

AGENDA

THE MEETING OF THE

DISABILITY PROCEDURES AND SERVICES COMMITTEE

and

BOARD OF RETIREMENT*

LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION

300 NORTH LAKE AVENUE, SUITE 810
PASADENA, CA 91101

9:00 A.M., WEDNESDAY, SEPTEMBER 5, 2018 **

*The Committee may take action on any item on the agenda,
and agenda items may be taken out of order.*

COMMITTEE MEMBERS:

William Pryor, Chair
James P. Harris, Vice Chair
Herman Santos
Gina Zapanta-Murphy
Marvin Adams, Alternate

I. CALL TO ORDER

II. APPROVAL OF THE MINUTES

A. Approval of the minutes of the regular meeting of August 1, 2018.

III. PUBLIC COMMENT

IV. ACTION ITEMS

A. Recommendation as submitted by Francis J. Boyd, Senior Staff Counsel, that the Disability Procedures and Services Committee recommend to the Board of Retirement that it adopt the recommended procedures for members to apply for a correction appeal in regard to their effective date of disability retirement under Government Code section 31541.1 (memo dated August 22, 2018).

V. FOR INFORMATION

A. Blood-borne Infectious Disease Presumption – Presentation by Francis J. Boyd, Senior Staff Counsel.

VI. REPORT ON STAFF ACTION ITEMS

VII. GOOD OF THE ORDER

(For information purposes only)

VIII. ADJOURNMENT

***The Board of Retirement has adopted a policy permitting any member of the Board to attend a standing committee meeting open to the public. In the event five (5) or more members of the Board of Retirement (including members appointed to the Committee) are in attendance, the meeting shall constitute a joint meeting of the Committee and the Board of Retirement. Members of the Board of Retirement who are not members of the Committee may attend and participate in a meeting of a Board Committee but may not vote, make a motion, or second on any matter discussed at the meeting. The only action the Committee may take at the meeting is approval of a recommendation to take further action at a subsequent meeting of the Board.**

****Although the meeting is scheduled for 9:00 a.m., it can start anytime thereafter, depending on the length of the Board of Retirement meeting. Please be on call.**

Assistive Listening Devices are available upon request. American Sign Language (ASL) Interpreters are available with at least three (3) business days notice before the meeting date.

Any documents subject to public disclosure that relate to an agenda item for an open session of the Committee, that are distributed to members of the Committee less than 72 hours prior to the meeting, will be available for public inspection at the time they are distributed to a majority of the Committee, at LACERA's offices at 300 North Lake Avenue, suite 820, Pasadena, California during normal business hours from 9:00 a.m. to 5:00 p.m. Monday through Friday.

Persons requiring an alternative format of this agenda pursuant to Section 202 of the Americans with Disabilities Act of 1990 may request one by calling the Disability Retirement Services Division at 626-564-2419 from 7:30 a.m. to 5:00 p.m. Monday through Friday, but no later than 48 hours prior to the time the meeting is to commence.

MINUTES OF THE MEETING OF THE
DISABILITY PROCEDURES AND SERVICES COMMITTEE
and
BOARD OF RETIREMENT

LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION
GATEWAY PLAZA - 300 N. LAKE AVENUE, SUITE 810, PASADENA, CA 91101

WEDNESDAY, AUGUST 1, 2018

COMMITTEE MEMBERS

PRESENT: James P. Harris, Vice Chair
Herman Santos
Gina Zapanta-Murphy
Marvin Adams, Alternate

ABSENT: William Pryor, Chair

ALSO ATTENDING:

BOARD MEMBERS AT LARGE

Thomas Walsh
Vivian H. Gray
Shawn Kehoe

STAFF, ADVISORS, PARTICIPANTS

Ricki Contreras, Disability Retirement Services Division Manager

Tamara Caldwell, Disability Retirement Specialist Supervisor

Francis J. Boyd, Senior Staff Counsel

The Meeting was called to order by Vice Chair Harris at 2:08 p.m., in the Board Room of Gateway Plaza.

I. APPROVAL OF THE MINUTES

A. Approval of the minutes of the special meeting of July 17, 2018.

Mr. Santos made a motion, Ms. Zapanta-Murphy seconded, to approve the minutes of the special meeting of July 17, 2018. The motion passed unanimously.

II. PUBLIC COMMENT

There were no requests from the public to speak.

III. ACTION ITEMS

A. Consider Application of Robert A. Moore, M.D., as a LACERA Panel Physician.

Mr. Santos made a motion, Ms. Zapanta-Murphy seconded, to approve to accept staff's recommendation and submit the application of Robert A. Moore, M.D. to the Board of Retirement for approval to the LACERA Panel of Examining Physicians. The motion passed unanimously.

B. Consider Application of Neil S. Ghodadra, M.D., as a LACERA Panel Physician.

Mr. Santos made a motion, Ms. Zapanta-Murphy seconded, to approve to accept staff's recommendation and submit the application of Neil S. Ghodadra, M.D. to the Board of Retirement for approval to the LACERA Panel of Examining Physicians. The motion passed unanimously.

C. Consider Application of Katalin Bassett, M.D., as a LACERA Panel Physician.

Mr. Adams made a motion, Mr. Santos seconded, to approve to accept staff's recommendation and submit the application of Katalin Bassett, M.D. to the Board of Retirement for approval to the LACERA Panel of Examining Physicians. The motion passed unanimously.

D. Request to Contract with Professional Investigation Agencies.

Mr. Santos made a motion, Mr. Adams seconded, to approve to accept staff's recommendation and submit the applications of American Employer Defense and MV Investigations to the Board of Retirement for approval to the LACERA Panel of Service Providers. The motion passed unanimously.

IV. FOR INFORMATION

A. Blood-borne Infectious Disease Presumption – Presentation by Francis J. Boyd, Senior Staff Counsel.

This item will be presented to the Disability Services and Procedures Committee at a future meeting.

V. GOOD OF THE ORDER

There was nothing to report during Good of the Order.

VI. ADJOURNMENT

With no further business to come before the Disability Procedures and Services

Committee, the meeting was adjourned at 2:24 p.m.



August 22, 2018

To: Disability Procedures & Services Committee
William R. Pryor, Chair
J.P. Harris, Vice Chair
Herman B. Santos
Gina Zapanta-Murphy
Marvin Adams, Alternate

From: Francis J. Boyd, 
Senior Staff Counsel

For: September 5, 2018 Disability Procedures & Services Committee

Subject: **Government Code section 31541.1**
Effective Date of Disability Retirement

RECOMMENDATION

It is recommended that the Disability Procedures & Services Committee recommend to the Board of Retirement that it adopt the recommended procedures for members to apply for a correction appeal in regard to their effective date of disability retirement under Government Code section 31541.1.

INTRODUCTION

On July 13, 2017, the Board of Retirement approved sponsorship of legislation (AB 2076) by LACERA to provide statutory authority to the Board to correct its decisions made between 2013 and 2015 in the determination of the effective date of disability retirement because these decisions were based on an incorrect interpretation of Government Code section 31724.

On July 16, 2018, Governor Jerry Brown signed AB 2076 into law effective January 1, 2019. The law has been codified as Government Code section 31541.1. A copy of this code section is enclosed as Attachment 1. The law does not guarantee that members will be granted an earlier effective date; it only provides that members may file an application and that the Board may correct its prior effective date decision on such terms as it deems just.

After Governor Brown signed the bill into law, a cross-functional team of staff from Benefits, Member Services, Disability Retirement, Communications, Disability Litigation, and the Legal Office met and created procedures for members seeking correction of

their disability effective date. The team's goal was to create procedures that were fair, efficient, and utilized LACERA's existing processes.

LEGAL AUTHORITY

The Board of Retirement has the plenary authority and fiduciary responsibility to administer the retirement system, and it holds executive, legislative, and quasi-judicial powers. It has the sole authority to determine eligibility for a disability retirement. In administering its duties, the Board has the authority to promulgate rules, regulations, procedures, and policies.¹

BACKGROUND

Generally, the earliest date a disability retirement becomes effective is the date the application is filed. Exceptions to this general rule are set forth in the last paragraph of Government Code section 31724, which states:

When it has been demonstrated to the satisfaction of the board that the filing of the member's application was delayed by administrative oversight or by *inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation*, such date will be deemed to be the date the application was filed. (Emphasis added).

Historically, LACERA followed the plain language interpretation of the above paragraph in regard to the inability-to-ascertain exception—members had to demonstrate that they were unable to ascertain the permanency of their incapacity until after the date following their last day of regular compensation.

From 2013 to 2015, under prior counsel, a different approach was used in interpreting the statute—members had to prove that they were unable to ascertain the permanency of their incapacity during the entire period of the delay, not just until the date following their last day of regular compensation. This approach did not follow the plain language of the statute.

Beginning in approximately July 2015, LACERA returned to the plain language interpretation of the statute. A review of records reveals that from January 2013 to December 2015, 157 applications were granted a disability retirement but denied an earlier effective date under the incorrect interpretation of Section 31724.² Of those 157

¹ Cal. Const., art. XVI, § 17, subd. (a) and (b); Gov. Code Sec. 31725; *Preciado v. County of Ventura, et al.* (1982) 143 Cal.App.3d 783, 789.

² The number of affected members is higher than what staff previously advised the Board. After the legislation was enacted, staff performed a more comprehensive analysis of the disability-retirement applications granted during the relevant period and this analysis uncovered additional affected members.

applications, 43 members could potentially collect retroactive benefits if they prove that they were unable to ascertain the permanency of their incapacity until the date following their last day of regular compensation.

In order to fulfill our fiduciary duty to our members, LACERA sought legislation (AB 2076) that would allow members to have the Board reconsider their decisions on the effective date issue. Now that the bill has been signed into law, it is the Legal Office's recommendation that the Board adopt the following procedures for members to apply for a correction appeal in regard to their effective date of disability retirement.

RECOMMENDED PROCEDURES

Notice of Right to File an Application for Correction Appeal, Benefit Adjustment Worksheet, and Application for Correction Appeal.

Beginning in early December 2018, Disability Retirement Services will send a notice to all affected members, and the attorney of record, informing them of their right to submit an Application for Correction Appeal. The notice will contain an Application for Correction Appeal form, allowing the members to appeal the Board's initial decision in regard to the effective date. The notice letter informs members of the following:

- Their right to appeal only covers eligibility for an earlier effective date and no other issue.
- The deadline to file an appeal is December 31, 2019.
- Members are provided with their application date and current effective date of their disability retirement.
- Members are informed that it is their burden to prove that they were unable to ascertain the permanency of their incapacity until the date following their last day of regular compensation.
- The notice contains a Benefit Adjustment Worksheet that explains how their disability retirement allowance will be affected if they meet their burden of proof.
- Members are informed of potential consequences if their effective date is deemed earlier than the date of their application. The benefit worksheet specifically warns members that an earlier effective date could result in a disqualification of their LTD benefits if the effective date is within the six-month qualifying period for LTD benefits. The worksheet warns that such a disqualification would result in members having to pay back all of the LTD benefits paid to them. Members are advised to consult with Sedgwick to discuss the potential LTD-benefit consequences. Members are also advised to contact their counsel and personal financial advisor to discuss tax implications.

A copy of the Notice of Right to File an Application for Correction Appeal Pursuant to Government Code section 314541.1, a sample Benefit Adjustment Worksheet, and an Application for Correction Appeal form are enclosed as Attachment 2.

Acknowledgement of Receipt of Application for Correction Appeal

Once Disability Retirement Services receives the member's signed Application for Correction Appeal form, it will send a confirmation letter acknowledging receipt of the appeal. The appeal will be assigned to a neutral referee and the Disability Litigation Division will represent LACERA in the appeal. The member will also be sent a copy of the "Board Packet" with the acknowledgement letter and an automatic reassignment affidavit to be utilized if the member desires to have a different referee assigned to the appeal. Within 45 days of the date of the letter, Disability Retirement Services will send the member all of the available records staff obtained during the original investigation of the application.

A copy of the Acknowledgement of Receipt of Application for Correction Appeal is enclosed as Attachment 3.

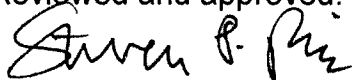
Disability Litigation Division's Role

Upon assignment to the Disability Litigation Division, the LACERA attorney will review the records on a priority basis to determine whether or not there is substantial evidence to support a denial of the member's request for an earlier effective date. If the evidence demonstrates that the member was unable to ascertain the permanency of his or her incapacity until after the date following the last day of regular compensation, the LACERA attorney will prepare a recommendation to the Board of Retirement to grant the member's request for an earlier effective date. The LACERA attorney will decide whether or not to make such a recommendation within 30 days of the date the file is assigned to the Disability Litigation Division. If the evidence supports a denial of an earlier effective date, the member will have the burden of moving the appeal forward pursuant to LACERA's Procedures for Disability Retirement Hearings.

CONCLUSION

The Legal Office recommends that the Disability Procedures & Services Committee recommend to the Board of Retirement that it adopt the recommended procedures for members to apply for a correction appeal in regard to their effective date of disability retirement under Government Code section 31541.1.

Reviewed and approved.



Steven P. Rice, Chief Counsel

c: Each Member, Board of Retirement



AB-2076 County employees' retirement: disability: date of retirement. (2017-2018)

SHARE THIS:



Date Published: 07/16/2018 09:00 PM

Assembly Bill No. 2076

CHAPTER 97

An act to add Section 31541.1 to the Government Code, relating to county employees' retirement.

[Approved by Governor July 16, 2018. Filed with Secretary of State July 16, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2076, Rodriguez. County employees' retirement: disability: date of retirement.

The County Employees Retirement Law of 1937 provides a comprehensive set of benefits for county and district employees who are members of a retirement system subject to that law and establishes county retirement boards for the administration of benefits authorized under that law. That law authorizes a county retirement system in Los Angeles County to adjust retirement payments due to errors or omissions, as specified. That law also permits a member permanently incapacitated for duty to retire for disability only if specified criteria are met and requires the board to determine the effective date of retirement in those cases, as specified.

This bill would authorize a county retirement system in Los Angeles County to correct a prior board decision determining the effective date of retirement for a member permanently incapacitated for disability that was made between January 1, 2013, and December 31, 2015, and was based upon an error of law existing at the time of the decision, as specified. The bill would authorize a member seeking correction under these provisions to file an application with the board no later than one year from the date these provisions become operative.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 31541.1 is added to the Government Code, to read:

31541.1. (a) Subject to subdivisions (c), (d), and (e) of Section 31541, the board, upon any terms it deems just, may correct prior board decisions made between January 1, 2013, and December 31, 2015, that were based upon an error of law existing at the time of the decision in the determination of the effective date of disability retirement pursuant to Section 31724. A member seeking correction of errors and omissions pursuant to this section may file an application for correction to the board no later than one year from the date this section becomes operative.

(b) This section shall apply to a county of the first class as described in Section 28020 and 28022.



(Date)

**NOTICE OF RIGHT TO FILE AN
APPLICATION FOR CORRECTION APPEAL
Pursuant to Government Code § 31541.1**

Dear _____ :

Introduction

Our records show that the Board of Retirement granted your disability retirement between January 1, 2013 and December 31, 2015, but did not grant your request for an earlier effective date pursuant to Government Code § 31724.

On March 2, 2018, we mailed you a letter explaining that between 2013 and 2015, the Board of Retirement based its decisions to grant members an effective date earlier than their application date on an incorrect interpretation of § 31724. In order to fulfill our fiduciary duty to our members, we sought legislation (AB 2076) that would allow members to have the Board reconsider their decisions on the effective date issue. On July 16, 2018, Governor Jerry Brown signed AB 2076 into law which has been codified as Government Code § 31541.1. The new law is effective on January 1, 2019. A copy of this code section is enclosed. The law does not guarantee that you *will* be granted an earlier effective date; it only provides that you may file an application and that the Board may correct its prior effective date decision on such terms as it deems just.

Your Right to Appeal

You now have the right to file an Application for Correction Appeal under the authority of Government Code § 31541.1. This appeal will only apply to the effective date of your disability retirement. No other issue may be appealed because the Board's earlier decision remains final as to all other issues. An Application for Correction Appeal form is enclosed.

Deadline to File Appeal

Under the new law, your signed Application for Correction Appeal must be filed with LACERA no later than Tuesday, December 31, 2019. This means your application must be received by LACERA before the close of business (Monday through Friday, 5 PM) on or before that date. Applications for Correction Appeal filed and received after that date will not be considered.

Current Disability Retirement Effective Date Based on Your Application

According to our records, you filed your disability retirement application on [Date]_____, and your disability retirement became effective on [Date]_____.

Burden of Proof for Receiving an Effective Date Earlier Than Your Application Date

To be entitled to a disability retirement allowance effective date earlier than the date of your original application, you must demonstrate to the satisfaction of the Board of Retirement that the delay in filing your application was caused by your inability to ascertain the permanency of your incapacity until after the day following your last day of regular compensation or by administrative oversight.

Your Last Day of Regular Compensation

According to our records, your last day of regular compensation was [Date]_____.

Potential Change in Your Disability Allowance If You Are Successful in Your Appeal

If you are able to prove that you were unable to ascertain the permanency of your incapacity until after the day following your last day of regular compensation or by administrative oversight, the enclosed Benefit Adjustment Worksheet explains how your disability allowance will be affected.

Things to Consider When Filing an Appeal

It may or may not be in your interest to file an appeal. You should carefully consider the consequences before filing your application.

There may not be a retroactive tax benefit in pursuing an earlier effective date. LACERA cannot provide you with any tax advice; we recommend you speak with a tax specialist.

Any retroactive benefits granted to you may be subject to an offset if you received Long-Term Disability (LTD) benefits. Also, an earlier disability retirement effective date may affect your eligibility for LTD benefits. Please speak with a representative from Sedgwick, the County's LTD administrator.

A grant of an earlier effective date of your disability retirement may affect your disability retirement survivor benefits for your spouse. Please contact LACERA Member Services to discuss this issue.

What Happens After You Submit Your Application for Correction Appeal?

Once LACERA receives your signed Application for Correction Appeal, you will receive a confirmation letter from Disability Retirement Services acknowledging receipt of your appeal, and your appeal will be assigned to a neutral referee. Your appeal will be subject to LACERA's Procedures for Disability Retirement Hearings. We have enclosed a copy of the procedural pamphlet for your review.

Notice of Right to File an Application for Correction Appeal

[Date]

Pursuant to Government Code § 31541.1

Page 3

Questions Regarding Your Appeal Rights

If you have questions about this information or need assistance, please contact LACERA's Call Center at 800-786-6464 between 7:00 AM and 5:30 PM PT. You can also make an appointment to visit our Member Services Center in Pasadena by visiting lacera.com or email us at welcome@lacera.com. A Retirement Benefits Specialist will gladly assist you.

Sincerely,

LACERA Benefits Division

— SAMPLE —

**ESTIMATED POTENTIAL BENEFIT ADJUSTMENTS IF GRANTED AN EARLIER
DISABILITY EFFECTIVE DATE**

RE: John Doe

Employee ID# 000000

If you are able to prove to the Board of Retirement that you were unable to ascertain the permanency of your incapacity until after the date following the day you last received regular compensation, your LACERA retirement benefits would be recalculated as follows:

Old Disability Effective Date	New Disability Effective Date*
1/18/2012	11/24/2009

This table reflects the recalculated Unmodified monthly benefit effective November 30, 2018 payroll:

Old Monthly Benefit	New Monthly Benefit
\$2,946.32 Total \$2,629.03 Base + \$317.29 COLA	\$3,043.16 Total \$2,622.83 Base + 420.33 COLA

This table reflects the retroactive benefits from November 24, 2009 (the new disability effective date) to October 31, 2018:

Description	Amount
Total recalculated benefit (if appeal is granted):	\$303,785.80
Benefit Already Paid:	\$227,185.32
Estimated Retroactive Amount Due To Member (if appeal is granted):	\$76,600.48**

Based on the new disability effective date (if appeal granted), your Final Average Compensation has changed from \$7,887.10 to \$7,868.49.

IMPORTANT NOTES

*If your new disability effective date is within the six-month qualifying period for LTD benefits, you **will lose your qualification for LTD benefits and will have to pay back all the LTD benefits paid to you**, which could have a major impact on whether or not an effective date change is beneficial to you. LACERA cannot make any LTD calculations.

You **may have to reimburse Sedgwick, the LTD provider, from this retroactive amount during your new, earlier period of disability.

We **strongly recommend** that you contact Sedgwick at (800) 786-8600 before requesting an earlier effective date.

You may also wish to consult with your counsel, a personal financial advisor, or a tax professional as to whether a request for an earlier effective date is in your best interest. LACERA cannot offer any financial or tax advice and does not make representations that an earlier effective date is in your best interest.



**APPLICATION FOR CORRECTION APPEAL
Pursuant to Government Code § 31541.1**

The Board of Retirement granted me a disability retirement between January 1, 2013 and December 31, 2015, but did not grant my request for an earlier effective date of my disability retirement pursuant to Government Code § 31724.

Under the authority of Government Code § 31541.1, I wish to appeal the Board of Retirement's disability decision on the limited issue of the effective date of my disability retirement.

I understand that I have the burden of proving to the satisfaction of the Board of Retirement that the delay in filing my disability retirement application was caused by my inability to ascertain the permanency of my incapacity until after the day following my last day of regular compensation or by administrative oversight. I further understand that this appeal only covers eligibility for an earlier effective date and no other issue.

Signature: _____ Date: _____

Name (Please Print): _____



[DATE]

**ACKNOWLEDGEMENT OF RECEIPT OF
APPLICATION FOR CORRECTION APPEAL
AND ASSIGNMENT OF REFEREE
Pursuant to Government Code § 31541.1**

Dear [NAME]:

We have received your Application for Correction Appeal pursuant to Government Code § 31541.1. The following referee has been assigned to your case:

[REFEREE NAME]
[REFEREE ADDRESS]
[CITY, ST, ZIP]

Enclosed is an automatic reassignment affidavit. If you wish to request that a different referee be assigned to your case, you have one opportunity to do so. If you choose to exercise this option, you will need to fill out and return this affidavit to our office within 10 days from the date of this letter.

Also enclosed is the "Board packet" that was presented to the Board of Retirement at the time the original decision on your application was made. The "Board packet" contains your application, the Board's panel-physician report, the list of records reviewed by the panel physician, and the Disability Retirement Evaluation Report prepared by LACERA staff.

All of the available records obtained by LACERA staff during the investigation of your application will be forwarded to you and LACERA's Disability Litigation Division within 45 days from the date of this letter.

You will be notified when a LACERA attorney has been appointed to represent LACERA and that attorney will make arrangements with you to schedule a procedural conference that will be conducted at LACERA with you, your attorney (if you have one), the attorney for LACERA, and the referee. If you have any questions about the procedural conference, you can call the Disability Litigation Division at (626) 564-6000, Ext. 4381.

Sincerely,

Ricki Contreras, Manager
Disability Retirement Services Division

Enclosure

PETITION FOR AUTOMATIC REASSIGNMENT

Case Name

AFFIDAVIT

State of California)
) ss.
County of _____)

_____, declares under penalty of perjury:
(Name of Affiant)

1. That (s)he is (a party) (an attorney for a party) to the above-named case.
2. That affiant believes that (s)he cannot have a fair and impartial trial before the referee to whom the case is assigned.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ at _____, California.
(Date) (City)

(Signature)

This declaration shall be filed not more than ten (10) days after the service of the notification of assignment of referee and shall be directed to the attention of the Board of Retirement.

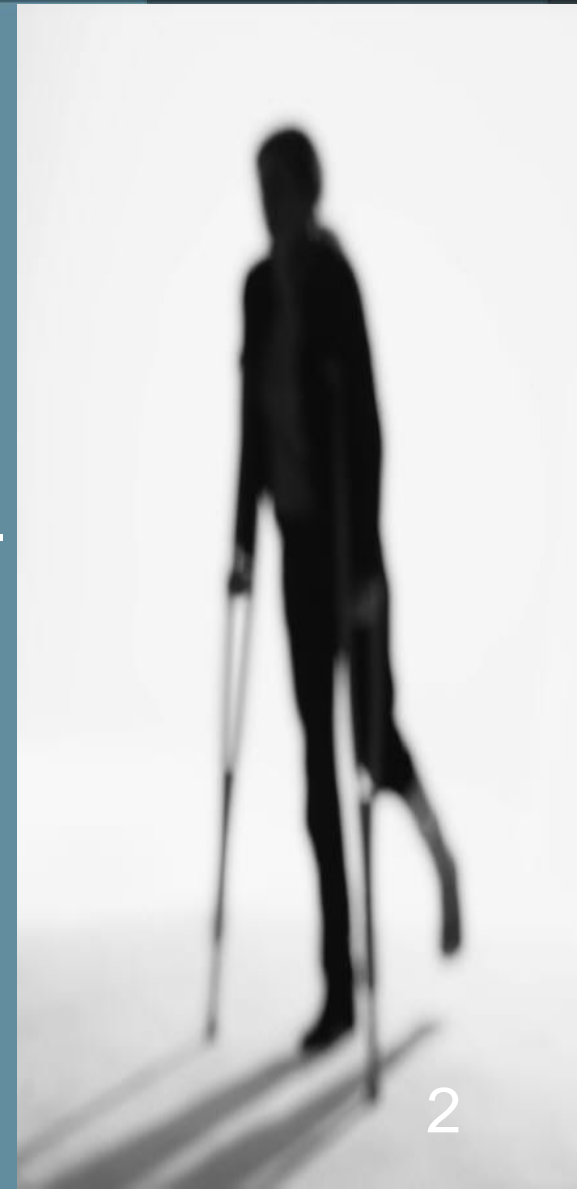
BLOOD-BORNE INFECTIOUS DISEASE PRESUMPTION

A close-up, high-contrast image of a person's eye, looking directly at the viewer. The image is partially obscured by the text on the left.

Government Code section 31720.7

SERVICE CONNECTION IN NON-PRESUMPTION CASES

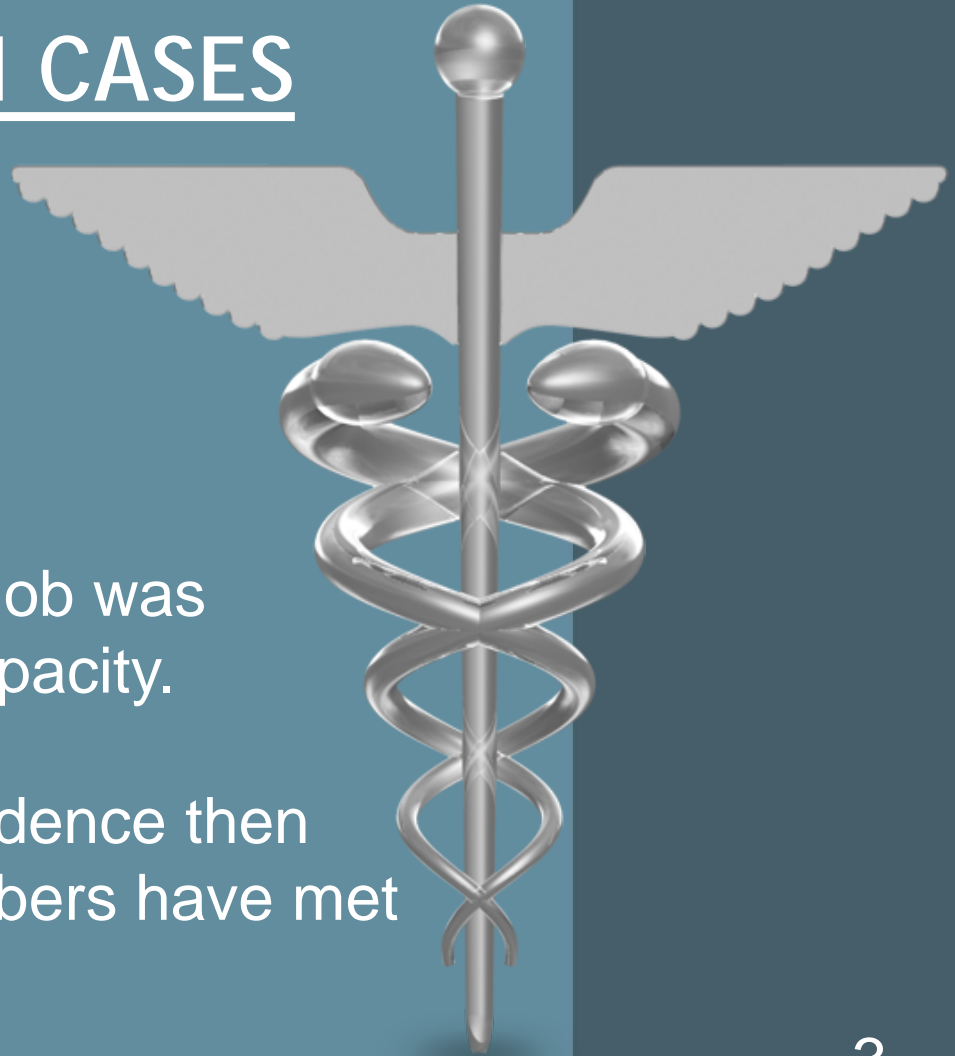
- After proving permanent incapacity, service connection will be established only if the member's incapacity arose out of and in the course of the member's employment, and such employment substantially contributed to the incapacity.
- Gov. Code section 31720
- Substantial contribution: There must be a "real and measurable" connection between the employment and the incapacity.
- *Bowen v. Board of Retirement* (1986) 42 Cal.3d 572.



BURDEN OF PROOF IN NON-PRESUMPTION CASES

NON-PRESUMPTION CASES

- Causation is established by a medical opinion from a physician.
- Physician describes the mechanism by which the job was a causal factor in the incapacity.
- The Board weighs the evidence then determines whether members have met their burden of proof.



BURDEN OF PROOF IN PRESUMPTION CASES

PRESUMPTION CASES

- In a presumption case, the applicant is relieved of the burden of proving that the injury or illness arose out of and in the course of employment and that the employment substantially contributed to the incapacity.
- Once certain prerequisite facts are established, the connection between the incapacity and employment is presumed to exist.



WHAT IS A PRESUMPTION?

DEFINITION:

It is an assumption of fact the law requires to be drawn from one or more other facts already established in the action.

Evidence Code section 600.



TYPES

1. **Rebuttable Presumption:** Establishes the existence of a fact unless evidence is introduced which would support a finding that the presumed fact does not exist.

Evidence Code sections 604 and 606.

2. **Conclusive Presumption:** A finding of fact that the law requires to be made once prerequisite facts are established, even if there is evidence that would establish that the presumed fact is not true.

See Evidence Code section 630 *et seq.*

BLOOD-BORNE PRESUMPTION

Government Code section 31720.7:

(a) If a safety member, a firefighter, a county probation officer, or a member in active law enforcement develops a blood-borne infectious disease or a methicillin-resistant *Staphylococcus aureus* skin infection, the disease or skin infection so developing or manifesting itself in those cases shall be presumed to arise out of, and in the course of, employment. The blood-borne infectious disease or methicillin-resistant *Staphylococcus aureus* skin infection so developing or manifesting itself in those cases shall in no case be attributed to any disease or skin infection existing prior to that development or manifestation.

(b) Any safety member, firefighter, county probation officer, or member active in law enforcement described in subdivision (a) permanently incapacitated for the performance of duty as a result of a blood-borne infectious disease or methicillin-resistant *Staphylococcus aureus* skin infection shall receive a service-connected disability retirement.

(c)(1) The presumption described in subdivision (a) is rebuttable by other evidence. Unless so rebutted, the board is bound to find in accordance with the presumption.

BLOOD-BORNE PRESUMPTION

(2) The blood-borne infectious disease presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(3) Notwithstanding paragraph (2), the methicillin-resistant *Staphylococcus aureus* skin infection presumption shall be extended to a member following termination of service for a period of 90 days commencing with the last day actually worked in the specified capacity.

(d) “Blood-borne infectious disease,” for purposes of this section, means a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including, but not limited to, those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations.

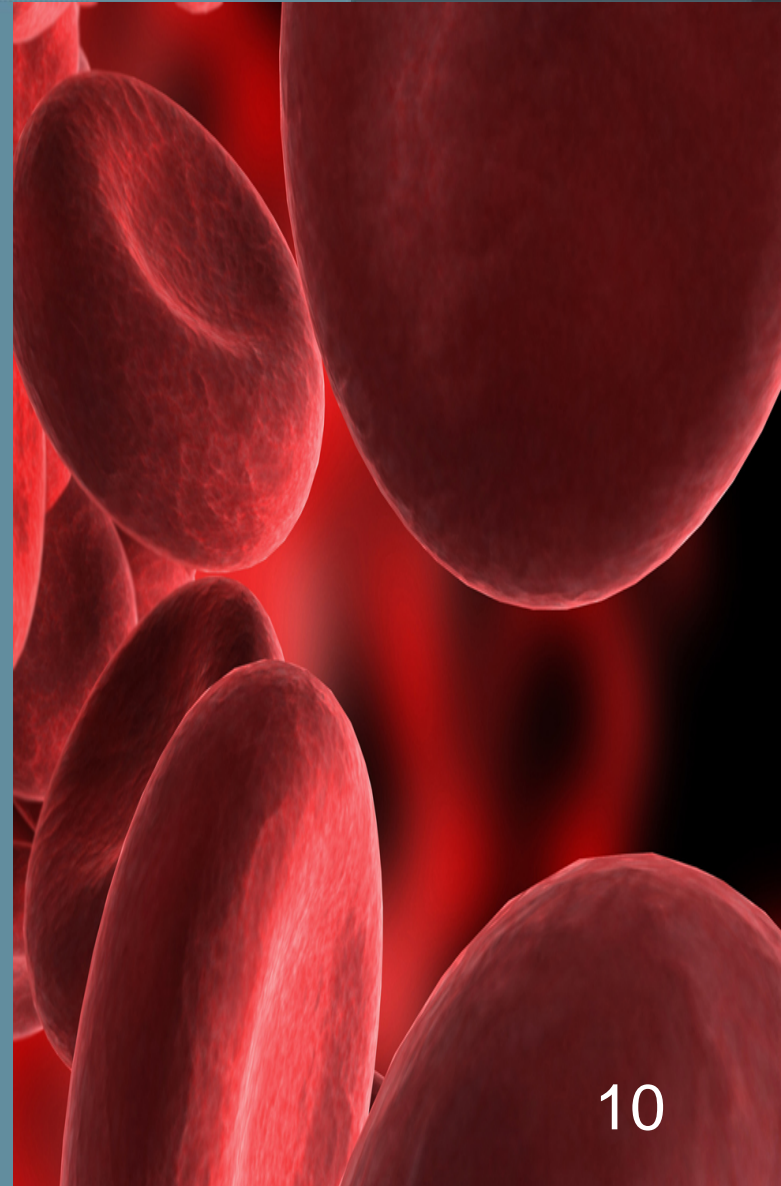
BLOOD-BORNE PRESUMPTION

(e) “Member in active law enforcement,” for purposes of this section, means members employed by a sheriff’s office, by a police or fire department of a city, county, city and county, district, or by another public or municipal corporation or political subdivision or who are described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code or who are employed by any county forestry or firefighting department or unit, except any of those members whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers, and includes a member engaged in active law enforcement who is not classified as a safety member.

BLOOD-BORNE PRESUMPTION

Requirements:

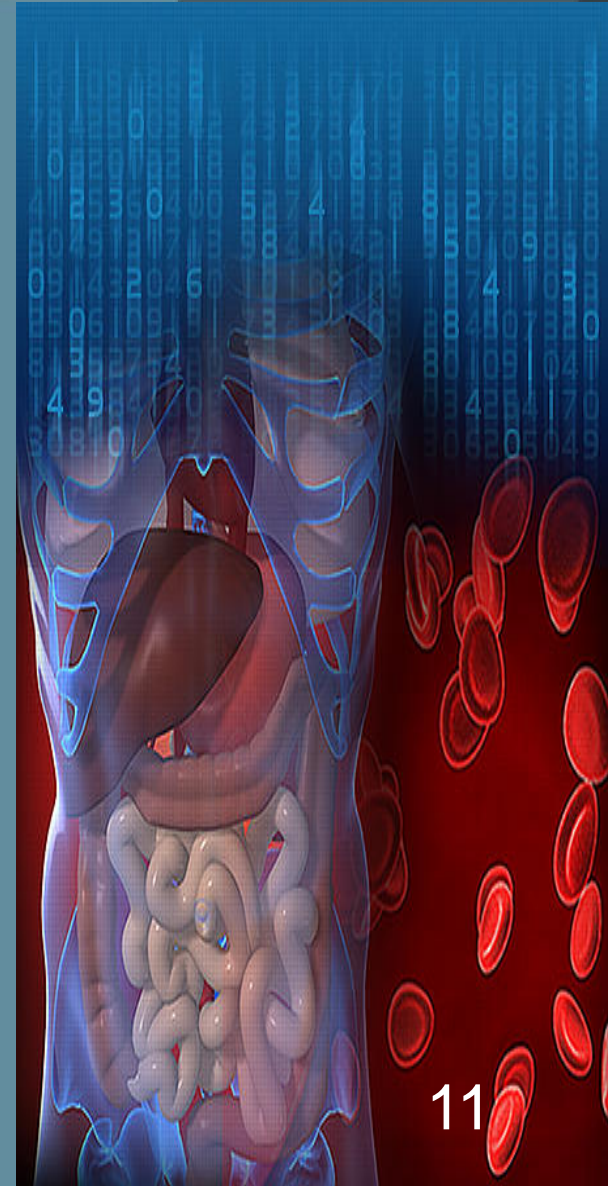
1. Designated occupation
 - a.) Safety members
 - b.) Firefighters
 - c.) County Probation Officers
 - d.) Members in active law enforcement
2. Develops blood-borne infectious disease



BLOOD-BORNE PRESUMPTION

Requirements:

3. Permanent incapacity for duty due to blood-borne infectious disease
4. Time for application
5. What does the presumption establish?
6. The presumption is rebuttable



BLOOD-BORNE PRESUMPTION

1. DESIGNATED OCCUPATION

- Safety Member
- Firefighter
- County Probation Officer
- “Members in Active Law Enforcement” means members engaged in “active law enforcement” who are not classified as safety members and are:
 - employed by a sheriff’s office
 - employed by a police or fire department of city, county, city and county, district, or by another public or municipal corporation or political subdivision

BLOOD-BORNE PRESUMPTION

“Members in Active Law Enforcement” (cont.)

- employed by any county forestry or firefighting department or unit, except those whose principal duties are clerical or not within the scope of active law enforcement services or active firefighting services
- Members defined as “peace officers” in Chapter 4.5 of Title 3 of Part 2 of the Penal Code

Note: Contrary to other statutes, the Legislature included members engaged in active firefighting who are not classified as safety members in the definition of “members in active law enforcement.”

BLOOD-BORNE PRESUMPTION

Active Law Enforcement

- Member in “active law enforcement” even if not a safety member.
- *Ames v. Board of Retirement*:
 - Contact with prisoners on a regular basis
 - Exposure to hazards from prisoner conduct
 - Risk of injury from the necessity of being able to cope with potential dangers inherent in the handling of prisoners
 - Primary duty is to maintain security

Ames v. Board of Retirement (1983) 147 Cal.App.3d 906, 916.



BLOOD-BORNE PRESUMPTION

2. Develops blood-borne infectious disease or Methicillin Resistant Staphylococcus Aureus (MRSA)

Blood-borne infectious disease must develop or manifest itself in the applicant.

BLOOD-BORNE PRESUMPTION

- 3. Member must be permanently incapacitated as a result of a blood-borne infectious disease or methicillin-resistant *Staphylococcus aureus* skin infection.**

The presumption only addresses **causation**, it does not establish incapacity.

BLOOD-BORNE PRESUMPTION

4. Time for application

The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while, from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.

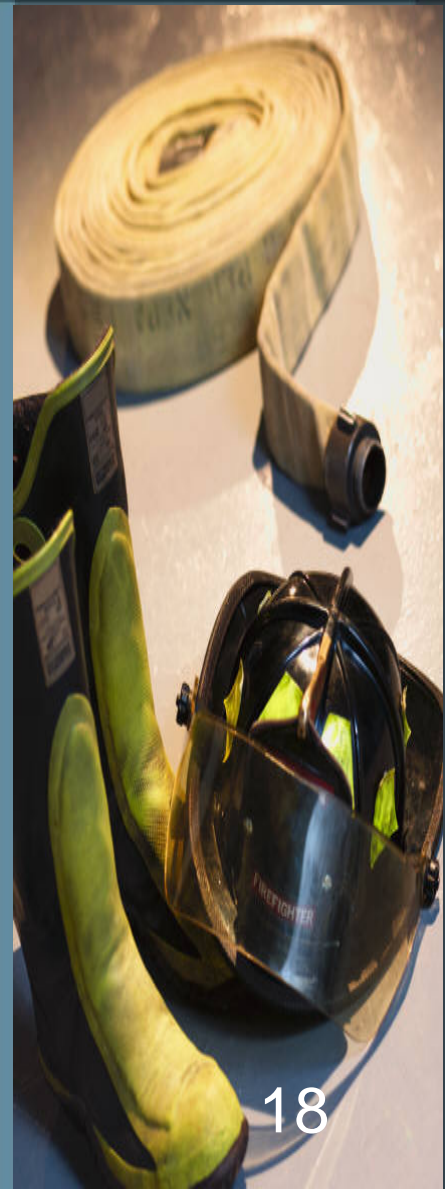
Gov. Code section 31722



BLOOD-BORNE PRESUMPTION

Time for application (cont.)

- **Extension:** “. . . This presumption shall be extended to a member following termination of services for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstances, commencing with the last day actually worked in the specified capacity.”



BLOOD-BORNE PRESUMPTION

Time for application (cont.)

MRSA Extension (90 days)

- The MRSA presumption is extended to a member following termination of service for a period of 90 days commencing with the last day actually worked in the specified capacity. It is not extended for up to 60 months like other blood-borne infectious diseases.



BLOOD-BORNE PRESUMPTION

5. What does the presumption establish?

The disease shall be:

- presumed to arise out of and in the course of employment and
- the permanently incapacitated member receives a service-connected disability retirement pension.



BLOOD-BORNE PRESUMPTION

6. The presumption is rebuttable. . .

but the illness cannot be attributed to any illness existing prior to the development or manifestation.



QUESTIONS?

