



Maine PERS
PUBLIC EMPLOYEES RETIREMENT SYSTEM

Disability Retirement Experience Report

Public Law 2021, c. 277, Sec. 44

January, 2023

Prepared by the Maine Public Employees Retirement System



MainePERS

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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I. Introduction to the MainePERS Disability Retirement Program

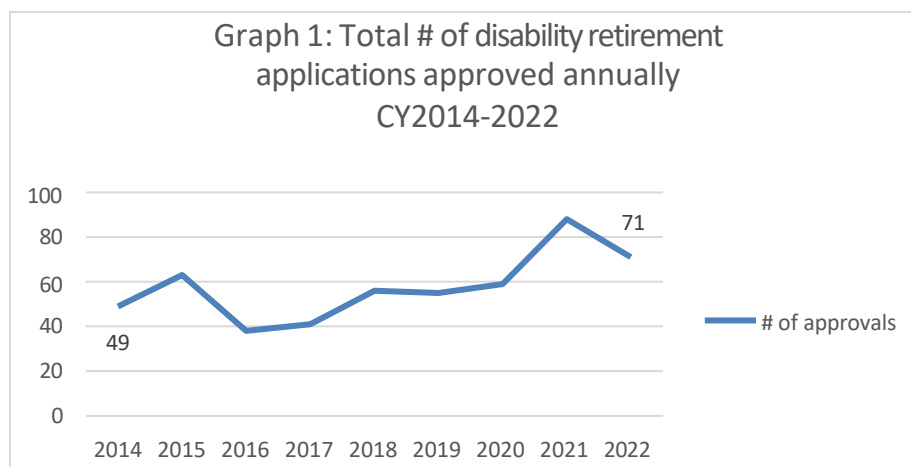
The Maine Public Employees Retirement System (MainePERS) is an incorporated public instrumentality of the state governed by a Board of Trustees pursuant to Maine law. Since 1942, MainePERS has joined with public employers to help their employees prepare for retirement. The System's active contributing members include teachers; state, county, and municipal employees; legislators; judges; and others. Upon retirement, our members receive a monthly service retirement benefit from their respective defined benefit plans. The System also administers group life insurance, survivor services, and a tax-advantaged retirement savings program known as MaineSTART. Management of these programs includes financial and investment administration, recordkeeping of members' work and compensation data, and administration of retirement and related services.

The System also administers a disability retirement program, the topic of this report. Public Law 2021, c. 277, *An Act to Improve the Disability Retirement Program of the Maine Public Employees Retirement System*, adopted changes in the disability retirement program that are outlined in section II of the report.

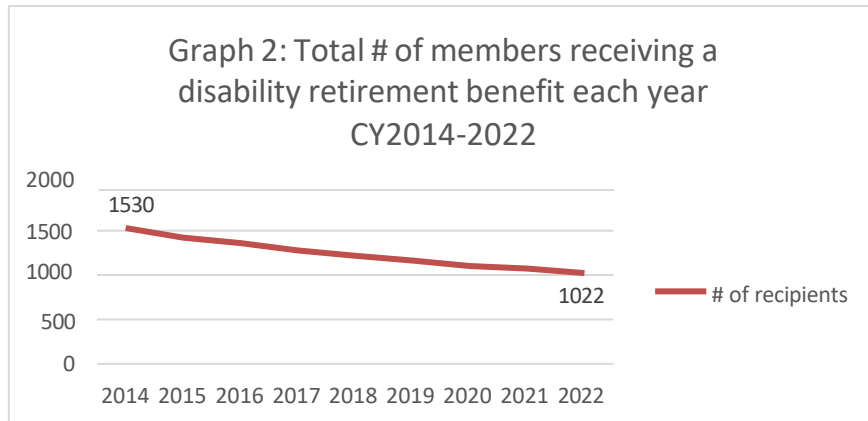
MainePERS' disability retirement program provides a benefit for a permanent disability that results in a member being "unable to perform the essential functions of the member's employment position with reasonable accommodation." The disability retirement benefit replaces either 59%, 60% or 66.67% of a member's compensation, depending on the plan under which a member has coverage. A member receiving a disability retirement benefit continues to accrue service credit, and their disability retirement benefit converts to a service retirement benefit when the member has accrued enough service credit that the two benefit amounts are equal.

Eligibility for a disability retirement benefit requires a determination that 1) a member has a disability; 2) the disability causes the member functional limitations; 3) the limitations make the member unable to perform the essential functions of the member's employment position with reasonable accommodation; and 4) the limitations are expected to be permanent. This latter requirement and the intended purpose of the disability retirement benefit make it distinct from benefits under long-term disability insurance, offered by some MainePERS employers. A long-term disability insurance benefit is the subject of a separate report submitted by MainePERS to the Legislature, pursuant to Public Law 2021, c. 277, § 43.

There are approximately 600 employers participating in MainePERS, with approximately 52,700 active members. In calendar year 2022, 71 members were approved to start receiving a disability retirement benefits as shown in graph 1 below.



As shown in graph 2 below, there are 1,022 members currently receiving a disability retirement benefit with a core monthly payroll of approximately \$2.1 million. There are also 75 members with applications in the review process moving toward a determination. Of the pending applications, 70% are less than twelve months old and half are less than six months old.



II. Public Law 2021, c. 277

Public Law 2021, c. 277, *An Act to Improve the Disability Retirement Program of the Maine Public Employees Retirement System*, became effective in October 2021 and is attached as Appendix A. The new provisions of the law ensure a member applying for a disability retirement benefit every opportunity to provide information and enable an accurate assessment of their eligibility for the benefit. In particular, the following changes were made to the program:

- Replaces “impossible to perform the duties of the member’s employment position” standard with “unable to perform the essential functions of the member’s employment position with reasonable accommodation”;
- Calls on MainePERS to create a form to be completed by the member’s provider addressing eligibility requirements;
- Eliminates the medical board and provides for a medical review service provider;
- Requires an independent medical examination before an application can be denied on medical grounds unless the requirement is waived;
- Requires primary consideration of medical opinions in the record and whether the opinions are supported by sound medical evidence and consistent with other medical evidence;
- Specifies that hearing officers are independent contractors;
- Gives an appellant a role in selecting the hearing officer;
- Provides for de novo court review; and
- Allows attorney’s fees of up to \$12,000 for a successful appellant.

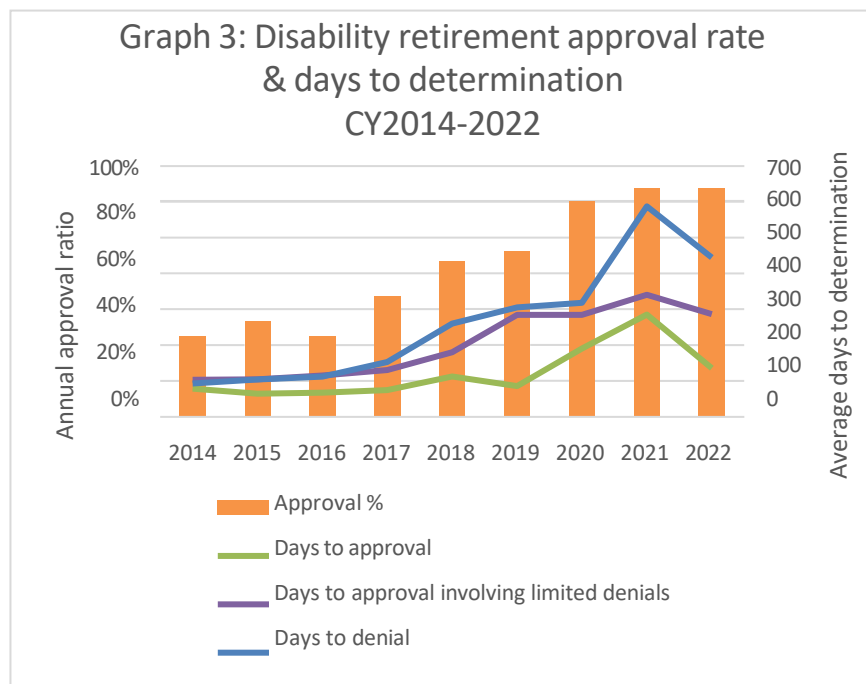
III. Program Experience under Public Law 2021, c. 277

MainePERS is required by Public Law 2021, c. 277, § 44, to report to the Legislature on the experience of the system and its members under the provisions of the new law, as follows:

Sec. 44. Report on disability retirement. The Maine Public Employees Retirement System shall report to the joint standing committee of the Legislature having jurisdiction over retirement matters, no later than January 31, 2023, on the experience of the system and its members after the implementation of this Act. The joint standing committee of the Legislature having jurisdiction over retirement matters may report out a bill to the 131st Legislature on matters related to the report.

As noted earlier, the new provisions of the law ensure a member applying for a disability retirement benefit every opportunity to provide information and enable an accurate assessment of their eligibility for the benefit. As a result of providing this extended opportunity to members, the application process generally takes longer but is more likely to result in a determination of approval.

As shown in graph 3 below, about 30% of disability retirement applications were approved in 2014 with an average processing time of three months. Whereas, about 90% of applications were approved in 2022 with an average processing time of four months for approvals and fifteen months for denials. A detailed overview of the current application process under the new provisions of the law and the variables that can impact the time from application to determination appear in Appendix B.



IV. First Year Review of the Disability Retirement Program

In preparation for this report, MainePERS undertook an extensive review of the disability retirement program a year after the implementation of Public Law 2021, c. 277.

In particular, these efforts included:

1. **Program Audit.** Contracting with a professional services firm to conduct an internal audit consulting engagement on the disability retirement program to assess compliance with the implementation of the new provisions of the law;
2. **Medical Review Service Provider Evaluation.** Conducting an internal evaluation of the medical review service provider to assess the current relationship and to explore an expansion of services;
3. **Member Experience Survey.** Surveying members who completed the disability retirement application process under the new provisions of the law and seeking additional feedback on member experience from a working group that included representatives of participant employer and employee groups; and
4. **Consensus-based Rulemaking.** Engaging in consensus-based rulemaking with stakeholders regarding the administration of the disability retirement program.

Program Audit

In fall 2022, MainePERS contracted with CliffLarsonAllen LLC (CLA) to conduct an internal audit consulting engagement on the disability retirement program, including appeals of disability retirement decisions, to assess compliance with the implementation of the new provisions of the law. The full CLA report is included in Appendix C of this report.

The scope of work performed by CLA included the following items:

- Changes to policy and procedures due to the repeal of a specific requirement for a medical board, and the new provision to contract with a medical review service provider;
- System's hearing officers must be independent contractors who serve as neutral independent decision makers;
- Policies and procedures must accurately reflect the change in definition of "disabled";
- Application process changes and updates noting that the Chief Executive Officer may grant benefits based on medical records and the member's health care provider's views, may obtain opinions and recommendations from the medical review service provider (as indicated above), and may not deny an application for disability retirement benefits on a medical basis without first obtaining an independent medical examination unless waived by the member;
- Process and policy changes related to the requirement that the Board of Trustees, Chief Executive Officer and hearing officers must primarily consider medical opinions in the record and whether the opinions are supported by sound medical evidence and are consistent with other medical evidence in the record;
- Process and rules are updated to indicate that attorney's fees up to a maximum of \$12,000 must be paid by MainePERS for a member who appeals the denial of disability benefits and is subsequently awarded those benefits;

- Reporting updates as required of MainePERS to report to the Legislature over retirement matters on the experience of the system and its members, as impacted under the changes made by the bill; and
- Implementation of a stakeholder group to report to the Legislature on the issuance of mandatory long-term disability insurance coverage. *[Please note, this item is the subject of a separate report submitted by MainePERS to the Legislature, pursuant to PL 2021, c. 277, § 43.]*

Additionally, CLA was asked to review two additional components of the disability retirement program related to benefit calculation – offsets and earnings limitations – to determine if MainePERS was applying those aspects consistently within the statute and Board of Trustees rules, and in a timely and controlled fashion on behalf of members. The program audit resulted in two observations (i.e., potential deficiencies), both of which are being addressed.

In the first observation, CLA identified functional limitations of the line of business software used for calculating benefit payments when processing complex calculations to determine the appropriate benefit payment amount and when archiving calculation history for previous benefit payments. Because of these limitations, MainePERS currently utilizes external spreadsheets to compute the benefit and archive that calculation. CLA found no material discrepancies but identified this and related limitations as a risk. CLA recommended assessing the line of business software limitations and performing a cost-benefit analysis on the impact these limitations have on operations. CLA noted that from that analysis, a decision could be made to either work with the hosting party/vendor of the software to determine enhancements to address limitations or to explore other software options and solutions. MainePERS concurred with the observation.

The MainePERS' line of business software is fully depreciated, approaching end of life, and in need of replacement. In November 2022, MainePERS chartered a team to determine the business needs and to conduct a competitive solicitation for a new line of business software solution. The charge to the line of business software team is included as Appendix D. Replacement of the line of business software is a major undertaking and a new system is not anticipated to be in place and operational for three to five years.

In the second observation, CLA identified that Disability Services Department Policy 2.1 pertaining to medical evidence and diagnosis should be reviewed and updated to ensure compliance with the new provisions of the law. The review was in progress at the time of the audit and has since been completed. The updated policy was effective January 23, 2023, and is included as Appendix E.

Medical Review Service Provider Evaluation

Public Law 2021, c. 277, repealed the provision for a medical board and provides for MainePERS to contract with a medical review service provider. In accordance with the new provisions of the law MainePERS contracted with Commonwealth Medicine, the public service consulting and operations division of the University of Massachusetts Chan Medical School (UMass).

In the fall of 2022, MainePERS undertook a review of the services provided by UMass to assess the current relationship and to explore an expansion of services. As part of the review, interviews were conducted with the disability retirement program staff, UMass personnel, and pension systems in other states utilizing the same service provider. Three pension systems were interviewed: the New Mexico Public Employees Retirement Association, the Tennessee Department of Treasury, and the Washington Department of Retirement Services. The review resulted in various options for consideration, including potential MainePERS process improvements as well as an expansion of services with UMass.

Potential process improvements identified include: establishing a regular meeting schedule with UMass; introducing a quality assurance review; adopting an approach similar to the Social Security Administration's compassionate allowance list; and proposing an amendment to the law to reduce the number of applications subject to a pre-existing condition analysis by changing the threshold from five years of continuous creditable service to a five-year vesting requirement.

UMass offers additional services that may improve the efficiency of the disability retirement application process and MainePERS intends to explore utilizing their medical records collection service to determine if it would result in a reduction of duplicate medical records.

Member Experience Survey and Other Feedback

To assess member experience with the disability retirement program, MainePERS conducted a survey from September 22 to October 7, 2022. All thirty members who had completed the disability retirement application process under the provisions of the new law and received a final determination on their application were invited to participate in the survey. Only one of these member applicants had been denied a disability retirement benefit.

Letters were mailed to these thirty members inviting them to participate in the email survey, requesting confirmation of their email address, and offering an alternative survey method for those without email addresses or who needed an accommodation. Three members did not have an email address on file and none requested an alternative method for completing the survey in response to the letter. The survey was sent to the remaining twenty-seven members. Of those who received the survey, sixteen members opened the email and twelve completed the survey. The full survey results are included in this report as Appendix F.

Among those members responding, 100% either agreed or agreed strongly they were treated respectfully and that MainePERS responded to their questions in a timely manner. Ninety-two percent agreed or strongly agreed the process was easy to understand and follow, while one respondent was neutral. In addition, 92% reported they were satisfied or very satisfied the process was fair, while one respondent expressed no opinion.

Seven of the member respondents also provided comments about the process, as follows:

1. "I felt that the associates at MainePERS were always on my side. Very personable and very professional."
2. "Well done, thank you very much."
3. "Thank you"
4. "It was a tedious, lengthy process. [staff name redacted] was always quick to respond, and helped me to understand each step in the process."
5. "It took me a long time to address my disability and move forward with the application. I was treated with respect, my medical issues were reflected extremely accurately and my questions were answered well. I am extremely grateful for the thoroughness in my application, it was however (understandable) a lengthy process."

6. “Even though I did not qualify[y] for disability you explained everything to me. Thank you”
7. “During my process my Specialist changed and I thought to myself things are going to slow down or get messed up. Not true at all my new Specialist picked the ball up and kept running. Thank you for making my case go so smoothly.”

Given the small sample size for the member experience survey, MainePERS is committed to conducting the survey again following the second full year of the program under the new provisions of the law.

In addition to the survey, MainePERS sought feedback on the member experience under the new provisions of the law from the Disability Working Group. The working group was formed in fall 2022 pursuant to Public Law 2021, c. 277, § 43, which called for MainePERS to convene a stakeholder group, including representatives of participant employer and employee groups, to develop an implementation plan for providing mandatory long-term disability insurance coverage to retirement system members through their employers. *[Please note, this item is the subject of a separate report submitted by MainePERS to the Legislature]*

The working group consisted of twelve members plus MainePERS staff. All known stakeholders representing participant employer and employee groups were invited to participate. Representatives from the Governor’s Office, Maine Department of Administrative and Financial Services, Maine Municipal Association, and Maine School Management Association represented the employers. Representatives from the Professional Fire Fighters of Maine, Maine Association of Police, AFSCME Council 93, Maine Service Employees Association, Maine State Troopers Association, Maine State Law Enforcement Association, and Maine Education Association represented employees. Additionally, a representative from Maine Association of Retirees joined the working group.

The Disability Working Group held eight meetings in the fall of 2022. The meetings were conducted through Zoom, interested members of the public were invited to observe, and documents were shared publicly through a web page on www.maineopers.org. In addition to the work related to the implementation plan for mandatory long-term disability insurance, the working group received information and held discussion on the disability retirement program under the new provisions of the law, as well as briefings on the progress of the first year review that is included in this report.

In advocating for employer-paid mandatory long-term disability insurance, the members of the working group representing employees noted that the process for applying for a disability retirement benefit is “onerous and lengthy” and has a “significant adverse impact... on the health, welfare and livelihood” of members. The complete comments provided by the working group members representing employees appear in the separate report on a long-term disability insurance benefit submitted to the Legislature. The working group members representing employers offered no specific comments relating to member experience with the disability retirement program.

The discussion by the working group was valuable in providing insight into concerns about the disability retirement program under the prior provisions of the law and continuing concerns about the adverse impact on members who do not have access to income or benefits while undergoing the process of applying for a disability benefit. The working group members were invited to keep MainePERS informed of any concerns with the disability retirement program moving forward.

Consensus-based Rulemaking

Utilizing its rulemaking authority, MainePERS adopted Rule 512, amended Rules 509 and 702, and repealed Rule 202 following the implementation of PL 2021, c. 277. Additionally, in the fall of 2022 MainePERS convened a representative group of stakeholders to engage in the process for consensus-based rule development pursuant to 5 M.R.S. §8051-B, in order to conduct a more comprehensive review and update of the agency's rules regarding the disability retirement program and appeals of disability retirement decisions. The participants included representatives from the Maine Education Association, Maine Service Employees Association, Professional Fire Fighters of Maine, and an attorney who has represented appellants in disability retirement cases.

The stakeholder group met five times from September through November of 2022. The meetings were conducted publicly through Zoom, interested members of the public were invited to observe and provide input, and documents were shared publicly through a web page on www.maineopers.org. At the time of this report the Board of Trustees has completed receipt of public comment on each of the rules outlined below and is expected to consider the proposals at the Board's February 2023 meeting.

The full text of the proposed new, amended and repealed rules appears in Appendix G of this report. A summary of key changes follows:

- **Rule 506** – New Rule 506 sets forth the standards and processes for determining eligibility for a disability retirement benefit pursuant to statutory law at both the initial application stage and upon review for continued eligibility. The rule:
 - adopts the new statutory definition of “disabled,” that the member is unable to perform the essential functions of the member’s employment position with reasonable accommodation;
 - makes the definition of “reasonable accommodation” the same as under the federal Americans with Disabilities Act;
 - makes clear that an applicant may not be denied benefits on medical grounds without first being offered the opportunity for an independent medical examination; and
 - reduces the likelihood of reviews for continuing eligibility.
- **Rule 507** – Repealed. This information has been incorporated into new rule 506.
- **Rule 509** – Repealed. This information has been incorporated into new rule 506.
- **Rule 510** – This rule change recognizes a statutory distinction between retirement plans in the methodology for determining the offset to disability retirement benefits when a recipient receives certain benefits under other laws. MainePERS has been applying the statutory distinction in its operations, and this will now be reflected in the rule.
- **Rule 511** – By statute, members who no longer are disabled continue to receive benefits as long as they actively seek work. This existing rule sets out the requirements for actively seeking work. The proposed amendment creates a presumption that the member has not actively sought work if no employment is obtained after five years, unless beyond the control of the member.
- **Rule 702** – Amended to:
 - Permit appeals to be filed by email;
 - Make clear that appellants be provided with a timely copy of the information considered in reaching a determination that is subject to appeal; and
 - Make clear that an appellant has the same right to an independent medical exam prior to a denial of benefits if new conditions are raised during an appeal.

V. Conclusions and Next Steps

In preparation for this report, MainePERS undertook an extensive review of the disability retirement program following the first year after the implementation of Public Law 2021, c. 277. In particular, these efforts included:

Program Audit. Contracting with a professional services firm to conduct an internal audit consulting engagement on the disability retirement program to assess compliance with the implementation of the new provisions of the law;

Medical Review Service Provider Evaluation. Conducting an internal evaluation of the medical review service provider to assess the current relationship and to explore an expansion of services;

Member Experience Survey. Surveying members who completed the disability retirement application process under the new provisions of the law and seeking additional feedback on member experience from a working group that included representatives of participant employer and employee groups; and

Consensus-based Rulemaking. Engaging in consensus-based rulemaking with stakeholders regarding the administration of the disability retirement program.

Importantly, this work represents our commitment to ensure not only the “letter” of the law is reflected in the program’s administration, but also the “spirit” of the law.

The program audit demonstrates the disability retirement program is functioning consistent with Public Law 2021, c. 277. The new provisions of the law ensure a member applying for a disability retirement benefit every opportunity to provide information and enable an accurate assessment of their eligibility for the benefit. As a result of providing this extended opportunity to members, the applications process generally takes longer but is more likely to result in a determination of approval.

Although the member experience to date appears positive as evidenced by the disability retirement experience survey, the changes to the law are relatively new and the population of members who have completed the application process is small. Additionally, MainePERS will soon implement new rules related to the disability retirement program and appeals of disability retirement decisions. Therefore, MainePERS intends to continue to monitor the program closely. Next steps include the following:

- Complete the process for rulemaking (anticipated February 2023)
- Implement changes following the program audit
 - Update Disability Services Department Policy 2.1 (completed January 23, 2023)
 - Upgrade/Replace the line of business software (ongoing, three to five years)
- Continue to solicit feedback from members who apply for a disability retirement benefit
 - Second member experience survey (fall 2023)
- Explore new opportunities for program improvements (2023)
 - Strengthen communications with UMass and explore additional services
 - Explore implementation of a quality assurance review
 - Explore approaches similar to the Social Security Administration compassionate allowance list
 - Review and update information and forms for member applicants
 - Propose updates to the law, as needed

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Appendix A: Public Law 2021, Ch. 277

APPROVED
JUNE 17, 2021
BY GOVERNOR

CHAPTER
277
PUBLIC LAW

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND TWENTY-ONE

S.P. 529 - L.D. 1644

An Act To Improve the Disability Retirement Program of the Maine Public Employees Retirement System

Be it enacted by the People of the State of Maine as follows:

Sec. 1. ~~3 MRSA §701, sub-§11-A~~, as enacted by PL 2017, c. 88, §1, is repealed.

Sec. 2. ~~3 MRSA §734~~, as amended by PL 2017, c. 88, §2, is repealed.

Sec. 3. ~~4 MRSA §1201, sub-§6-A, ¶B~~, as enacted by PL 1989, c. 133, §17, is amended to read:

B. Regardless of age or marital status, any other progeny certified by ~~the medical board~~ an independent health care provider or the medical review service provider to be permanently mentally incompetent or permanently physically incapacitated and determined by the executive director to be unable to engage in any substantially gainful employment.

Sec. 4. ~~4 MRSA §1201, sub-§10-A~~ is enacted to read:

10-A. Health care provider. "Health care provider" means an appropriately licensed, certified or registered provider of mental or physical health care, in either the public or private sector.

Sec. 5. ~~4 MRSA §1201, sub-§12-A~~, as enacted by PL 2017, c. 88, §4, is repealed.

Sec. 6. ~~4 MRSA §1201, sub-§12-B~~ is enacted to read:

12-B. Medical review service provider. "Medical review service provider" means an entity with whom the executive director has contracted for the review of medical records and the provision of recommendations, opinions and certifications under this chapter by health care providers employed by the entity.

Sec. 7. ~~4 MRSA §1234~~, as amended by PL 2017, c. 88, §5, is further amended to read:

§1234. Medical board review of disability

~~A medical board of the other programs of the Maine Public Employees Retirement System established in section 17106, subsection 1 is the medical board of the Judicial~~

~~Retirement Program. The medical board shall arrange for and pass upon all medical examinations required under this chapter with respect to disability retirements and shall report in writing to the Supreme Judicial Court its conclusions and recommendations upon all the matters referred to it. The board of trustees may designate other medical health care providers to provide medical consultation on judicial disability cases.~~

Sec. 8. 4 MRSA §1353, sub-§1, as amended by PL 2017, c. 88, §6, is further amended to read:

1. Conditions. Any member who becomes disabled while in service may receive a disability retirement allowance by order of at least 5 Justices of the Supreme Judicial Court or upon written application to the executive director, ~~review and report of the application by the medical board~~ and approval of that application by at least 5 of the Justices of the Supreme Judicial Court if that member is mentally or physically incapacitated to the extent that it is impossible for that member to perform the duties as a judge and the incapacity is expected to be permanent, as shown by medical examination or tests. A ~~qualified medical health care~~ provider mutually agreed upon by the executive director and member shall conduct the examinations or tests at an agreed upon place, and the costs must be paid by the Maine Public Employees Retirement System.

Sec. 9. 4 MRSA §1353, sub-§4, ¶C, as amended by PL 2017, c. 88, §7, is further amended to read:

C. The executive director may require the beneficiary to undergo annual medical examinations or tests for the purpose of determining whether the beneficiary is incapacitated. These examinations or tests must be conducted by a ~~qualified medical health care~~ provider, mutually agreed upon by the executive director and beneficiary, at a place also mutually agreed upon, and the costs of the examination or tests must be paid by the Maine Public Employees Retirement System. If the beneficiary refuses to submit to an examination or tests, the beneficiary's disability allowance ceases until the beneficiary agrees to the examination or tests. If the beneficiary's refusal continues for one year, all rights to any further benefits under this section terminate.

Sec. 10. 5 MRSA §11007, sub-§3, as enacted by PL 1977, c. 551, §3, is amended to read:

3. Judgment. The court ~~shall~~ may not substitute its judgment for that of the agency on questions of fact, ~~except that, with respect to a timely appeal by an individual of a denial of a disability determination by a hearing officer pursuant to sections 17106-A and 17106-B, the court shall review the matter de novo.~~

Sec. 11. 5 MRSA §17001, sub-§12, ¶B, as enacted by PL 1985, c. 801, §§5 and 7, is amended to read:

B. Regardless of age or marital status, any other progeny certified by ~~the medical board an independent health care provider or the medical review service provider~~ to be permanently mentally incompetent or permanently physically incapacitated and determined by the executive director to be unable to engage in any substantially gainful employment.

Sec. 12. 5 MRSA §17001, sub-§18-B is enacted to read:

18-B. Health care provider. "Health care provider" means an appropriately licensed, certified or registered provider of mental or physical health care, in either the public or private sector.

Sec. 13. 5 MRSA §17001, sub-§19-A, as enacted by PL 2017, c. 88, §8, is repealed.

Sec. 14. 5 MRSA §17001, sub-§19-B is enacted to read:

19-B. Medical review service provider. "Medical review service provider" means an entity with whom the executive director has contracted for the review of medical records and the provision of recommendations, opinions and certifications under this Part by health care providers employed by the entity.

Sec. 15. 5 MRSA §17106, as amended by PL 2017, c. 88, §§14 to 16, is repealed.

Sec. 16. 5 MRSA §17106-A, first ¶, as enacted by PL 2009, c. 322, §7, is amended to read:

~~A hearing officer employed, contracted or otherwise provided by the board~~ The board shall contract with qualified attorneys to act as hearing officers to implement the provisions of this chapter ~~is~~. Hearing officers are subject to the provisions of this section. Hearing officers are not employees of the board but independent contractors who serve as neutral and independent decision makers.

Sec. 17. 5 MRSA §17106-A, sub-§6, as amended by PL 2017, c. 88, §18, is further amended to read:

6. Engagement and termination. The board shall ~~engage contract with~~ only qualified hearing officers, ~~who must be monitored by the board~~. A contract with a hearing officer may be terminated for misconduct. Retaliatory action of any kind, including reprimand or termination, may not be taken against a hearing officer on the basis of that hearing officer's having issued decisions contrary to the decision of the executive director. In the event of termination, the retirement system shall set forth in writing the basis for the termination, the propriety of which may then be considered by the joint standing committee of the Legislature having jurisdiction over public employee retirement matters pursuant to subsection 5.

Sec. 18. 5 MRSA §17106-B is enacted to read:

§17106-B. Disability retirement; medical review

1. Disability retirement forms; assessment. The executive director shall develop and make easily accessible to health care providers in this State a disability form that allows a health care provider to provide an assessment of a member's ability to work after taking into account the member's mental or physical disability under the standards of this Part. References in this section to "disability form" refer to the form developed by the executive director. A member seeking disability retirement shall cooperate with the executive director in obtaining the member's medical records and may obtain an assessment from the health care provider of the member's ability to work after taking into account the member's mental or physical disability, and, if the health care provider finds that the member is disabled under the standards of this Part, the health care provider, at the request of the member, may file with the executive director a disability form signed by the health care provider. The health care provider shall also provide a copy of the form to the member. The executive

director may find that a member has a mental or physical disability and is eligible for disability retirement based on the information provided in the form and medical records. The executive director may seek, receive and consider recommendations and opinions from the medical review service provider in making this determination.

2. Medical review. If the executive director is unable to determine whether a member is eligible for disability retirement based on the information provided under subsection 1, the executive director shall direct the member to have an independent medical examination by an independent health care provider. The member may waive the independent medical examination, in which case the executive director may determine that the member is not eligible for disability retirement. The member may appeal this determination under subsection 3.

A. The retirement system shall pay all fees of the independent health care provider. The independent health care provider may not be a state employee and may not have any association with the retirement system other than providing independent medical examinations or medical consultations and receiving payment for these services and, unless the member consents in writing, may not have previously examined or treated the member with respect to the member's mental or physical disability.

B. The member may have a representative present at the independent medical examination, who may be a union representative, an attorney, a health care provider or any individual of the member's choice. The retirement system shall reimburse the member's representative as follows:

(1) If the representative is a health care provider, the retirement system shall pay that health care provider a standard per diem rate established by the board and a reasonable mileage reimbursement; and

(2) Any other representative of the member may be paid a reasonable mileage reimbursement only.

3. Disability determination; appeal. After an independent medical review under subsection 2, the executive director or the executive director's designee shall make a determination of eligibility for disability retirement based upon the totality of the evidence and in accordance with subsection 4. The executive director or the executive director's designee may obtain recommendations or opinions from the medical review service provider to assist in this determination. A determination by the executive director or the executive director's designee that the member is not disabled may be appealed by the member to a hearing officer, who shall hear the appeal in accordance with section 17106-A. The board shall by rule provide for procedures for the member to participate in selection of the hearing officer who will hear the member's appeal. Rules adopted pursuant to this subsection are routine technical rules as defined in chapter 375, subchapter 2-A.

4. Medical evidence. When reviewing medical evidence in making determinations of disability, the board, executive director and hearing officers shall primarily consider medical opinions in the record and whether the opinions are supported by sound medical evidence and are consistent with other medical evidence in the record.

5. Attorney's fees. If a member has retained services of an attorney to represent the member before a hearing officer or in a court proceeding on appeal of a board decision, the fee arrangement has been approved by the hearing officer or the court and the attorney obtains a favorable result for the member, the attorney's fees must be paid by the retirement

system, up to a maximum of \$12,000. The fee arrangement may be a contingency fee, in which case the payment by the retirement system must be applied toward the satisfaction of the contingency fee.

Sec. 19. 5 MRSA §17902, sub-§1, ¶A, as amended by PL 2017, c. 88, §22, is further amended to read:

A. The executive director shall obtain medical consultation on each applicant for disability retirement benefits in accordance with related rules established by the board, ~~which must include provisions indicating when a case must be reviewed by a medical board and when alternative means of medical consultation are acceptable.~~ Rules adopted pursuant to this paragraph are routine technical rules as defined in chapter 375, subchapter 2-A. ~~Whether provided by the medical board or by an alternative means,~~ medical Medical consultation obtained by the executive director must be objective and be provided by a medical provider or medical providers qualified to review the case by specialty or experience and to whom the applicant is not known.

Sec. 20. 5 MRSA §17911, first ¶, as enacted by PL 2003, c. 387, §4, is amended to read:

Upon agreement of the executive director and the person, rehabilitation services may be provided to any person who is the recipient of a disability retirement benefit under this article as a means to the person being able to return to substantially gainful activity. As a condition of entering into an agreement to provide rehabilitation services, the executive director must determine that rehabilitation is feasible, that rehabilitation is consistent with the purposes of this article, that the recipient is suitable for rehabilitation services and that rehabilitation services are likely to lead to substantially gainful activity. ~~When appropriate, determination of suitability must include consultation with the medical board to determine any medical indications that the recipient should not engage in a rehabilitation program or to identify a recipient too severely disabled to benefit from rehabilitation services in accordance with the purposes of this article.~~ Services must be provided by private and public rehabilitation counselors, government agencies and others approved by the executive director as qualified to provide rehabilitation services. The executive director shall consider a rehabilitation counselor's rate of successfully placing rehabilitated employees in jobs relative to the placement rates of other counselors in the State as fundamental in deciding whether to approve the counselor as qualified. This section does not affect the ongoing requirement that a person remain disabled in order to continue to receive disability benefits.

Sec. 21. 5 MRSA §17921, sub-§1, ¶B, as enacted by PL 1989, c. 409, §§8 and 12, is amended to read:

B. ~~That it is impossible to perform the duties of the member is unable to perform the essential functions of the member's employment position with reasonable accommodation;~~

Sec. 22. 5 MRSA §17925, sub-§1, ¶A, as amended by PL 2017, c. 88, §25, is repealed.

Sec. 23. 5 MRSA §17926, as amended by PL 2017, c. 88, §26, is further amended to read:

§17926. Examinations or tests

Any examinations or tests ~~recommended by the medical board in accordance with~~ conducted under section ~~17106~~ 17106-B or required by the executive director under section 17921, subsection 1, paragraph D; section 17924; section 17929, subsection 2, paragraph B; or section 17933, subsection 3, paragraph A, are governed as follows.

1. **Agreed upon ~~medical~~ health care provider.** The examinations or tests must be conducted by a ~~qualified medical health care~~ provider mutually agreed upon by the executive director and the member claiming to be disabled.

2. **Agreed upon place.** The examinations or tests ~~shall~~ must be conducted at the health care provider's office or facility or at a place mutually agreed upon by the executive director and the member claiming to be disabled.

3. **Costs.** The costs incurred under subsections 1 and 2 ~~shall~~ must be paid by the retirement system.

Sec. 24. 5 MRSA §17927, first ¶, as amended by PL 2003, c. 387, §5, is further amended to read:

Upon agreement of the executive director and the person, rehabilitation services may be provided to any person who is the recipient of a disability retirement benefit under this article as a means to the person being able to return to substantially gainful activity. As a condition of entering into an agreement to provide rehabilitation services, the executive director must determine that rehabilitation is feasible, that rehabilitation is consistent with the purposes of this article, that the recipient is suitable for rehabilitation services and that rehabilitation services are likely to lead to substantially gainful activity. ~~When appropriate, determination of suitability must include consultation with the medical board to determine any medical indications that the recipient should not engage in a rehabilitation program or to identify a recipient too severely disabled to benefit from rehabilitation services in accordance with the purposes of this article.~~ Services must be provided by private and public rehabilitation counselors, government agencies and others approved by the executive director as qualified to provide rehabilitation services. The executive director shall consider a rehabilitation counselor's rate of successfully placing rehabilitated employees in jobs relative to the placement rates of other counselors in the State as fundamental in deciding whether to approve the counselor as qualified. This section does not affect the ongoing requirement that a person remain disabled in order to continue to receive disability benefits.

Sec. 25. 5 MRSA §17929, sub-§2, ¶B, as amended by PL 2003, c. 675, §2, is further amended to read:

B. The executive director may require, once each year, that the person undergo examinations or tests, conducted in accordance with section 17926, to determine the person's disability. ~~The executive director may refer the records documenting the results of the examinations or tests and the person's file to the medical board for medical consultation regarding rehabilitation in accordance with section 17106, subsection 3, paragraph E.~~

(1) After the disability has continued for 2 years, the disability must render the person unable to engage in any substantially gainful activity that is consistent with the person's training, education or experience and average final compensation adjusted by the same percentage adjustment as has been received under section

17806. The disability retirement benefit continues if the person can effectively demonstrate to the executive director that the person is actively seeking work. For the purposes of this subparagraph, the ability to engage in substantially gainful activity is demonstrated by the ability to perform work resulting in annual earnings that exceed \$20,000 or 80% of the recipient's average final compensation at retirement, whichever is greater, adjusted by the same percentage adjustments granted under section 17806.

(2) If the person refuses to submit to the examinations or tests under this paragraph, the disability retirement benefit is discontinued until that person withdraws the refusal.

(3) If the person's refusal under subparagraph (2) continues for one year, all rights to any further benefits under this article cease.

(4) If it is determined, on the basis of the examinations or tests under this paragraph, that the disability of a person no longer exists, the payment of the disability retirement benefit ceases.

(5) The executive director shall notify the person in writing of the decision to discontinue the disability retirement allowance under subparagraph (2) or (4).

(a) The decision is subject to appeal under section 17451.

(b) If the person appeals the executive director's decision, the disability retirement allowance may not be discontinued until all appeals have been exhausted.

Sec. 26. 5 MRSA §17930, sub-§2, ¶C, as enacted by PL 1989, c. 409, §§8 and 12, is amended to read:

C. If, during the first 5 years of reemployment, the person again becomes disabled, terminates employment and is not covered by any other disability program, the retirement system shall resume paying the disability retirement benefit payable prior to the reemployment with all applicable cost-of-living adjustments and shall provide rehabilitation services ~~under~~ in accordance with section 17927 ~~if recommended by the medical board~~. If the benefit payable under the other disability program is not equal to or greater than the benefit under this article, the retirement system shall pay the difference between the amount of the benefit payable under the other disability program and the amount of the benefit payable under this article. The executive director shall require examinations or tests to determine whether the person is disabled as described in section 17921; and

Sec. 27. 5 MRSA §17930, sub-§3, ¶E, as enacted by PL 1989, c. 409, §§8 and 12, is amended to read:

E. If, during the first 5 years of reemployment, the person again becomes disabled and terminates employment, the retirement system shall resume paying the disability retirement benefit payable prior to the reemployment with all applicable cost-of-living adjustments, or if greater, a disability retirement benefit based upon the person's current average final compensation and shall provide rehabilitation services ~~under~~ in accordance with section 17927 ~~if recommended by the medical board~~. The executive

director shall require examinations or tests to determine whether the person is disabled as defined in section 17921; and

Sec. 28. 5 MRSA §17932, sub-§2, as amended by PL 2017, c. 88, §27, is further amended to read:

2. Dispute over mental or physical capacity. If there is a dispute between the person and the former employer over the person's mental or physical capacity to perform a specific job, at the option of the person that dispute must be resolved by a majority of 3 ~~medical health care~~ providers, one appointed and reimbursed by the person, one appointed and reimbursed by the employer and one appointed and reimbursed by the retirement system. If the 3 ~~medical health care~~ providers resolve the dispute in favor of the person, the former employer must reimburse the ~~medical health care~~ provider appointed by the person.

Sec. 29. 5 MRSA §17953, sub-§3, ¶A, as amended by PL 1991, c. 469, §2, is further amended to read:

A. A surviving spouse of the qualifying member is paid a \$150 benefit each month beginning the first month after the death occurs and continuing during the surviving spouse's lifetime, if:

- (1) The deceased qualifying member had 10 years of creditable service at the time of death; or
- (2) The surviving spouse is certified by ~~the medical board~~ an independent health care provider or the medical review service provider to be permanently mentally incompetent or permanently physically incapacitated and is determined by the executive director to be unable to engage in any substantially gainful employment.

A full month's benefit is paid to the estate of the surviving spouse for the month in which the surviving spouse dies.

Sec. 30. 5 MRSA §17953, sub-§5-A, ¶A, as amended by PL 1991, c. 469, §2, is further amended to read:

A. A designated beneficiary who is alive at the time of the death of the qualifying member is paid \$150 per month beginning the first month after the death occurs and continuing until the date of the designated beneficiary's death, if the designated beneficiary is certified by ~~the medical board~~ an independent health care provider or the medical review service provider to be permanently mentally incompetent or permanently physically incapacitated and is determined by the executive director to be unable to engage in any substantially gainful employment.

Sec. 31. 5 MRSA §18502, sub-§1, ¶A, as amended by PL 2017, c. 88, §30, is repealed.

Sec. 32. 5 MRSA §18503, as amended by PL 2017, c. 88, §31, is further amended to read:

§18503. Examination or tests

The examination or tests to determine whether a member is disabled under section 18501 are governed as follows.

1. Agreed upon medical health care provider. The examination or tests must be conducted by a ~~qualified medical~~ health care provider mutually agreed upon by the executive director and member claiming to be disabled.

2. Agreed upon place. The examination or tests ~~shall~~ must be conducted at the health care provider's office or facility or at a place mutually agreed upon by the executive director and member claiming to be disabled.

3. Costs. The costs incurred under subsections 1 and 2 ~~shall~~ must be paid by the retirement system.

Sec. 33. 5 MRSA §18512, first ¶, as enacted by PL 2003, c. 387, §10, is amended to read:

Upon agreement of the executive director and the person, rehabilitation services may be provided to any person who is the recipient of a disability retirement benefit under this article as a means to the person being able to return to substantially gainful activity. As a condition of entering into an agreement to provide rehabilitation services, the executive director must determine that rehabilitation is feasible, that rehabilitation is consistent with the purposes of this article, that the recipient is suitable for rehabilitation services and that rehabilitation services are likely to lead to substantially gainful activity. ~~When appropriate, determination of suitability must include consultation with the medical board to determine any medical indications that the recipient should not engage in a rehabilitation program or to identify a recipient too severely disabled to benefit from rehabilitation services in accordance with the purposes of this article.~~ Services must be provided by private and public rehabilitation counselors, government agencies and others approved by the executive director as qualified to provide rehabilitation services. The executive director shall consider a rehabilitation counselor's rate of successfully placing rehabilitated employees in jobs relative to the placement rates of other counselors in the State as fundamental in deciding whether to approve the counselor as qualified. This section does not affect the ongoing requirement that a person remain disabled in order to continue to receive disability benefits.

Sec. 34. 5 MRSA §18521, sub-§1, ¶B, as enacted by PL 1989, c. 409, §§11 and 12, is amended to read:

B. That ~~it is impossible to perform the duties~~ the member is unable to perform the essential functions of the member's employment position with reasonable accommodation;

Sec. 35. 5 MRSA §18525, sub-§1, ¶A, as amended by PL 2017, c. 88, §32, is repealed.

Sec. 36. 5 MRSA §18526, as amended by PL 2017, c. 88, §33, is further amended to read:

§18526. Examinations or tests

Any examinations or tests ~~recommended by the medical board in accordance with~~ conducted under section ~~17106~~ 17106-B or required by the executive director under section 18521, subsection 1, paragraph D; section 18524; section 18529, subsection 2, paragraph B; or section 18533, subsection 3, paragraph A, are governed as follows.

1. **Agreed upon medical health care provider.** The examinations or tests must be conducted by a ~~qualified~~ medical health care provider mutually agreed upon by the executive director and the member claiming to be disabled.

2. **Agreed upon place.** The examinations or tests ~~shall~~ must be conducted at the health care provider's office or facility or at a place mutually agreed upon by the executive director and the member claiming to be disabled.

3. **Costs.** The costs incurred under subsections 1 and 2 ~~shall~~ must be paid by the retirement system.

Sec. 37. 5 MRSA §18527, first ¶, as amended by PL 2003, c. 387, §11, is further amended to read:

Upon agreement of the executive director and the person, rehabilitation services may be provided to any person who is the recipient of a disability retirement benefit under this article as a means to the person being able to return to substantially gainful activity. As a condition of entering into an agreement to provide rehabilitation services, the executive director must determine that rehabilitation is feasible, that rehabilitation is consistent with the purposes of this article, that the recipient is suitable for rehabilitation services and that rehabilitation services are likely to lead to substantially gainful activity. ~~When appropriate, determination of suitability must include consultation with the medical board to determine any medical indications that the recipient should not engage in a rehabilitation program or to identify a recipient too severely disabled to benefit from rehabilitation services in accordance with the purposes of this article.~~ Services must be provided by private and public rehabilitation counselors, government agencies and others approved by the executive director as qualified to provide rehabilitation services. The executive director shall consider a rehabilitation counselor's rate of successfully placing rehabilitated employees in jobs relative to the placement rates of other counselors in the State as fundamental in deciding whether to approve the counselor as qualified. This section does not affect the ongoing requirement that a person remain disabled in order to continue to receive disability benefits.

Sec. 38. 5 MRSA §18529, sub-§2, ¶B, as amended by PL 2003, c. 675, §4, is further amended to read:

B. The executive director may require, once each year, that the person undergo examinations or tests, conducted in accordance with section 18526, to determine the person's disability. ~~The executive director may refer the records documenting the results of the examinations or tests and the person's file to the medical board for medical consultation regarding rehabilitation in accordance with section 17106, subsection 3, paragraph E.~~

(1) After the disability has continued for 2 years, the disability must render the person unable to engage in any substantially gainful activity that is consistent with the person's training, education or experience and average final compensation adjusted by the same percentage adjustment as has been received under section 18407. The disability retirement benefit continues if the person can effectively demonstrate to the executive director that the person is actively seeking work. For purposes of this subparagraph, the ability to engage in substantially gainful activity is demonstrated by the ability to perform work resulting in annual earnings that exceed \$20,000 or 80% of the recipient's average final compensation at retirement,

whichever is greater, adjusted by the same percentage adjustments granted under section 18407.

(2) If the person refuses to submit to the examinations or tests under this paragraph, the disability retirement benefit is discontinued until that person withdraws the refusal.

(3) If the person's refusal under subparagraph (2) continues for one year, all rights to any further benefits under this article cease.

(4) If it is determined, on the basis of the examinations or tests under this paragraph, that the disability of a person no longer exists, the payment of the disability retirement benefit ceases.

(5) The executive director shall notify the person in writing of the decision to discontinue the disability retirement allowance under subparagraph (2) or (4).

(a) The decision is subject to appeal under section 17451.

(b) If the person appeals the executive director's decision, the disability retirement allowance may not be discontinued until all appeals have been exhausted.

Sec. 39. 5 MRSA §18530, sub-§2, ¶C, as enacted by PL 1989, c. 409, §§11 and 12, is amended to read:

C. If, during the first 5 years of reemployment, the person again becomes disabled, terminates employment and is not covered by any other disability program, the retirement system shall resume paying the disability retirement benefit payable prior to the reemployment with all applicable cost-of-living adjustments and shall provide rehabilitation services under in accordance with section 18527 ~~if recommended by the medical board~~. If the benefit payable under the other disability program is not equal to or greater than the benefit under this article, the retirement system shall pay the difference between the amount of the benefit payable under the other disability program and the amount of the benefit payable under this article. The executive director shall require examinations or tests to determine whether the person is disabled as described in section 18521; and

Sec. 40. 5 MRSA §18530, sub-§3, ¶E, as enacted by PL 1989, c. 409, §§11 and 12, is amended to read:

E. If, during the first 5 years of reemployment, the person again becomes disabled and terminates employment, the retirement system shall resume paying the disability retirement benefit payable prior to the reemployment with all applicable cost-of-living adjustments, or if greater, a disability retirement benefit based upon the person's current average final compensation and shall provide rehabilitation services under in accordance with section 18527 ~~if recommended by the medical board~~. The executive director shall require examinations or tests to determine whether the person is disabled as defined in section 18521; and

Sec. 41. 5 MRSA §18553, sub-§3, ¶A, as amended by PL 1991, c. 469, §5, is further amended to read:

A. A surviving spouse of the qualifying member is paid a \$150 benefit each month beginning the first month after the death occurs and continuing during the surviving spouse's lifetime, if:

- (1) The deceased qualifying member had 10 years of creditable service at the time of death; or
- (2) The surviving spouse is certified by ~~the medical board~~ an independent health care provider or the medical review service provider to be permanently mentally incompetent or permanently physically incapacitated and is determined by the executive director to be unable to engage in any substantially gainful employment.

A full month's benefit is paid to the estate of the surviving spouse for the month in which the surviving spouse dies.

Sec. 42. 5 MRSA §18553, sub-§5-A, ¶A, as amended by PL 1991, c. 469, §5, is further amended to read:

A. A designated beneficiary who is alive at the time of the death of the qualifying member is paid \$150 per month beginning the first month after the death occurs and continuing until the date of the designated beneficiary's death, if the designated beneficiary is certified by ~~the medical board~~ an independent health care provider or the medical review service provider to be permanently mentally incompetent or permanently physically incapacitated and is determined by the executive director to be unable to engage in any substantially gainful employment.

Sec. 43. Implementation plan for mandatory long-term disability insurance. The Maine Public Employees Retirement System shall convene a stakeholder group, including representatives of participant employers and employee groups, to develop an implementation plan for providing mandatory long-term disability insurance coverage to retirement system members through their employers. The Maine Public Employees Retirement System shall submit an implementation plan, including any recommended legislation, to the joint standing committee of the Legislature having jurisdiction over retirement matters no later than January 3, 2023. The joint standing committee of the Legislature having jurisdiction over retirement matters may report out a bill to the 131st Legislature on matters related to the report.

Sec. 44. Report on disability retirement. The Maine Public Employees Retirement System shall report to the joint standing committee of the Legislature having jurisdiction over retirement matters, no later than January 31, 2023, on the experience of the system and its members after the implementation of this Act. The joint standing committee of the Legislature having jurisdiction over retirement matters may report out a bill to the 131st Legislature on matters related to the report.

Sec. 45. Application. This Act applies to disability retirement benefit applications received by the Maine Public Employees Retirement System on or after the effective date of this Act.

Appendix B: Disability Retirement Application Process and Time Variables



MEMORANDUM

Date: October 5, 2022

To: Disability Working Group

From: Mara McGowen, Supplemental Benefits Division Manager

Re: Disability Retirement Application Process and Time Variables

This memo is meant to provide a brief overview of the current application process as most recently updated by law in October 2021 for Disability Retirement and to outline the variables that can influence the time elapsed between an application being filed and a decision being rendered.

Executive Summary:

- The process of applying for disability retirement and reaching a determination on an application currently requires approximately 9 to 12 months, sometimes longer, depending on the particulars of a case.
- The length of time required generally is associated with providing an applicant every opportunity under the law to provide information that will help result in an accurate assessment of their eligibility for benefits.
- In practice, this has resulted in more approvals and fewer denials. For the applications resolved in 2021-2022, MainePERS approved more than 90 percent of all applications.
- Some typical factors that can lengthen the process include: compilation of medical and employer records; review by the medical review service provider (i.e., UMASS); independent medical examination; and, applicant-requested extensions.
- Each of these and other steps are further detailed below.

Disability Application Process:

Intake – When a member calls MainePERS to inquire about application for Disability Retirement, a Disability Specialist is assigned to process an intake. During the intake, members are provided, in detail, with the eligibility requirements of the program, an understanding of the application process, and next steps to be taken. These conversations typically require approximately an hour. They provide an initial opportunity for an applicant to describe their situation and often the hardships they are facing. It is also at this point that applicants or potential applicants are provided with a health care provider form, newly required by law, which describes the requirements for eligibility and which MainePERS considers in making the determination.

Receipt of Application – Upon completion of the intake, application materials are sent to the member at their

request. Application materials are not available unless an intake is completed. MainePERS has found that the intake process reduces frustration for members due to the proactive education surrounding program eligibility requirements. It also assists members in deciding if or when the right time to apply is and informs them about important impacts on benefits such as life or health insurance if an unpaid leave or termination occurs.

New Application Interview – Once a complete application has been received, a Specialist will speak with the applicant. This is another opportunity for the Specialist to outline expectations for the applicant. This interview is also used to gather information regarding the applicant's most recent position, the difficulties they are facing, ask questions regarding the application itself, etc.

Compilation of Records – In addition to the medical records MainePERS needs to compile, specialists and support staff are also requesting documentation from employers, worker's compensation, staff responsible for processing ADA accommodations and any other sources deemed necessary through the application and interview process.

Employer Interview – This is an important step in the application process. Specialists schedule interviews to discuss any difficulties the applicant was having performing job functions, any accommodations provided, further explanation of job duties, etc. This often involves speaking with more than one individual (i.e., direct supervisor, Human Resources personnel, ADA personnel, etc.).

Pre-Medical Review – After receipt of all initial medical documentation and completion of employer interviews, the Specialist calls the applicant to review the medical records received and to determine if the information the applicant intends to submit is complete. This is an opportunity for an applicant to identify important missing information prior to reaching any conclusions about eligibility.

Submission to Medical Review Service Provider – MainePERS' independent contractor as stipulated by law (currently contracted with UMASS) provides medical opinions regarding the applicable diagnoses, limitations caused by the applicant's diagnoses and whether or not any limitations are expected to be permanent.

Observation – Upon receipt and review of the report from the medical review service provider, the assigned Specialist will speak with the applicant regarding the findings. A letter outlining the detail of this conversation, as well as a copy of the report from the medical review service provider/UMASS, is provided to the applicant.

Record Supplementation – Following the observation, the applicant often will choose to supplement the documentation previously provided to MainePERS. Examples of supplementation include undergoing suggested treatment, consulting with treating physicians regarding the observation and UMASS report or seeing a new medical provider. Additional medical records are often compiled at this phase.

2nd Review by Medical Review Service Provider – Once the applicant is satisfied with the content of their record, the record is sent to UMASS for a second review.

Independent Medical Examination (IME) – Each applicant has the opportunity to have an IME scheduled prior to a denial being issued on medical grounds. The medical professionals who perform IMEs are procured by an outside contractor or are themselves independent contractors. The applicant must agree that the professional suggested is acceptable to them prior to scheduling. Applicants may choose to

waive the right to an IME.

Decision Issued – Several levels of internal review are performed prior to a decision being rendered.

Hold – At any point in the process above, an applicant may request that their application be placed on hold for 30, 60 or 90 days. Multiple holds may be requested.

The process above is outlined to convey the typical applicant's experience. Please note, some steps may be omitted or repeated depending on the circumstances. For example, an applicant in the end stages of a terminal cancer may cause a Specialist to work directly with the applicant's Oncologist in order to expedite the application and permit an application to be granted without review by the medical review service provider.

Variables that Impact Application Processing Time:

Compilation of Medical Records – Compiling medical records can be a lengthy process. Many Maine providers request MainePERS wait 30 days prior to checking the status of requests, while out of state facilities and national medical record compilation services request 60 days. Once received, staff often discover treating physicians not previously disclosed during the application process, which then requires additional record requests. It also is not uncommon for partial records to be received requiring follow up and likely a second request to obtain the needed information.

Employer Response Times – Response times from employers vary. It is not uncommon for an Employer Report to take several months to be received and then additional time to schedule an Employer Interview and HR follow up.

Record Supplementation – Applicants are permitted to supplement their record at any time. While this is encouraged when the applicant believes it necessary, it lengthens the process.

Seeking Further Treatment – Some applicants apply while still in treatment and/or before they have exhausted all treatment options. Since permanency is an eligibility requirement, further treatment can be required in order to determine an applicant's prognosis.

Holds – An applicant, at any time, may request their case be placed on hold for 30, 60 or 90 days. Applicants can request multiple holds.

Independent Medical Examinations (IMEs) – Sometimes the contracted vendor has difficulty procuring the appropriate medical professional to provide this service. Since an applicant must agree to the medical professional, the pool of available candidates can be further limited if the applicant chooses to deny professionals. Once a medical professional agreeable to both parties is located, there is often further time required actually to secure an appointment. Conducting an IME may add six months to the application processing time as a result.

Medical Review Provider Reports – The medical review provider (currently UMASS) contractually has 30 days to review a case and render an opinion each time the file is sent to them for review. If it is necessary for staff to ask clarifying questions about the content of the report, coordination can take several weeks after the 30 day deadline has passed.

Time required to process an application often is voluntarily extended by the member at their discretion.

In order for each applicant to be confident in the documentation submitted for consideration, MainePERS provides as much opportunity as possible for a complete record to be compiled. Whether the decision is to approve or deny the application, specialists are dedicated to ensuring the record is as complete as possible in order for the appropriate determination to be made.

Maine Public Employees Retirement System (MainePERS) Disability Program Compliance Assessment

November 11, 2022



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WEALTH ADVISORY
OUTSOURCING
AUDIT, TAX, AND
CONSULTING

Maine Public Employees Retirement System
Augusta, ME

To: Executive Management

We have concluded our internal audit consulting engagement to perform the procedures for the disability program compliance assessment as described in the attached document. These procedures, which were agreed to by Maine Public Employees Retirement System (MainePERS), were applied solely to assist in evaluating the disability program and related requirements at MainePERS. The management of MainePERS is responsible for the operations and the internal controls related to disability program(s). This engagement was conducted in accordance with Statements on Standards for Consulting Services issued by the American Institute of Certified Public Accountants. The sufficiency of the procedures, including the scope of and timing of the procedures, is solely the responsibility of the Board of Trustees and management of MainePERS. Consequently, we make no representations regarding the sufficiency of the procedures described in the attached document either for the purpose for which this report has been requested or for any other purpose.

We have included findings and recommendations resulting from the consulting engagement for consideration of MainePERS. Our procedures covered the period from October 18, 2021 through July 31, 2022.

Our engagement to perform these procedures was conducted as a consulting services engagement. We were not engaged to, and did not perform an audit, the objective of which would be the expression of an opinion on the operations or internal controls of MainePERS. Accordingly, we do not express such an opinion. Had we performed additional procedures; other matters might have come to our attention that would have been reported to you.

This report is intended solely for the use of the Board of Trustees, Audit Committee, Legislative Oversight, and management of MainePERS and should not be used by others; however, a copy may be provided to regulatory authorities.

CliftonLarsonAllen LLP

Plymouth Meeting, Pennsylvania
November 11, 2022

In coordination with MainePERS, there were key items identified related to S.P. 529 – L.D. 1644, An Act to Improve the Disability Retirement Program of the Maine Public Employees Retirement System, as enacted on June 17, 2021 (the “Act”). Specifically the following scope items were noted for assessment and conformance with the Act, including:

- Changes to policy and procedures due to the repeal of specific requirement for a Medical Board, and the new provision and role for permission of the executive director to contract with a medical review service provider;
- System’s hearing officers must be independent contractors who serve as neutral independent decision makers;
- Policies and procedures must accurately reflect the change in definition of "disabled";
- Application process changes and updates noting that the executive director may grant benefits based on medical records and the member’s health care provider’s views, may obtain opinions and recommendations from the medical review service provider (as indicated above), and may not deny an application for disability retirement benefits without first obtaining an independent medical examination unless waived by the member;
- Process and policy changes related to the requirement that the Board, executive director and hearing officers must primarily consider medical opinions in the record and whether the opinions are supported by sound medical evidence and are consistent with other medical evidence in the record;
- Process and rules are updated to indicate that attorney's fees up to a maximum of \$12,000 must be paid by the MainePERS for a member who appeals the denial of disability benefits and is subsequently awarded those benefits;
- Reporting updates as required of MainePERS to report to the Legislature over retirement matters on the experience of the system and its members, as impacted under the changes made by the bill; and
- Implementation of a stakeholder group to report to the Legislature (and reporting) over issuance of mandatory long-term disability insurance coverage.

Purpose and Objectives:

We reviewed the changes required in the statute and determined if MainePERS has implemented those provisions, and if not, identified and reported what was outstanding. In addition, the assessment provided executive management insight of process documentation for the program and highlighted any gaps in conformance of the requirements and scope as listed above. Lastly, the assessment reviewed two additional components of the program related to benefit calculation(s) – offsets and earnings limitations – to determine if MainePERS was applying those aspects consistently within the statute and board rule, and in a timely and controlled fashion on behalf of members.

CLA, with the aid of personnel from the MainePERS, obtained and reviewed documentation surrounding the Agency’s management and operations around the Disability Retirement Program, including appeals of disability retirement decisions. This document serves as a draft copy of observations and recommendations CLA noted over the course of the engagement, for management’s discussion and review before finalization. Below are risk definitions assigned to each of CLA’s observations, which begin on the following page.

Based on the review of the content of each observation, one of the following definitions of risk is assigned to facilitate comparison between observations.

Risk	Definition
High	<p>High priority issue, which requires immediate management attention. This is a serious internal control or risk management issue that if not mitigated, may, with a high degree of certainty, lead to:</p> <ul style="list-style-type: none"> • Substantial losses, possibly in conjunction with other weaknesses in the control framework, systems/applications, or the organizational entity or process being audited. • Serious violation of corporate strategies, policies, or values. • Serious reputation damage, such as negative publicity. And/or • Significant adverse regulatory impact, such as loss of operating license or material fines.
Moderate	<p>Timely management attention is warranted. This is an internal control or risk management issue that could lead to:</p> <ul style="list-style-type: none"> • Financial losses. • Loss of effective or efficient control within the organizational entity, systems/applications, or process being audited. • Reputation damage. And/or • Adverse regulatory impact, such as report comments or material fines.
Low	<p>Low priority issue that requires routine management attention. This is an internal control or risk management issue, the solution to which may lead to improvement in the quality and/or efficiency of the organizational entity, systems/applications, or process being audited. Risks of loss or inefficiency are immaterial/inconsequential or significantly limited.</p>

Observation #	Description of Observation (Potential Deficiency)	Risk	Description of Recommendation
1	<p>The MainePERS line of business software used for calculating benefit payments has functional limitations when processing complex calculations to determine the appropriate benefit payment amount and when archiving calculation history for previous benefit payments.</p> <p>For one (1) of the five (5) samples selected for benefit calculation testing, there was an immaterial discrepancy between the calculated benefit amount within the system and the finalized benefit amount. Upon follow up, it was determined that external spreadsheets are utilized to compute the benefit, which was then entered into the system manually.</p> <p>For one (1) of the nine (9) samples selected for offset calculation testing, there was past calculation data that was overwritten within the system to reflect the current status of the member. To obtain the past data, an external spreadsheet was utilized to show the past computation of the benefit.</p>	High	<p>We recommend assessing the line of business software functional limitations and performing a cost-benefit analysis on the impact that these limitations have on operations. From that analysis, a decision can be made to either work with the hosting party / vendor of the software to determine enhancements to address functional limitation or to explore other software options and solutions.</p> <p>Management Response: Management agrees that the use of spreadsheets to do calculations outside of the line of business system creates risk. MainePERS is assessing whether calculations currently performed manually can be added to the line of business application efficiently or if another solution can be put in place. The question related to archiving calculation history will be investigated with the vendor. This work is ongoing.</p>
2	<p>As a part of the MainePERS Disability Services Practice policies and procedures, it was noted that one of the policies had not been updated/approved since the 130th Maine Legislature update:</p> <ul style="list-style-type: none"> 2.1 – Medical Diagnosis (Last updated/approved on February of 2021) <p>Upon follow up and review of the policy and practice review logs, it was noted that Policy 2.1 had also not been reviewed since it was last updated in February of 2021.</p>	Low	<p>We recommend that all policies and procedural documents be subject to the annual review process.</p> <p>Management Response: Management has a system in place to track the review of policies and procedural documentation with each document being subject to review annually. Policy 2.1 – Medical Diagnosis is currently under review to be updated.</p>

Appendix D: Line of Business Software Team Charge

From: Rebecca Wyke

Sent: Monday, November 21, 2022

Subject: Charge to the Line of Business (LOB) Team

We have arrived at the point of considering what software solution can best support MainePERS core retirement and associated functions in lieu of the current V3 tool. To advance that work, I am formalizing a group to serve as the core team for our MainePERS Line of Business software project.

I will serve as the executive sponsor of the team. Chip Gavin will serve as the team leader with responsibilities for facilitating the team itself and helping the team to tackle the full spectrum of work we'll need to do in order to make any technical solution successful in practice. Joy Childs will be the project leader for the technical project itself and make sure we get a strong system that works for our needs. Chip will convene routine meetings of the group in the coming weeks and arrange periodic updates for me as needed.

The team's charge, pending the team's own feedback to me, is to: 1. gain an understanding of the Pension Administration Software line of business systems marketplace; 2. determine the MainePERS business needs for such a system; 3. conduct any necessary or desired competitive solicitation(s); 4. recommend a technical solution; 5. propose a timeline and comprehensive budget for implementation of a system to replace the current tool (V3) with a goal of having the new or updated system in place and operational in the FY25 to FY27 window, with that timeline to be refined by the end of FY23; and, 6. Conduct the implementation.

I fully expect that reconsideration of our own business practices may be needed to make the most and efficient use of any new software. We will need to be open to those changes as an alternative to customization of any new tool, while also being open to customization when absolutely necessary or unavoidable.

This is an important project. We have the opportunity to transform the work for ourselves with this project and to better serve our members. I look forward to future updates and to the project's success.

Best,

Becky

DR. REBECCA M. WYKE
Chief Executive Officer
MainePERS

Appendix E: MainePERS Disability Services Department Policy 2.1

Departmental Policy – Disability Services

2.1 – Medical Evidence

Summary of Policy

State law allows for, and in some circumstances requires, MainePERS to seek, receive and consider diagnosis, opinions and other information from a medical review service provider, independent medical examiner, healthcare providers and others to inform determinations regarding whether a member has a mental or physical disability that qualifies them for Disability Retirement. MainePERS established this policy to provide guidance regarding the medical evidence on which Disability Retirement determinations are based.

Statutory/Legal/Board Policy Provisions

- 5 M.R.S. § 17106 B

Impacted Departments

- Service Programs
- Legal

Definitions

In the context of this Departmental Policy:

1. **Medical Evidence:** The term medical evidence means the information such as is collected from an individual's personal history, physical and/or psychological examination(s), and tests performed by a health care provider which have bearing on the medical-related components of a disability retirement claim.
2. **Medical Diagnosis.** The term "medical diagnosis" refers to the process of determining which namable illnesses, injuries or conditions explain a person's symptoms. It is a specific type of medical evidence. The information required for diagnosis is typically collected from an individual's personal history, physical and/or psychological examination(s), and tests performed by a health care provider.
3. **Health care provider:** The term "health care provider" means an appropriately licensed, certified or registered provider of mental or physical health care, in either the public or private sector.

Background and Legal Framework

1. **Background.** The foundation of a disability retirement claim is built on three medical-related components. Applicants must demonstrate that a) one or more medically diagnosable conditions exists, b) that functional limitations caused by the conditions make the member unable to perform the essential functions of the member's employment position with reasonable accommodation, and c) the inability can be expected to be permanent. Meaningful determinations regarding these issues require the involvement and expertise of health care providers.
2. **Legal Framework.** Maine law describes how MainePERS must consider medical evidence when making a disability retirement application decision. The basic expectation is that MainePERS will primarily consider the

medical opinions in the record and whether the opinions are supported by sound medical evidence and are consistent with other evidence in the record. MainePERS shall consider the totality of the evidence in making its determination.

Interpretations of the statutory provisions that govern medical evidence have occurred from time-to-time by Maine courts, the Board of Trustees, and the Chief Executive Officer. To the extent that any such interpretation establishes relevant precedent regarding the handling of medical evidence by a decision maker, it will be applied by MainePERS.

Sound Medical Evidence

1. **Diagnostic standards and methods.** There is sometimes not a single accepted approach to reaching a medical diagnosis. Some methods may provide a higher degree of certainty than others and some approaches may have published industry standards associated with them. Where an accepted diagnostic standard exists and is used, that is strongly suggestive of the diagnosis being supported by sound medical evidence.
2. **Variety of approaches:** The wide variety of approaches used for diagnosis may include but are not necessarily limited to clinical, laboratory, radiology, differential, or dual approaches. When one approach is considered more standard or robust by health care providers, using that approach is strongly suggestive of the resulting opinion or findings being supported by sound medical evidence.
3. **Expertise and experience:** It is accepted in the field of medicine that the credentials acquired by individuals are hierarchical, creating a system where the opinion of an individual with extensive schooling and experience is more heavily relied on than the opinion rendered by an individual with less. Consistent with state law, all other things being equal, a medical opinion rendered by a health care provider with greater expertise or experience is strongly suggestive of that opinion being as sound or more sound than an opinion of a health care provider with less expertise or experience.
4. **Specialists and generalists:** The existence of specialists in a particular field neither necessarily requires that an opinion rendered by an individual with expertise and/or specialization be part of the record in order to reach a determination nor necessarily precludes a generalist health care provider's opinion from being considered sound medical evidence. In short, the need for sound medical evidence may make a specialist's opinion necessary in some individual circumstances, while not in others.
5. **Availability and consistency of medical evidence.** A crucial factor in all determinations is the extent to which opinions and qualifications are documented in the totality of records available for consideration regarding an application. Recognized in state law is the importance of a sufficient foundation of information and consistency within the available records. High value will be placed on the health care provider opinions and medical evidence that exist in the record when MainePERS makes a determination. The soundness of the medical evidence typically is diminished when records are insufficient to support offered opinions or inconsistent among health care providers.

Ownership

This policy is owned by the Disability Services Business Unit Leader.

Revisions adopted January 23, 2023.

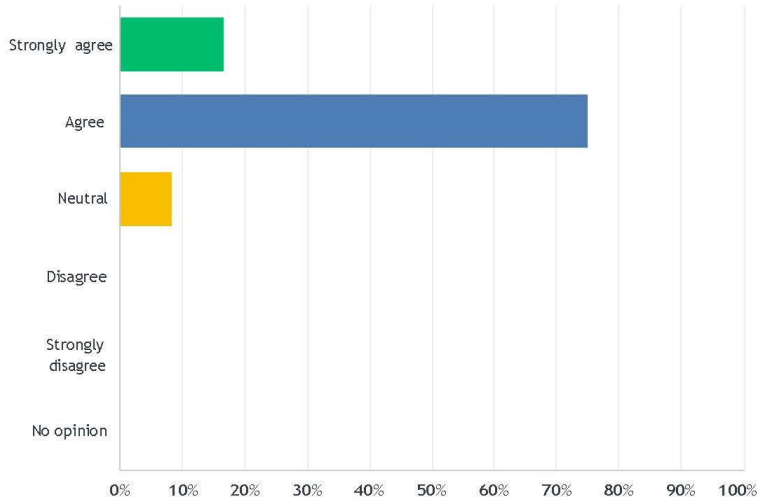
(Originally adopted October 2016, updated February 8, 2021)

Appendix F: Disability Retirement Experience Survey

Disability Services Survey

Q1 The disability application and process is easy to understand and follow.

Answered: 12 Skipped: 0

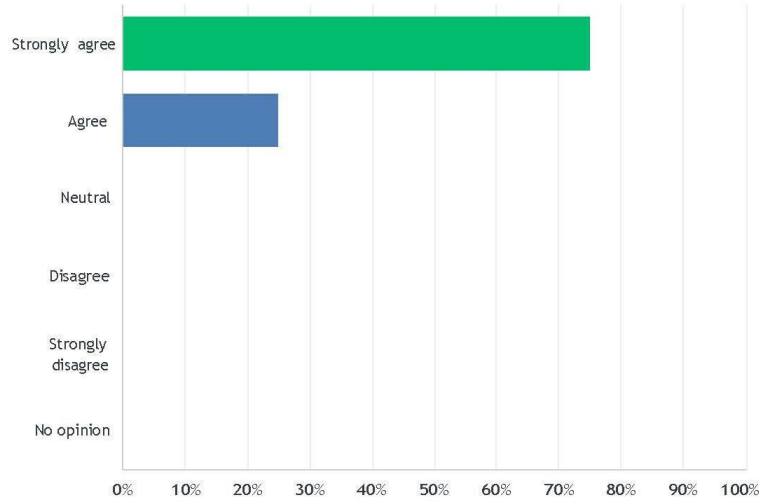


ANSWER CHOICES	RESPONSES	
Strongly agree	16.67%	2
Agree	75.00%	9
Neutral	8.33%	1
Disagree	0.00%	0
Strongly disagree	0.00%	0
No opinion	0.00%	0
TOTAL		12

Disability Services Survey

Q2 I was treated with respect by those handling my application.

Answered: 12 Skipped: 0



ANSWER CHOICES	RESPONSES	
Strongly agree	75.00%	9
Agree	25.00%	3
Neutral	0.00%	0
Disagree	0.00%	0
Strongly disagree	0.00%	0
No opinion	0.00%	0
TOTAL		12

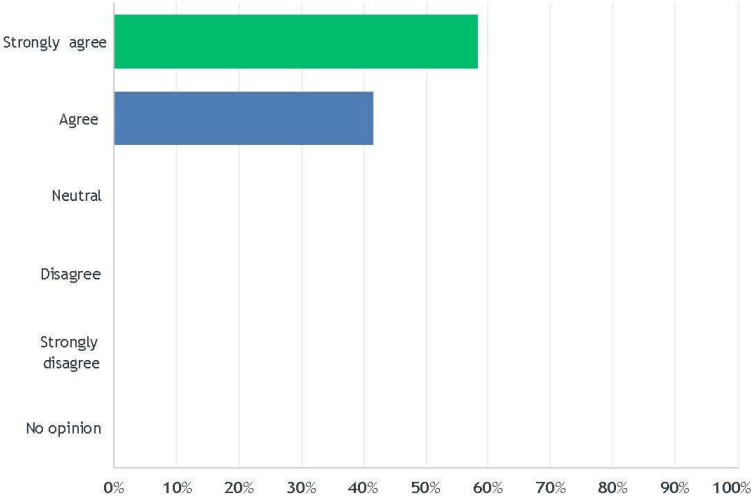
F.

2 / 5

Disability Services Survey

Q3 MainePERS responded to my questions in a timely manner.

Answered: 12 Skipped: 0

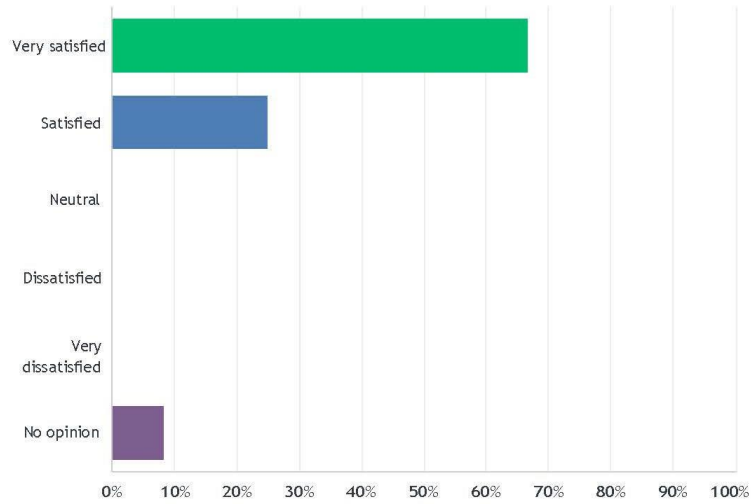


ANSWER CHOICES	RESPONSES	
Strongly agree	58.33%	7
Agree	41.67%	5
Neutral	0.00%	0
Disagree	0.00%	0
Strongly disagree	0.00%	0
No opinion	0.00%	0
TOTAL		12

Disability Services Survey

Q4 The Disability Services process was fairly conducted.

Answered: 12 Skipped: 0



ANSWER CHOICES	RESPONSES	
Very satisfied	66.67%	8
Satisfied	25.00%	3
Neutral	0.00%	0
Dissatisfied	0.00%	0
Very dissatisfied	0.00%	0
No opinion	8.33%	1
TOTAL		12

Disability Services Survey

Q5 Please feel welcome to provide any additional feedback regarding your experience with MainePERS Disability Services Unit.

Answered: 7 Skipped: 5

#	RESPONSES	DATE
1	I felt that the associates at MainePERS were always on my side. Very personable and very professional.	10/6/2022 2:50 PM
2	Well done, thank you very much.	10/4/2022 12:21 PM
3	Thank you	10/4/2022 11:28 AM
4	It was a tedious, lengthy process. Ben Parkhurst was always quick to respond, and helped me to understand each step in the process.	9/22/2022 12:50 PM
5	It took me a long time to address my disability and move forward with the application. I was treated with respect, my medical issues were reflected extremely accurately and my questions were answered well. I am extremely grateful for the thoroughness in my application, it was however (understandable) a lengthy process.	9/22/2022 12:34 PM
6	Even thou I did not qualified for disability you explained everything to me. Thank you	9/22/2022 9:44 A
7	During my process my Specialist changed and I thought to myself things are going to slow down or get messed up. Not true at all my new Specialist picked the ball up and kept running. Thank you for making my case go so smoothly	9/22/2022 9:41 AM

PROPOSED NEW RULE – JANUARY 2023

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.** “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. **Earnings.** “Earnings” means wages from employment and non-wage net income received in return for labor, services or goods, such as received in self-employment. Absent evidence to the contrary, net rental income from real estate is considered earnings and will be allocated equally among owners.
5. **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.
6. **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 of 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

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- D. Was directly caused by another condition that was diagnosed or reasonably should have been diagnosed before membership.
7. **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.
8. **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.
9. **Mental or physical condition.** A “mental or physical condition” is a condition affecting the member mentally or physically that is medically diagnosable.
10. **Permanent.** “Permanent” means:
- A. the incapacity is likely to continue for the foreseeable future;
 - B. the member has reasonably pursued appropriate treatment options; and
 - C. those treatment options have not resolved the incapacity.
11. **Reasonable accommodation.** “Reasonable accommodation” has the same meaning as that phrase does under the federal Americans with Disabilities Act, 42 U.S.C. § 12111(9).
12. **Reasonable commuting distance.** “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.
13. **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 of residence.
14. **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.

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- (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.
 - 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.

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- 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)

PROPOSED FOR REPEAL – JANUARY 2023

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 accommodation.

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 accommodation. 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 accommodation.
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.
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STATUTORY AUTHORITY:

5 MRS §§ 17103(4), 17921 and 18521

EFFECTIVE DATE:

June 7, 1997 – filing 97-199

September 20, 2022 – filing 2022-187

PROPOSED AMENDMENTS – JANUARY 2023

94-411 MAINE ~~STATE PUBLIC EMPLOYEES~~ RETIREMENT SYSTEM

Chapter 510: REDUCTION OF DISABILITY RETIREMENT BENEFITS BECAUSE OF LUMP-SUM SETTLEMENTS OF BENEFITS PAYABLE UNDER THE WORKERS' COMPENSATION OR SIMILAR LAW OR THE UNITED STATES SOCIAL SECURITY ACT

SUMMARY: This chapter sets forth the methodology by which disability retirement benefits ~~under the Maine Legislative Retirement System, Maine Judicial Retirement System and the Maine State Retirement System~~ are reduced when a beneficiary of such benefits receives a lump-sum settlement of benefits payable under the workers' compensation or similar law or the United States Social Security Act.

SECTION 1. DEFINITIONS

1. **Accumulated Contributions.** The term “accumulated contributions” as used in this Chapter means the amount of “accumulated contributions” calculated pursuant to the provisions of the applicable Retirement System plan, as of the effective date of the recipient’s entitlement to Retirement System disability retirement benefits.
2. **Actuarial Equivalent of Accumulated Contributions.** “Actuarial Equivalent of Accumulated Contributions” as used in this Chapter means the recipient’s accumulated contributions at the time of his or her disability retirement divided by the “annuity factor for recipient’s age at retirement” as calculated pursuant to Section 5.2, and then converted to a monthly amount by dividing by twelve.
3. **Actuarial Equivalent of the Lump-Sum Settlement.** “Actuarial Equivalent of the Lump Sum Settlement” as used in this Chapter means the amount of the “lump-sum settlement” divided by the “annuity factor for recipient’s age at effective date of lump-sum settlement” calculated pursuant to Section 5.3, and then converted to a monthly amount by dividing by twelve.
4. **Average Annual Earnings.** “Average Annual Earnings” means the total of the person’s average final compensation plus other wages and earnings from employment for the calendar year in which the person has the highest total of other wages and earnings from employment during the 5 years immediately preceding the year in which the person became disabled.
45. **Average Final Compensation.** “Average Final Compensation” as used in this Chapter means the amount of “average final compensation” calculated pursuant to the provisions of the applicable Retirement System plan, as of the effective date of the recipient’s entitlement to Retirement System disability retirement benefits.
56. **Initial Disability Retirement Benefit.** “Initial disability retirement benefit” as used in this Chapter means the monthly disability retirement benefit, not reduced because of disability benefits received under other laws, payable to the recipient as of the effective date of his or her entitlement to Retirement System plan disability retirement benefits, calculated pursuant to the applicable Retirement System plan provisions.

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67. **Lump-Sum Balance.** “Lump-Sum Balance” as used in this Chapter in a given month means the sum of the lump-sum settlement and interest for that month and all prior months subject to reduction pursuant to this Chapter less the reduction amount determined pursuant to Section 4.1 for that month and all prior months subject to reduction pursuant to this Chapter.
78. **Lump-Sum Settlement.** “Lump-sum settlement” as used in this Chapter means the amount paid or to be paid pursuant to a settlement agreement under the workers’ compensation law and/or similar law and/or the United States Social Security Act for the same disability for which Retirement System plan disability retirement benefits are awarded, but not including any part of the lump-sum settlement amount attributable to vocational rehabilitation, attorneys’, physicians’, nurses’, hospital, medical, surgical or related fees or charges or any amount paid or payable under former Title 39, section 56-B for permanent impairment or under Title 39-A, section 212, subsection 3 for specific loss benefits. “Lump-sum settlement” includes amounts paid or to be paid under the United States Social Security Act only if the employment for which Retirement System creditable service with the employer is allowed was also covered under that Act at the date of disability retirement.
89. **Lump-Sum Settlement Agreement.** A “Lump-Sum Settlement Agreement” as used in this Chapter is an agreement, signed or otherwise approved by the approving authority, describing payment of the lump-sum settlement.
910. **Retirement System Plan.** “Retirement System plan” as used in this Chapter means a benefit plan of the Maine Legislative Retirement System, Maine Judicial Retirement System, or the Maine State Retirement System. Benefit plans of the Maine State Retirement System include benefits for eligible state employees, teachers, and Participating Local District (“PLD”) members.

SECTION 2. APPLICABILITY

This Chapter applies to any disability retirement benefit recipient who enters into a lump-sum settlement agreement or otherwise receives a lump sum settlement under the workers’ compensation or similar law or the United States Social Security Act for the same disability for which disability retirement benefits were awarded pursuant to a Retirement System plan.

SECTION 3. MAKING THE REDUCTION

1. When a disability retirement benefit recipient enters into a lump-sum settlement agreement, the monthly Retirement System disability retirement benefit shall be reduced by an amount determined pursuant to the provisions of this Chapter.
2. The reduction amount determined pursuant to the provisions of this Chapter shall be deducted from Retirement System disability retirement benefits payable to the recipient, beginning the first day of the month following the effective date of the lump-sum settlement. For purposes of this Chapter, the effective date of the lump-sum settlement is the date that the settlement agreement is signed by the approving authority.

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3. That same reduction amount determined pursuant to the provisions of this Chapter shall continue to be deducted from the monthly disability retirement benefit otherwise payable for the length of time that the recipient receives a Retirement System disability retirement benefit. If, for periods of time prior to the effective date of the lump-sum settlement during which Retirement System disability retirement benefits are payable to the recipient, the recipient is also paid benefits under the workers' compensation or similar law or the United States Social Security Act, subject to the same limitations described in Section 1.7, then the recipient's disability retirement benefits shall also be reduced by amounts equal to those benefits unless the applicable statute bars any reduction or requires a smaller reduction.
 4.
 - A. Notwithstanding Section 3.3, reductions pursuant to this Chapter for a recipient who continues to be entitled to receive disability retirement benefits pursuant to a Retirement System plan that provides for cost-of-living adjustments ("COLAs") shall cease when the sum of the reduction amount equals the amount of the lump-sum settlement plus monthly interest on the lump-sum balance calculated at the annual rate of four percent (4%);
 - B. Notwithstanding Section 3.3, reductions pursuant to this Chapter for a recipient pursuant to a Retirement System plan that does not provide for COLAs shall cease under the same circumstances as for Section 3.4.A except that monthly interest on the lump-sum balance shall be calculated at the annual rate of six percent (6%).
 5. To determine when the sum of the reduction amounts will equal the lump-sum settlement plus interest calculated monthly at the annual rate specified in Section 3.4.A and 3.4.B as applicable:
 - A. Calculate the interest for the first month subject to reduction by multiplying the lump-sum settlement by the specified annual interest rate and then dividing the product by 12.
 - B. Determine the lump-sum balance in the given month.
 - C. Calculate the interest for each month after the first month subject to reduction by multiplying the lump-sum balance for the previous month by the specified annual interest rate and then dividing the product by 12.
 6. The month in which the lump-sum balance is zero is the last month of disability retirement benefits that will be reduced pursuant to Sections 3.4.A and 3.4.B.
 7. If there is no month in which the lump-sum balance is zero, then the last month of disability retirement benefits that will be reduced pursuant to Sections 3.4.A and 3.4.B is the first month in which the lump-sum balance is a negative number. In such case, the reduction amount required for the last month shall be equal to the lump-sum balance for the previous month plus interest.
 8. Notwithstanding Sections 3.3, 3.4 and 3.5, the reduction amount shall be recalculated pursuant to the provisions of this Chapter if the recipient enters into a subsequent lump-sum settlement agreement.

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9. The amount payable to the disability retirement recipient after the reduction amount is applied will be adjusted by any cost-of-living adjustments (“COLAs”) according to the provisions of the applicable Retirement System plan.

SECTION 4. DETERMINING THE REDUCTION AMOUNT, IF ANY

1. The reduction amount that is to be applied to the recipient’s monthly disability retirement benefit is determined as follows:
 - A. For members of the State Employee and Teacher, Legislative and Judicial Retirement Program, by subtracting the figure representing 80% of average final compensation, converted to a monthly amount by dividing by twelve, from the amount represented by the sum of the initial disability retirement benefit and actuarial equivalent of the lump sum settlement.
 - B. For members of the Participating Local District Retirement Program, by subtracting the figure representing 80% of average annual earnings, converted to a monthly amount by dividing by twelve, from the amount represented by the sum of the initial disability retirement benefit and actuarial equivalent of the lump sum settlement.
2. If the result obtained in Section 4.1 is zero or a negative number, then no reduction is applied to the monthly disability retirement benefits.
3. If the reduction amount calculated in Section 4.1 causes the initial disability retirement benefit to be reduced to an amount that is less than the “actuarial equivalent of accumulated contributions”, then the full reduction amount calculated in Section 4.1 may not be applied. Instead, the recipient shall receive the “actuarial equivalent of accumulated contributions” in lieu of the amount obtained by applying the full reduction described in section 4.1.

SECTION 5. DETERMINING THE ANNUITY FACTORS TO BE USED FOR SECTION 4

1. **Selecting the Applicable Table.** To determine the “annuity factor at age of retirement” or the “annuity factor at age at effective date of lump-sum settlement,” use Table AA of Chapter 303.

NOTE: As of the effective date of this rule, judicial retirement, legislative retirement, and Maine State Retirement System plans for state employees and teachers all include COLAs. Some Participating Local District (“PLD”) plans include COLAs and others do not.

2. **Determining the “Annuity Factor for Recipient’s Age at Retirement.”** To determine the “annuity factor for recipient’s age at retirement,” use the applicable Table to locate the annuity factor that corresponds to the recipient’s attained age as of the first day of the first month for which he or she received Retirement System plan disability benefits. If the recipient’s previous birthday was six months or more prior to the first day of the first month for which he or she received Retirement System plan disability retirement benefits, then use the recipient’s age at his or her next birthday to locate the applicable annuity factor.

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3. **Determining the “Annuity Factor for Recipient’s Age at Effective Date of Lump-Sum Settlement.** To determine the “annuity factor for recipient’s age at effective date of lump-sum settlement, use the applicable Table to locate the annuity factor that corresponds to the recipient’s attained age as of the effective date of the lump-sum settlement. If the recipient’s previous birthday was six months or more prior to the effective date of the lump-sum settlement, then use the recipient’s age at his or her next birthday to locate the applicable annuity factor.

SECTION 6. DETERMINING THE AMOUNT OF THE “LUMP-SUM SETTLEMENT” IF THE SETTLEMENT PROVIDES FOR PAYMENT IN A MONTH OR MONTHS FOLLOWING THE DATE THAT THE SETTLEMENT AGREEMENT IS SIGNED BY THE APPROVING AUTHORITY

1. If the lump-sum settlement is to be paid in a single payment but at a date subsequent to the effective date of the settlement agreement, then the single settlement payment must be converted into a single present value amount using the methodology of Section 6.5.B. The resulting present value shall be used as the amount of the lump-sum settlement for purposes of this Chapter.
2. If the lump-sum settlement is to be paid not as a single settlement payment, but instead is to be paid in installments, then the installment amounts must be converted into a single present value amount pursuant to the provisions of this Section. The resulting single present value shall be used as the “lump-sum settlement” for purposes of this Chapter.
3. The provisions of this Chapter do not apply if all of the installments to be paid pursuant to the lump-sum settlement agreement are to be paid in scheduled increments such that the total paid each month is less than or equal to the recipient’s disability retirement benefit for that month in the absence of any reduction because of benefits payable under the workers’ compensation or similar law or the United States Social Security Act. Instead, the recipient’s disability retirement benefits shall be reduced in the same manner as if there had been no lump-sum settlement agreement.
4. Any part of the lump-sum settlement payment amounts attributable to vocational rehabilitation, attorneys’ fees, physicians, nurses, hospital, medical, surgical or related fees or charges of any amount paid or payable under former Title 39, section 56-B for permanent impairment or under Title 39-A, section 212, subsection 3 for specific loss benefits shall not be included in any of the payment amounts for purposes of this Section.
5. The single present value of the settlement paid in installments shall be calculated as follows:
 - A. Determine the amount of the first installment payment if the first payment is scheduled to be issued in the same month or in the month immediately following the month that the settlement agreement is signed or otherwise approved by the approving authority.
 - B. To determine the present value of any payment to be issued in a subsequent month, except for any installment amount to be paid for a “term certain and life thereafter,” apply an effective (“real”) interest rate of 7.75% per year.

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- C. Determine the present value, using an effective (“real”) interest rate of 7.75% per year of any settlement installment amount to be paid for a certain term of years (“term certain”) and life thereafter as follows:
- (1) Add the recipient’s age as used in Section 5.3 to the number of years in the term certain.
 - (2) Using the sum obtained in Section 6.5.C.1, locate on Table X the corresponding figure in Column B.
 - (3) Divide the amount obtained in Section 6.5.C.2 by the figure in Column A in Table X corresponding to the recipient’s age as used in Section 5.3.
 - (4) Add the result in Section 6.5.C.3 to the annuity factor on Table Y corresponding to the number of months in the term certain.
 - (5) Multiply the result obtained in Section 6.5.C.4 by the installment amount to be paid annually for the term certain and life thereafter.
- D. Add the total results obtained in Sections 6.5.A, 6.5.B and 6.5.C.A to obtain the single value amount to be used as the amount of the “lump-sum settlement” for purposes of this Chapter.
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The attached TABLES are an integral part of this Chapter:

TABLE ‘X’: Annuity Factors for use with installment settlement

TABLE ‘Y’: Annuity Factors (for installment settlements) corresponding with the number of months in term certain.

APA Office Note: the tables are available from the Maine ~~State~~ Public Employees Retirement System.

STATUTORY AUTHORITY: 3 M.R.S.A. § 853; 4 M.R.S.A. § 1353(6); 5 M.R.S.A. §§ ~~17906(2);~~
~~17930(4); 18506(2); and~~ 18530(4); ~~1122(5-A) and 1122(6).~~

EFFECTIVE DATE

July 6, 1999

AMENDED:

June 21, 2006 – filing 2006-269

PROPOSED AMENDMENTS – JANUARY 2023

94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chapter 511: STANDARDS FOR ACTIVELY SEEKING WORK

SUMMARY: This Chapter sets out the standards and definitions to be applied in determining under 5 M.R.S.A. §§ 17929(2)(B)(1) and 18529(2)(B)(1) whether a disability retirement benefit recipient is actively seeking work.

SECTION 1. PURPOSE

The purpose of this Chapter is to set out the standards of “actively seeking work” for a person who was awarded disability retirement benefits and for whom a final determination has been made that the person does not meet the requirements for the continuation of disability retirement benefits.

SECTION 2. DEFINITIONS

1. **Actively seeking work status.** “Actively seeking work status” means that a final determination has been made that the person no longer meets the requirements for the continuation of disability retirement benefits and that the person is able to engage in substantially gainful activity. In this status, disability benefits are continued until the person has secured substantially gainful activity but only so long as the person is actively seeking work.
2. **Substantially gainful activity earnings level.** “Substantially gainful activity earnings level” means annual earnings that exceed the greater of \$20,000 or 80% of average final compensation at disability retirement, each adjusted by cost of living adjustments if applicable to the member’s retirement plan.

SECTION 3. STANDARDS

1. A person in actively seeking work status must:
 - ~~1A.~~ Register with the Maine Department of Labor Career Center;
 - ~~2B.~~ Participate in all job readiness or job seeking activities recommended by the Career Center;
 - ~~3C.~~ Participate at least annually in resume preparation and interviewing skills workshops offered by the Career Center and submit an updated resume to the Career Center;
 - ~~4D.~~ Maintain a current signed record release authorization that allows MainePERS to request and receive information from the Career Center and verify any other information submitted pursuant to this rule;

~~5E.~~ Apply in person or online for at least eight jobs each month with employers who are hiring or otherwise accepting applications, at least four of which must result in written acknowledgement of receipt of the application; and

~~6F.~~ Do all other activities that a reasonably prudent non-incapacitated individual would do to secure work.

2. A person who has not secured employment at or above the substantially gainful activity earnings level after five years in actively seeking work status is presumed to not have been actively seeking work notwithstanding compliance with subsection 1. This presumption may be rebutted by information showing that the failure to secure employment at or above the substantially gainful activity earnings level was beyond the person's control. For persons in actively seeing work status on December 31, 2022, the five-year period begins to run on that date.

SECTION 4. DOCUMENTING COMPLIANCE WITH STANDARDS

A person in actively seeking work status must demonstrate compliance with the standards set forth in Section 3 by submitting, so it is received by the system by the 5th of each month, an accurate, complete and signed report of the following information on forms provided by the system:

1. Verification of eight job applications, including date of submission, employer name and address, method of contact, and a short statement of the result, and a copy of any internet posting, advertisement or Career Center printout that led to submission of the application;
2. A copy of four written acknowledgements of receipt of job applications detailed under subsection 1, which written confirmation may include an email response, a computer-generated acknowledgement, a letter, or a signed system employer contact form;
3. Information pertaining to any job offer that the person has received and refused, including a detailed explanation for any such refusal;
4. Verification of the source and amount of any earnings, remuneration or other compensation from any employment, self-employment, commission sales, or other income for the previous month;
5. Verification of any change in name, address or telephone number; and
6. In the report submitted in January of each year, verification of any classes completed with the Career Center in the past year and verification that the person has submitted an updated resume to the Career Center.

SECTION 5. SUSPENSION OR TERMINATION OF BENEFITS

1. For any month during the calendar year that the person does not meet all the required standards, the retirement system will suspend the payment of benefits subject to 5 M.R.S. §17105-A. Such a suspension in benefits will occur in the month following the issuance of a written decision that the standards have not been met. If the person subsequently resumes

compliance, the benefits will resume. Such resumption in benefits will occur in the month following the month for which the standards are again met. There will be no payment of disability retirement benefits for the month or months for which benefits were suspended under this subsection.

2. If the person fails to meet the standard for a total of any sequential or non-sequential three months in any 12-month period, the retirement system will terminate the payment of benefits.
3. If the person refuses a job that is consistent with the person's training, education, and experience that would generate an income equal to or greater than the member's substantially gainful activity earnings level, the retirement system will terminate the payment of benefits as of the month following the month that the person refused the job offer.
4. A disability retirement benefit recipient in actively seeking work status who is incarcerated shall be deemed unable to actively seek work, and the payment of disability retirement benefits will be suspended during the period of incarceration.
5. For any person who secures a job or engages in activity that generates an income equal to or greater than that member's substantially gainful activity earnings level, the retirement system will terminate the payment of benefits as of the month following the month the person accepts or engages in the job or activity.

STATUTORY AUTHORITY:

5 M.R.S. §§ 17103(4), 17929(2)(B)(1) and 18529(2)(B)(1)

EFFECTIVE DATE:

April 30, 2007 – filing 2007-152

AMENDED:

April 14, 2020 – Section 8 added, filing 2020-093 (EMERGENCY)

July 18, 2020 – Section 8, filing 2020-157

REPEALED AND REPLACED:

December 8, 2021 – filing 2021-241

PROPOSED AMENDMENTS – JANUARY 2023

94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chapter 702 APPEALS OF DECISIONS OF THE CHIEF EXECUTIVE OFFICER

SUMMARY: This Chapter sets out the process for appeals of decisions of the Chief Executive Officer to the Board of Trustees (“Board”). It provides for the appointment of a hearing officer to conduct an appeal and to prepare a recommended decision for action by the Board.

SECTION 1. Purpose and Scope

The purpose of this Chapter is to set out procedures for reaching final agency action on matters initially decided by the Chief Executive Officer (or designee) of the Maine Public Employees Retirement System (“System” or “MainePERS”). The law governing the System provides that the Chief Executive Officer’s decisions may be appealed to the Board, which has authority and responsibility to render a decision that will become the final agency action. The person appealing the Decision has the burden to establish, by a preponderance of the evidence, that the Chief Executive Officer’s Decision is in error. This Chapter applies to appeals by any person aggrieved by a decision of the Chief Executive Officer.

SECTION 2. Authority

The authority for this Chapter is 5 M.R.S. §§ 9051 - 9064 and 5 M.R.S. §17451, which provide that an appeal under section 17451 is an adjudicatory proceeding subject to the Administrative Procedure Act and 5 M.R.S. §§17106-A, 17106-B.

SECTION 3. Definitions

1. **Appeals clerk.** “Appeals clerk” means the dedicated clerk who acts as liaison between the hearing officer and the parties to an appeal. The appeals clerk shall avoid all communication with System staff, or MainePERS representatives, regarding substantive issues for cases on appeal. The appeals clerk shall address all policy and procedural questions to the clerk’s supervisor, the system advisor or Board counsel.
2. **Board.** “Board” means the Board of Trustees of MainePERS.
3. **Board counsel.** “Board counsel” means the attorney general or the designated assistant attorney general assigned to represent the Board and to prepare the Board’s decisions.
4. **Chief Executive Officer.** “Chief Executive Officer” means the Chief Executive Officer of MainePERS or their decision-making designee.
5. **Hearing officer.** “Hearing officer” means an individual who has contracted with the Board to conduct appeal proceedings under this Chapter.

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6. **Medical review service provider.** “Medical review service provider” means an entity with whom the Chief Executive Officer has contracted for the review of medical records and the provision of recommendations, opinions and certifications by health care providers employed by the entity.
 7. **MainePERS or System Representative.** “MainePERS Representative” or “System Representative” means the person or persons advocating for the decision of the Chief Executive Officer in an appeal.
 8. **Participating Local District.** "Participating local district" means a local district which has approved the participation of its employees in the Retirement System under 5 M.R.S. §18201.
 9. **Party.** "Party" means the person bringing an appeal, MainePERS, and any person who intervenes in an appeal. If an appeal involves or affects a participating local district, "party" includes the participating local district, regardless of whether the participating local district actually participates as a party in the appeal.
 10. **Person.** "Person" means any individual, partnership, corporation, governmental entity, association or public or private organization of any character, other than the Board or the System.
 11. **Record.** "Record" means those materials required by 5 M.R.S. §9059 and this rule to be compiled in the course of an appeal.
 12. **Staff.** "Staff" means an employee of MainePERS, other than the MainePERS Representative.
 13. **Substantially larger caseload.** “Substantially larger caseload” means that the number of appeals a hearing officer is presiding over is at least five and exceeds the mean hearing officer caseload by at least 30%.
 14. **System advisor.** “System advisor” is a System employee who is knowledgeable in System policies, practices and procedures and who is available as an informational resource to assist the hearing officer, the Board and Board counsel. ~~If the hearing officer seeks information from the system advisor, such request shall be in writing and both the request and the response shall be copied to the parties and placed of record.~~

SECTION 4. Applicability: Who May Appeal

1. **Application.** This Chapter applies to all appeals of decisions of the Chief Executive Officer to the Board.
2. **Who may appeal.** Any person whose legal rights, duties or privileges are adversely affected by a decision of the Chief Executive Officer may appeal the decision to the Board. A person may but is not required to be represented by another person in accordance with 4 M.R.S. §807.

SECTION 5. Bringing an Appeal

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1. **Notice.** When notifying a person whose legal rights, duties or privileges are affected by a decision of the Chief Executive Officer, the System must advise the person of the right to appeal to the Board and of the manner in which the right may be exercised. This notice must comply with 5 M.R.S. §9052.
 2. **Statement of appeal.** A person who wishes to appeal a decision of the Chief Executive Officer must begin the appeal process by sending a written statement of appeal to the Board. Any reasonably clear statement to the effect that the person wishes to appeal a decision of the Chief Executive Officer, and identifying that decision, submitted by email or otherwise in writing to the System shall be treated as a statement of appeal. The only issues that are the subject of an appeal are those that have previously been decided by the Chief Executive Officer. If the person wishes to raise issues or conditions not previously considered by the Chief Executive Officer, those additional issues can be added in accordance with section 6(2) below.
 3. **Assignment to hearing officer.** When a statement of appeal is received, the System, in a timely manner, will assign the appeal to a hearing officer in accordance with section 8. The System will notify the person of the identity of the assigned hearing officer and alternative hearing officers, describe the process for selecting an alternative hearing officer, briefly outline the appeal process and advise that, if the person fails to appear at any hearing, the appeal may be deemed to have been abandoned and the matter dismissed with prejudice.
 4. **Notice to ~~Employer Participating Local District~~.** If the appeal involves an employee of a participating local district or school unit, the System will notify the ~~employer participating local district~~ that the appeal has been brought, identify the employee and hearing officer, and ~~inform advise that the employer participating local district is~~ how to become a party to the appeal. The notice must comply with 5 M.R.S. §9052.
 5. **Appeals Packet.** MainePERS shall provide the appellant with a copy of the information considered by the Chief Executive Officer in reaching the decision that is subject to the appeal no later than 30 days after receipt of the statement of appeal.

SECTION 6. Choice of Appeal Process

At the pre-hearing conference described in section 8(3)(C) of this Chapter, the appellant shall affirmatively elect either the expedited or the unrestricted appeal process. This election becomes irrevocable 10 days after the pre-hearing conference, unless the System agrees to a later request to change the election.

1. **Expedited Appeal.** If the appellant elects the expedited process to pursue an appeal of the issues decided in the decision of the Chief Executive Officer, the evidence is limited to the appellant's testimony, the testimony of any lay witnesses and the documentary evidence already considered by the Chief Executive Officer. The parties may not raise any additional issues for decision. It is anticipated that a decision will be issued by the Board within approximately 90 days of the initial pre-hearing conference. Under this option, only non-expert witnesses may provide testimony on behalf of the appellant or the System.

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2. **Unrestricted Appeal.** Alternatively, in the unrestricted appeal process, the appellant may raise issues in addition to those decided by the Chief Executive Officer, and the parties may introduce documentary evidence in addition to the evidence already considered by the Chief Executive Officer and testimony from expert as well as non-expert witnesses. The unrestricted appeal process is anticipated to take substantially longer than 90 days because some or all of the steps listed below may be required, or duplicated prior to the hearing officer's issuance of a recommended decision. An appellant who chooses to proceed under the unrestricted appeal process must affirmatively accept and acknowledge that this appeal process is likely to take substantially longer than 90 days. The additional steps that might occur in the unrestricted appeal process include, but are not limited to the following:
- A. If the appellant introduces issues not previously decided by the Chief Executive Officer, the hearing officer will return the appeal to the Chief Executive Officer for consideration of the new issues and reconsideration of any issues previously decided by the Chief Executive Officer. The appeal will be stayed pending the issuance of a decision of the Chief Executive Officer on all issues.
 - (1) If the new issues include one or more new conditions on which the appellant wishes to apply for disability retirement benefits, the appellant has the same right to an independent medical examination on the new conditions as the appellant would have had if the conditions had been raised in a new application.
 - B. If the appellant seeks to introduce new documentary medical evidence on any of the issues previously decided by the Chief Executive Officer, the hearing officer will, at the request of the MainePERS Representative, return the appeal to the Chief Executive Officer for reconsideration of those issues. The appeal will be stayed pending a reconsidered decision of the issues previously decided by the Chief Executive Officer. The Chief Executive Officer may submit the new evidence to the medical review provider.
 - C. If any party introduces expert testimony, any other party, upon request to the hearing officer, may be granted additional time to prepare cross-examination of the expert and/or the submission of rebuttal expert testimony. Parties are entitled to a rebuttal hearing on request.

SECTION 7. Public Interest; Notice

If the Chief Executive Officer or designee determines that an appeal involves an issue of substantial public interest, notice must be given to the public, sufficiently in advance of the hearing date, to afford interested parties an adequate opportunity to prepare and submit evidence and to petition to intervene pursuant to 5 M.R.S. §9054. Notice to the public must be given in accordance with 5 M.R.S. §9052(3). If a party asserts that an appeal involves a matter of substantial public interest, such that public notice is required and the Chief Executive Officer or designee does not agree, the Board will make the determination in the following manner.

1. **By request.** The Chief Executive Officer or any other person may request that the Board make a determination of substantial public interest.

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2. **Determination after appeal process has begun.** If the Board makes a determination of substantial public interest after the appeal process has begun, the process must be suspended until notice to the public has been given and interested persons have had an adequate opportunity to take action in accordance with this section.

SECTION 8. Hearing officer

1. **Appointment.** The Board shall contract with hearing officers to perform the duties and exercise the powers set forth in this Chapter. The hearing officers must have appropriate experience and training, be fair, impartial, unbiased, and demonstrate a continuing ability to conduct a fair, efficient and effective appeal process.

2. **Assignment; Removal; Replacement**

- A. An appeal will be assigned by the System to a hearing officer who has no personal or financial interest, direct or indirect, in the appeal or its outcome, and who has not been involved directly or indirectly in the matter that is the subject of the appeal. The fact that a hearing officer is the recipient of a MainePERS benefit does not constitute, by itself, direct or indirect personal or financial interest in an appeal or its outcome. The assignment shall be based on balancing caseloads among contracted hearing officers. The appellant within 15 days after notice of the assigned hearing officer may select an alternative hearing officer who has contracted with the Board.
 - (1) The System need not offer as an alternative any hearing officer who has a substantially larger caseload than other hearing officers. The appellant may select a hearing officer who was not offered as an alternative because of a substantially larger caseload if the appellant shows, within the timeframe for selecting an alternative hearing officer, that the hearing officer is uniquely qualified to preside over the appeal.
 - (2) In an appeal with more than one appellant, if the appellants cannot agree on an alternative hearing officer, the hearing officer assigned by the System will serve as hearing officer.
- B. If a party files a timely allegation of bias, prejudice or personal or financial interest, either direct or indirect, against the hearing officer, the hearing officer will promptly determine whether to remove herself/himself as hearing officer and will include that determination in the record.
- C. A hearing officer may also independently remove themselves from the appeal if the hearing officer cannot be fair, impartial and unbiased.
- D. When a hearing officer is removed, terminated or cannot continue, the System will assign the appeal to another hearing officer, and the appellant will have an opportunity to select an alternative hearing officer consistent with paragraph A and section 5(3). The new hearing officer will continue the ongoing appeal process, unless the hearing officer determines that in order to avoid substantial prejudice to any party it is necessary to start the process anew.

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3. **Duty and powers of the hearing officer.** The hearing officer has the duty to render a fair and impartial recommended decision to the Board in accordance with section 15. This recommended decision must be based on the record as a whole and resolve all material issues in the appeal. In lieu of a recommended decision, the hearing officer may recommend dismissal. The hearing officer has the following powers:
- A. To resolve an appeal without a hearing; provided that the parties mutually agree to dispense with a hearing, by issuing:
 - (1) a recommended decision which meets the requirements of section 15, to be acted on by the Board under section 16, on the basis of the documentary materials which constitute the record; or
 - (2) a recommended dismissal with prejudice to be submitted to the Board for approval if, pursuant to section 6(2), the Chief Executive Officer issues a decision that favors the appellant, in whole or in part, and the appellant withdraws the appeal with respect to all portions of the decision of the Chief Executive Officer that are not in the appellant's favor; or
 - (3) a recommended dismissal, with or without prejudice as circumstances warrant, to be submitted to the Board for approval.
 - B. Upon adequate notice to the parties, to schedule the date, time and place or to change the date, time or place and to continue any conference, hearing, or deadline of any nature;¹
 - C. Generally working through the appeals clerk, to notify parties and hold a pre-hearing conference, of which all parties must be notified and at which they may participate, the purposes of which may include:
 - (1) determining whether the appellant elects the expedited or unrestricted appeal process in accordance with section 6, and explaining the consequences of the choice of appeal process;
 - (2) identifying and clarifying the issues on appeal and determining whether the appellant intends to introduce issues, not previously considered by the Chief Executive Officer;
 - (3) developing stipulations of fact and admissions as to facts that are not contested;
 - (4) identifying exhibits to apprise the parties as fully as is practicable of the nature of the evidence to be offered by all parties and to eliminate, as far as possible, the element of surprise;
 - (5) identifying witnesses and the manner in which the testimony will be provided as described in section 11(2);

¹ The MainePERS office in Augusta shall be the normal location for hearings, absent a request made in the notice of appeal or at the pre-hearing conference, together with a showing by the requesting party of a compelling need for an alternative venue.

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- (6) identifying any potential parties to the adjudication whose joinder may foster economy, efficiency and fairness;
- (7) identifying and resolving disputes as to production of documents and admissibility of evidence, including the making of evidentiary rulings; and
- (8) any other action that will encourage and maintain a fair, efficient and effective appeal process.
- D. To order, where relevant and useful, one or more independent medical evaluations on conditions that have not previously been the subject of an independent medical examination, for which the System will, to the extent reasonably practicable, provide the names of three appropriately qualified health care providers, among whom the person appealing will choose and to whom the person will go for evaluation, the costs of which will be paid by the System;
- E. To return to the Chief Executive Officer or designee for consideration, any issue raised for the first time in the appeal process, as required pursuant to section 6(2)(A);
- F. To rule on any request at any conference, during the hearing or at any other time during the appeal process, prior to delivery of the recommended decision to the Board;
- G. Generally working through the appeals clerk, to set the time for all filings, appearances, and other actions by any party or parties in connection with the appeal process, in accordance with 5 M.R.S. §17451;
- H. To issue subpoena(s) on request of a party or to deny a request when the hearing officer determines that the testimony or evidence is not relevant to any issue of fact in the hearing, or otherwise inadmissible, in accordance with 5 M.R.S. §9060 and section 12 of these rules;
- I. After the close of the evidence, the parties' receipt of a hearing transcript, if any, and the issuance of an Chief Executive Officer's reconsidered decision as described in section 14, to request that the parties submit briefs on the issues not decided by the Chief Executive Officer in the appellant's favor, and to request or allow the parties to make oral argument to the hearing officer, when the hearing officer deems oral argument to be necessary or useful;
- ~~J. To refer or re-refer to the medical review service provider any matter involving medical evidence, questions or issues;~~
- ~~J. K~~ To ascertain the rights of the parties, to identify and notify all parties that may be affected by a decision, to ensure that all parties have a full opportunity to present their claims orally or in writing and to secure witnesses and evidence to establish their claims, and to assist parties and witnesses in making full and free statements in order to develop all issues which may govern the outcome of the appeal;

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- KL. To administer oaths or affirmations to all witnesses in all hearings;
 - LM. To regulate the presentation of evidence, including questioning of witnesses and the participation of parties, in order to ensure an adequate and comprehensive record of the proceedings and to avoid repetition and delay;
 - MN. To examine witnesses and ensure that relevant evidence is admitted in the record;
 - NO. To determine the credibility of witnesses and to decide the weight to be given to testimony and all other evidence;
 - OP. To take official notice of facts in accordance with 5 M.R.S. §9058, and parties shall be copied with the facts noticed, and the source of those facts, which shall be placed of record;
 - PQ. To rule on the admissibility of evidence;
 - QR. To ensure that a complete record is made of the hearing, including recording in accordance with 5 M.R.S. §9059;
 - RS. To consult with the Board's counsel on legal issues; provided that, when an appeal raises issues of equity or constitutionality, the hearing officer must consult with the Board's counsel.
 - ST. To consult with the System advisor if the hearing officer requires information concerning general System structure, policies or practices if the hearing officer determines that such consultation would be helpful to a determination of the issues on appeal. If the hearing officer seeks information from the System advisor, such request shall be in writing and identify the case, and both the request and the response shall be copied to the parties and placed of record.
 - TU. To recommend dismissal in the event an appellant fails to appear at a hearing, or otherwise fails to prosecute the appeal, unless there is a showing of good cause under section 10.

SECTION 9. Duties and Responsibilities of the MainePERS Representative

The MainePERS Representative shall:

1. Organize case. Organize the presentation of the Chief Executive Officer's case;
2. Pre-hearing conference. Participate in the pre-hearing conference;
3. Present witnesses. Present and examine witnesses when appropriate;
4. Provide records. Ensure that the relevant records of the System are present at the hearing and that other parties have adequate opportunity to examine the records prior to and during the hearing;
5. Introduce records. Introduce into evidence relevant System records and documents; and

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6. Provide evidence. Present and establish relevant facts and circumstances by oral testimony, including that of MainePERS staff, and by documentary evidence.

SECTION 10. Default

1. **Failure to appear.** Except as provided in subsection 2 below, if an appellant fails to participate in a scheduled conference, appear at hearing, or otherwise fails to prosecute ~~the his or her~~ case, the appellant may be deemed by the hearing officer to have abandoned the appeal. The hearing officer will so notify the appellant in writing via certified mail. If within 10 business days of receipt of the notice, the appellant submits information which demonstrates, in the judgment of the hearing officer, ~~that she or he had~~ good cause for failure to appear, the hearing will be rescheduled. On the 11th day following receipt of the notice by appellant and without suitable response, the decision of the Chief Executive Officer will become final and the hearing officer will issue a recommended dismissal with prejudice to the Board.
2. **Hearing in the absence of the appellant.** A hearing may be held in the absence of the person appealing when:
 - A. The person requests or agrees to a hearing in their absence; or
 - B. The hearing officer, at their discretion, proceeds with the hearing as the alternative to a default.

SECTION 11. Evidence

1. **Admissibility.** Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.
2. **Testimony and Conduct of Hearings.** Testimony may be provided ~~telephonically, by deposition, by video, by a sworn written statement, or, after the requirement to conduct hearings using audio or video conferencing has expired,~~ in person, by video, by deposition, or, for compelling reasons, by telephone or sworn written statement at the discretion of the hearing officer. With the exception of sequestered witnesses, all participants in a hearing conducted by ~~audio or~~ video conferencing must be able to hear and see the other participants, and all participants in a hearing conducted telephonically must be able to hear the other participants. Parties must ensure that witnesses who provide sworn written statements or testimony be available for cross-examination during the hearing, although the cross-examination of expert witnesses may, at the request of a party, take place at a different time.
3. **Irrelevant or repetitious evidence.** Evidence which is irrelevant or unduly repetitive may be excluded.
4. **No formal rules of evidence.** Formal rules of evidence are not required and need not be observed.
5. **Weight of evidence.** The fact that evidence is admitted shall not limit the authority of the hearing officer to determine the weight to be given the evidence.

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6. **Hearsay.** Hearsay evidence shall not be excluded simply because of its hearsay nature. The hearing officer will determine the weight to be given to hearsay evidence.
 7. **Rules of privilege.** Rules of privilege as provided in the *Maine Rules of Evidence*, Article 5, shall be observed.
 8. **Stipulation of facts.** When all parties stipulate to a fact, the hearing officer may make a finding of fact on the basis of the stipulation. Signed statements or on-the-record oral statements by parties are sufficient as stipulations.
 9. **Official notice of facts.** The hearing officer may take official notice of a fact upon her/his own initiative or at the request of a party. Official notice may be taken of any fact of which judicial notice could be taken, and in addition, of any general or technical matter within the specialized experience or knowledge of the hearing officer, and of any statutes, rules and non-confidential public records. The hearing officer will notify the parties when official notice is taken and shall afford the parties an opportunity to contest the reliability, substance and/or materiality of the material noticed.
 10. **Rebuttal Evidence.** To the extent that the appellant testifies or introduces evidence on matters or facts not previously known to the System, the hearing officer may, at the request of the MainePERS Representative, hold the record open for a reasonable period in order to allow the System to offer rebuttal evidence.

SECTION 12. Discovery and subpoenas

1. **Access to System documents and records.** A party must have an adequate opportunity prior to hearing, and at the hearing, to examine all of the System's documents and records to be offered as evidence. The System must provide to the person bringing the appeal a copy of the relevant portions of the record without charge.
2. **Request for subpoenas.** Any party may request the issuance of a subpoena by presenting the request to the hearing officer. The request must contain:
 - A. The name and address of the party requesting the subpoena; and
 - B. The name and address of the person to be subpoenaed, or other place where the person to be subpoenaed may be found; and
 - C. A brief statement why the testimony or evidence of the person to be subpoenaed is relevant to an issue of fact in the appeal.
3. **Issuance on approval.** If the hearing officer determines that the request seeks testimony or evidence relevant to an issue of fact in the appeal, and not otherwise excludable, the hearing officer must submit the subpoena for approval by the Attorney General or Deputy Attorney General who is not involved in the appeal.
4. **Requirements.** A subpoena shall comply with the requirements of 5 M.R.S. §9060.

SECTION 13. Hearings recorded

1. All hearings will be recorded in a form susceptible to transcription.
2. A copy of the transcript of a hearing or of expert testimony taken pursuant to section 11(2) will be provided to the parties.

SECTION 14. Reconsideration by the Chief Executive Officer

After the close of the evidence and the parties' receipt of any transcript, the Chief Executive Officer shall have ~~30 calendar~~^{10 working} days to reconsider all of the evidence and affirm or reverse, in whole or in part, the decision that is the subject of the appeal. 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. If, after receiving the appeal evidence and any transcripts, the Chief Executive Officer consults with the medical review provider, the ~~1300~~-day period described above begins to run upon the Chief Executive Officer's receipt of the medical review provider's reports.

SECTION 15. Recommended decision of the hearing officer

1. **Contents.** Following the hearing or, if the parties have agreed to waive hearing, following review of the documentary and testimonial record, and following the issuance of the Chief Executive Officer's reconsidered decision, the hearing officer will prepare a recommended decision, which will include:
 - A. A clear statement of the subject(s) of the appeal and of the issues which must be resolved to decide the appeal;
 - B. A listing of the date, place of hearing, and participants at the hearing or, if no hearing was held, a statement that the parties agreed to proceed without a hearing or other explanation;
 - C. A listing of all evidence admitted and upon which the recommended final decision is based;
 - D. Findings of fact, which must be sufficient to apprise the parties of the basis for the recommended decision;
 - E. A clear statement of result resolving all issues under consideration; and
 - F. A clear explanation of the reasoning underlying the result, including references to applicable law and rules.
2. **Comments, modification, and delivery to the Board**
 - A. The hearing officer will furnish a copy of the recommended decision to each of the parties for comment. A party's comments must be in writing and must be received within the time period set by the hearing officer.

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- B. If a party believes that the hearing officer's decision contains one or more errors of law, or that the hearing officer has exceeded their jurisdiction, or that there is no support in the record for the factual findings of the hearing officer, the party shall so advise the hearing officer in that party's written comments. Identification of the error(s) by specific record citation is required.
 - C. The hearing officer may, but is not required to, modify the recommended decision in response to the parties' comments. If in the judgment of the hearing officer, the previously issued recommended decision is substantially modified, the hearing officer will send the recommended decision as modified to the parties for further comment, as provided in paragraph A.
 - D. The hearing officer will submit the recommended decision, as originally prepared and as modified, together with the written comments made by the parties, to the Board clerk. Where the recommended decision is not modified, the hearing officer will also deliver to the Board clerk a written response to the parties' written comments. Upon transmittal to the Board, the decision of the hearing officer constitutes the recommended final decision of the hearing officer.
 - E. If a party believes that the recommended final decision of the hearing officer contains one or more errors of law, or that the hearing officer has exceeded their jurisdiction, or that there is no support in the record for the factual findings of the hearing officer, the party must so notify the Board in writing so that the notification is received by the Board within 10 days after that party's receipt of the recommended final decision, specifying the error(s) by specific citation to the record. In the event no written comments are received by the Board as specified herein, the Board will be compelled to accept the recommended final decision pursuant to 5 M.R.S. §17106-A and will not schedule consideration of the appeal or permit oral argument by the parties.

SECTION 16. Action by the Board

- 1. If the Board is compelled to adopt the recommended final decision of the hearing officer pursuant to 5 M.R.S. §17106-A(1), the Board will do so during its monthly meeting, as time permits, and will not schedule consideration of the appeal or permit oral argument by the parties.
- 2. If a party believes an error exists in the recommended decision pursuant to 5 M.R.S. §17106-A and the alleged error has not been resolved by the hearing officer, that party shall notify the Attorney General's Office, to the attention of MainePERS Board counsel, so that the notification is received within 10 days of that party's receipt of the recommended final decision.
 - A. The Board or Board counsel may on its own initiative, determine that an error pursuant to 5 M.R.S. §17106-A exists in the recommended final decision.
- 3. Upon review of the record, the Attorney General or designee shall notify the parties, prior to the scheduled Board consideration, whether the Board will be advised that an error of law exists in the recommended final decision.

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4. If the Attorney General or designee recommend that the Board find one or more errors in the recommended final decision as described in 5 M.R.S. §17106-A(1), then the following procedures will be followed.
- A. **Board Consideration.** The Board will consider the recommended final decision, together with the allegation of error(s), on a timely basis and, for an appellant who has chosen the expedited appeal process, will issue a decision within 90 days of the initial pre-hearing conference, when possible.
 - B. **Recommended final decision and record.** In advance of Board consideration, a copy of the recommended final decision with the parties' comments and Board counsel's recommendation, will be forwarded to each Board member.
 - C. **Statement by party.** A party who is present at a scheduled consideration may not offer evidence but may make a statement of position not to exceed 15 minutes in length. Such statement of position may address the alleged error(s) pursuant to 5 M.R.S. §17106-A(1). When a party's statement of position relies on specific portions of the record, the party must provide copies of the relevant portions to the Board and other parties at least 5 days prior to the date for consideration by the Board.
 - D. **Hearing officer present.** If requested by the Board, the hearing officer may be present at the scheduled consideration to assist the Board.
 - E. **Action after consideration.** After considering the recommended final decision, the Board may:
 - (1) adopt the recommended final decision as delivered;
 - (2) modify the recommended final decision;
 - (3) send the recommended final decision back to the same hearing officer if possible, or a replacement hearing officer for the taking of further evidence, for additional consideration of issues, for reconsideration of the application of law or rules, or for such other proceedings or considerations as the Board may specify; or
 - (4) reject the recommended final decision in whole or in part and issue an amended Board decision;
5. ~~Board counsel will draft the decision and order.~~ A decision as issued by the Board under this Section is the final administrative decision in the appeal.

SECTION 17. Attorney's Fees

1. The System is required by 5 M.R.S. § 17106-B(5) to pay attorney's fees, up to a total of \$12,000, if an attorney has represented the appellant on appeal of a disability retirement decision and obtained a favorable result. A favorable result is a reversal of a decision of the Board or Chief Executive Officer that results in the grant of benefits to the appellant or otherwise materially advantages the appellant.

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2. Attorney's fees under this section may be awarded by a Court on judicial review of a Board decision or by the hearing officer in the case where a decision of the Chief Executive Officer has been reversed by the Board or the Chief Executive Officer.
 3. Application to a hearing officer for attorney's fees must be made no later than 30 days after receipt of the Board decision or the dismissal of the appeal following reversal by the Chief Executive Officer.
 - A. The application must be accompanied by proof of the fee arrangement and a statement of attorney's fees incurred in the appeal. The statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and a statement of the attorney's customary billing rate for similar work.
 - B. The hearing officer may grant the application based on the proof submitted or may hold a hearing and receive argument orally, in writing, or both.
 - C. A decision on an attorney's fee application may be appealed to the Board, who shall affirm the decision unless it is not supported by the record as a whole, the Board is advised by 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.
 1. The process for Board review shall be consistent with section 16 above to the extent applicable.
 2. The Board's decision constitutes final agency action.

STATUTORY AUTHORITY:

5 M.R.S. §§ 9051-9064, 17103(4), 17106-A, 17106-B and 17451