenly they are told by the System that they owe money back to the System and lose their disability retirement all together due to "earnings." Within the new rule, Sec. 3 (1)(B) states only, "Earnings or other information about a retiree's activities received by MainePERS show that the retiree may have capacity to engage in substantial gainful activity and at least one year has passed since any previous review." Sec. 3(4) simply says, "...has earned more than the substantially gainful activity amount." **How does the agency define "earnings?"**

Annual Statement of Compensation

The statute says 5 M.R.S. §17931 (1) "Statement of compensation: The chief executive officer shall require each person who is the recipient of a disability retirement benefit to submit, each calendar year, a statement of compensation received from any gainful occupation during that year." However, MainePERS's implementation collects tax returns annually from disabled retirees without a policy on confidentiality of the records. Retirees almost immediately begin to lose benefits for noncompliance within a month of tax return day. If the retiree has only MainePERS and Social Security income, the retiree should not have to submit tax returns to the agency. But simply report the same on the Annual Statement of Compensation form, sign it, and mail it in. I resent needing to send MainePERS our joint tax returns every year when my husband has only MainePERS and Social Security Disability income..

Rule Must State that Administrative Summary Will be Provided to the Applicant/Retiree

WITH ANY DECISION OR INITIAL BENEFIT CALCULATIONS the applicant or retiree must automatically receive a copy of the Administrative Summary (or data used behind a calculation) created by MainePERS for final decisions of an application or eligibility review (or any final

decision/calculation). The Administrative Summary is written up and added to the individual's file to document the MainePERS analysis behind the application and eligibility review decisions. The records are relied upon during future reviews. When the records contain errors, the member is unaware and cannot address the issue.

Topics from the Old Law and Rule 202 Medical Board Not Yet Addressed in New Eligibility Rule
The Medical Board responsibilities must be re-deployed under the new law through the new rule.

With unclear procedures described in the rule, I am concerned that the inconsistency seen in my husband's SGA review will occur with other retirees. It appears that the proposed rebuttable presumption of SGA ability may be applied by MainePERS staff without first reviewing medical records/opinions as to the person's capacity, thereby allowing MainePERS staff to simply claim any activity as SGA without a medical expert behind the decision? *Or* is #5 saying that an IME will be required if MainePERS believes a retiree "has earned" or is engaged in what MainePERS non-medically trained staff perceives as substantially gainful activity without expert medical opinion? Then my husband must submit to an in-person Independent Medical Exam with an unknown doctor based on lay staff's opinion that he may be able to engage in SGA?

When the now-repealed Medical Board rule REQUIRED medical opinion on SGA, the Disability Associate Specialist wrote on June 20, 2020, "On review, we must establish whether you have demonstrated these conditions which, makes you unable to engage in any substantially gainful activity. **Based on consultation with the System's Medical Board** and medical records that have been reviewed by the System, I am approving the continuation of your disability retirement allowance." (emphasis added)

However, when I requested the documentation supporting the Disability Associate Specialist's decision in December 2020, expecting a written Medical Board opinion per the rule, the same employee wrote to the contrary, "I have attached the documents you requested regarding Mr. Hawes' review for continuing eligibility including the medical records, the Administrative Summary, and the decision letter. **Medical Board review was not needed.** The documentation you sent to us was adequate to complete the review." (emphasis added)

What procedures are replacing those lost by the repeal of the rule and law, such as:

A. Medical Board shall advise .... as to the need for further medical review in each case.
B. The Medical Board shall assist... in determining if a medical review of a disability recipient is warranted.
C. Medical Board may recommend... specific tests to be performed upon the recipient of a disability retirement allowance to determine his capacity to engage in a substantially gainful activity for which he is qualified by training, education or experience.
D. Based upon a review of the updated medical file, the Medical Board shall inform ... in writing as to whether in its opinion the disability recipient is capable of engaging in a substantially gainful activity for which he is qualified by training, education or experience.
E. Medical Board will advise … whether there are medical indications that a person who is the recipient of a disability retirement benefit … should not engage in a rehabilitation program or whether a recipient is too severely disabled to benefit from rehabilitation in accordance with the purposes of chapter. See 5 M.R.S. §17927 (6) Employer must accept rehabilitated employee back into service.

The new rule must incorporate these responsibilities to avoid arbitrary discretion by the agency and inconsistencies across decisions. Disabled MainePERS members deserve transparent procedures.

94-411 MAINE STATE RETIREMENT SYSTEM

Chapter 202 MEDICAL BOARD

SUMMARY: This Chapter regulates the administrative relationship between the Maine State Retirement System and the Medical Board provided for in the Maine State Retirement System statutes (5 MRSA, Section 1031, subsection 11).

1. Establishment and Operations of the Medical Board.

A. The members of the Medical Board shall be designated by the Board of Trustees of the Maine State Retirement System.

B. The members of the Medical Board shall be physicians chosen from those fields of medicine within which the Maine State Retirement System receives the greatest number of applications for disability retirement.

C. The Medical Board shall meet bi-weekly or as needed to review the medical files of applicants for disability retirement.

D. The Medical Board shall advise the Executive Director of the Maine State Retirement System as to the need for further medical review in each case.

E. The Medical Board shall recommend to the Executive Director a physician within the appropriate medical field to perform medical reviews.

2. Role of the Medical Board in Determining Disability.

A. The Medical Board shall recommend to the Executive Director specific medical tests to be performed on the applicant in order to obtain objective evidence of the existence of a permanent disability.

B. The Medical Board shall recommend an additional medical review in those instances where there are conflicting medical opinions.

C. Based upon a review of a completed medical file, the Medical Board shall inform the Executive Director and the Board of Trustees of the Maine State Retirement System in writing as to whether in its opinion the disability applicant suffers from a permanent disability which makes it impossible for the applicant to perform the duties of his job position as outlined in his job description.

D. The Medical Board may recommend to the Board of Trustees general guidelines where possible to assist it in determining whether or not a disability is permanent and makes it impossible for the applicant to perform the duties of his job position as outlined in his job description.

3. Role of the Medical Board in Review of a Disability.

A. The Medical Board shall assist the Executive Director in determining if a medical review of a disability recipient is warranted. If not, the Medical Board shall provide the Executive Director with a written memorandum stating that a medical review is not warranted.

B. The Medical Board shall recommend to the Executive Director physicians within the appropriate medical field to perform the medical review of the recipient of a disability allowance.

C. The Medical Board may recommend to the Executive Director specific tests to be performed upon the recipient of a disability retirement allowance to determine his capacity to engage in a substantially gainful activity for which he is qualified by training, education or experience.

D. Based upon a review of the updated medical file, the Medical Board shall inform the Executive Director and the Board of Trustees of the Maine State Retirement System in writing as to whether in its opinion the disability recipient is capable of engaging in a substantially gainful activity for which he is qualified by training, education or experience.

AUTHORITY: 5 MRSA, Section 1031, subsection 5.

EFFECTIVE DATE: January 20, 1985

EFFECTIVE DATE (ELECTRONIC CONVERSION): May 5, 1996

NON-SUBSTANTIVE CORRECTIONS: October 2, 1996 - minor spelling and format.

(3) Deter actions or omissions by the employer that impede or delay the retirement system's efforts to resolve issues related to these matters. [PL 1993, c. 387, Pt. A, §6 (NEW).]

For purposes of this subsection, "employer" means a department or agency of State Government, a school administrative unit or a participating local district.
[PL 1993, c. 387, Pt. A, §6 (NEW).]

SECTION HISTORY

PL 1985, c. 801, §§5,7 (NEW). PL 1987, c. 402, §§A66,A67 (AMD). PL 1993, c. 387, §§A5,6 (AMD). PL 1993, c. 410, §L23 (AMD). PL 1995, c. 368, §G5 (AMD). PL 2005, c. 238, §1 (AMD). PL 2007, c. 249, §11 (AMD). PL 2007, c. 491, §78 (AMD).

§17105-A. Adverse decisions of the retirement system

Prior to any adverse decision rendered by retirement system staff with respect to the recoupment, suspension or termination of benefits, or assessment of penalties or interest, the affected member or retiree is entitled to an informal hearing to which the member or retiree may bring legal counsel. The retirement system shall issue a written decision; this decision is subject to the retirement system's review and appeal process pursuant to section 17451. [PL 2009, c. 322, §5 (NEW).]

SECTION HISTORY

PL 2009, c. 322, §5 (NEW).

§17106. Medical board

1. Establishment. The board shall designate a medical board to be composed of at least 3 medical providers not eligible to participate in any of the retirement programs of the retirement system. The board shall make a good faith effort to appoint medical providers to the medical board who are from those fields concerning which the Maine Public Employees Retirement System receives the greatest number of applications for disability retirement benefits.
[PL 2017, c. 88, §14 (AMD).]

2. Other medical providers. If determined advisable by the board, the board may designate other medical providers to provide medical consultation on disability cases.
[PL 2017, c. 88, §15 (AMD).]

3. Powers and duties. The medical board is advisory only to the retirement system. The medical board or other medical providers designated by the board shall review the file of an applicant for disability retirement and:

A. Recommend an additional medical review in those instances where there are conflicting medical opinions; [PL 1985, c. 801, §§5, 7 (NEW).]

B. Recommend additional medical tests to be performed on an applicant to obtain objective evidence of a permanent disability; [PL 1985, c. 801, §§5, 7 (NEW).]

C. Assist the executive director in determining if a disability review of a recipient of a disability allowance is warranted; [PL 1989, c. 409, §§1, 12 (AMD).]

D. Provide a written report of its analysis of how the applicant's medical records do or do not demonstrate the existence of physical or mental functional limitations entitling an applicant to benefits under chapter 423, subchapter 5, articles 3 and 3-A, or chapter 425, subchapter 5, articles 3 or 3-A; and [PL 2009, c. 322, §6 (AMD).]

E. Advise the retirement system whether there are medical indications that a person who is the recipient of a disability retirement benefit under chapter 423, subchapter 5, article 3-A or chapter 425, subchapter 5, article 3-A should not engage in a rehabilitation program or whether a recipient is too severely disabled to benefit from rehabilitation in accordance with the purposes of chapter

423, subchapter 5, article 3-A or chapter 425, subchapter 5, article 3-A. [PL 2009, c. 322, §6 (AMD).]

[PL 2017, c. 88, §16 (AMD).]

4. Medical evidence. The provisions of this subsection apply to medical evidence used for a disability retirement determination.

A. The retirement system shall consider the applicant's disability application, medical records and the medical board's analysis in making a disability retirement determination. [PL 2009, c. 322, §6 (NEW).]

B. Explicit or implicit preferential weight may not be afforded any medical evidence or source of evidence, whether provided by the retirement system, its medical board or contracted examiners, or by any member, in connection with the application, review or hearing processes. [PL 2009, c. 322, §6 (NEW).]

C. When addressing the weight to be given any medical evidence upon which a determination to award, deny or discontinue benefits is made, the retirement system, hearing officers and board of trustees shall consider, at least, the expertise of the medical source, the foundation of information upon which the opinion is rendered and its consistency with other medical evidence in the record. [PL 2009, c. 322, §6 (NEW).]

D. The retirement system shall offer to review the decision and the records supporting that decision with the applicant prior to issuing a determination. [PL 2009, c. 322, §6 (NEW).]

[PL 2009, c. 322, §6 (NEW).]

SECTION HISTORY

PL 1985, c. 801, §§5,7 (NEW). PL 1989, c. 409, §§1,2,12 (AMD). PL 1995, c. 643, §4 (AMD). PL 2007, c. 491, §79 (AMD). PL 2009, c. 322, §6 (AMD). PL 2017, c. 88, §§14-16 (AMD).

§17106-A. Use of hearing officers

A hearing officer employed, contracted or otherwise provided by the board to implement the provisions of this chapter is subject to the provisions of this section. [PL 2009, c. 322, §7 (NEW).]

1. Independent decision makers. All hearing officers are independent decision makers and are authorized to make recommended final decisions in regard to matters that come before them, consistent with applicable statutes and rules. A decision of the hearing officer must be based upon the record as a whole. The board shall accept the recommended decision of the hearing officer unless the recommended decision is not supported by the record as a whole, the retirement system is advised by the Attorney General that the hearing officer has made an error of law or the decision exceeds the authority or jurisdiction conferred upon the hearing officer. A decision of the board upon a recommended decision of the hearing officer constitutes final agency action. The board shall retain its decision-making authority in all retirement system policy areas.

[PL 2009, c. 322, §7 (NEW).]

2. No direct or indirect influence. A party to the appeal, including the appellant, the board, the executive director or the staff of the board may not exert direct or indirect influence on a hearing officer with regard to decisions of the hearing officer or the decision-making process.

[PL 2009, c. 322, §7 (NEW).]

3. Decision-making process. In the course of the decision-making process, hearing officers may accept, reject or determine the amount of weight to be given any information offered into evidence, including, but not limited to, medical evidence submitted by any of the parties to the appeal.

[PL 2009, c. 322, §7 (NEW).]

4. Discussion of issues before the hearing officers. All parties to an appeal, including the appellant, the board, the executive director and the retirement system staff are prohibited from ex parte