

LIVE VIRTUAL COMMITTEE MEETING

*The Committee meeting will be held following the Board of Retirement meeting scheduled prior.



TO VIEW VIA WEB



TO PROVIDE PUBLIC COMMENT

You may submit a request to speak during Public Comment or provide a written comment by emailing PublicComment@lacera.com. If you are requesting to speak, please include your contact information, agenda item, and meeting date in your request.

Attention: Public comment requests must be submitted via email to PublicComment@lacera.com no later than 5:00 p.m. the day before the scheduled meeting.

LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION
300 N. LAKE AVENUE, SUITE 650, PASADENA, CA

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., THURSDAY, MARCH 11, 2021 **

This meeting will be conducted by the Disability Procedures and Services Committee by teleconference under the Governor's Executive Order No. N-29-20.

Any person may view the meeting online at
https://members.lacera.com/lmpublic/live_stream.xhtml.

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

COMMITTEE TRUSTEES:

JP Harris, Chair
Wayne Moore, Vice Chair
Herman B. Santos
Gina Zapanta
William Pryor, Alternate

- I. CALL TO ORDER
- II. APPROVAL OF THE MINUTES
 - A. Approval of the minutes of the regular meeting of February 11, 2021
- III. PUBLIC COMMENT
- IV. FOR INFORMATION ONLY
 - A. The Board of Retirement and its Staff's
Role in Processing Disability Retirement
Applications and Appeals
Presentation by Frank Boyd, Senior Staff Counsel

V. ITEMS FOR STAFF REVIEW

VI. GOOD OF THE ORDER
(for information only)

VII. ADJOURNMENT

***The Board of Retirement has adopted a policy permitting any trustee of the Board to attend a standing committee meeting open to the public. In the event five (5) or more trustees of the Board of Retirement (including trustees appointed to the Committee) are in attendance, the meeting shall constitute a joint meeting of the Committee and the Board of Retirement. Trustees of the Board of Retirement who are not trustees 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.**

Any documents subject to public disclosure that relate to an agenda item for an open session of the Committee, that are distributed to trustees 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 Board Offices at (626) 564-6000, Ext. 4401/4402 from 8:30 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. 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.

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

THURSDAY, FEBRUARY 11, 2021

This meeting was conducted by the Board of Retirement by teleconference under the Governor's Executive Order No. N-29-20.

COMMITTEE TRUSTEES

PRESENT:

JP Harris, Chair
Wayne Moore, Vice Chair
Herman B. Santos
Gina Zapanta
William Pryor, Alternate

ALSO IN ATTENDANCE:

BOARD TRUSTEES AT LARGE

Shawn Kehoe
Vivian Gray
Keith Knox
Ronald Okum
Les Robbins
Alan Bernstein

STAFF, ADVISORS, PARTICIPANTS

Ricki Contreras, Disability Retirement Services Manager
Tamara Caldwell, Disability Retirement Services Supervisor
Francis J. Boyd, Senior Staff Counsel

I. CALL TO ORDER

The Meeting was called to order by Chair Harris at 10:55 a.m., in the Board Room of Gateway Plaza.

II. APPROVAL OF THE MINUTES

A. Approval of the minutes of the regular meeting of December 10, 2020

Mr. Moore made a motion, Mr. Santos seconded, to approve the minutes of the regular meeting of January 14, 2021. The motion passed unanimously.

III. PUBLIC COMMENT

There were no requests from the public to speak.

IV. ACTION ITEMS

A. Consider Application of Mark K. Urman, M.D., as a LACERA Panel Physician (Memo dated January 28, 2021)

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

V. FOR INFORMATION ONLY

A. Discussion regarding Applications when the Member has been Terminated for Cause by the County of Los Angeles (Memo dated January 29, 2021)

Mr. Santos made a motion, Mr. Moore seconded, for staff to revise the Termination for Cause policy to exclude Medical Panel Physicians from obtaining termination for cause information.

Mr. Santos made a substitute motion, Mr. Moore seconded, to adopt the general rule that no Medical Physician should receive any information regarding the cause for termination, except for Psychiatrists and Psychologists, and that the Termination for Cause policy be revisited by staff and submitted to the Board of Retirement for

discussion and approval. The motion passed unanimously.

VI. ITEMS FOR STAFF REVIEW

There was nothing to report.

VII. GOOD OF THE ORDER

There were no comments during the Good of the Order.

VIII. ADJOURNMENT

With no further business to come before the Disability Procedures and Services Committee, the meeting was adjourned at 11:38 a.m.



The Board of Retirement and its staff's role in processing disability retirement applications and appeals.

Presented By:

Frank Boyd

Senior Staff Counsel, LACERA

Purpose

We will review the Board of Retirement's role in administering disability retirement applications and appeals in conjunction with the role and responsibilities of LACERA's Disability Retirement Services Division, Legal Office, Disability Litigation Office, and the Board's Medical Advisor.

Board of Retirement's Role

The Board has a tripartite role in governing LACERA.

- Executive
- Legislative
- Quasi judicial.

(Cal Const., art. XVI, § 17, subd. (a) and (b).)

Board of Retirement's Role (cont.)

The court explains the Board's role in the following manner:

"It [the Board] administers the retirement system, promulgates rules and regulations, determines member contributions, investigates claims and makes determinations concerning the eligibility of members for retirement benefits. **It is both the 'forum' and a 'party' in proceedings for disability retirement which it conducts.**"

Preciado v. County of Ventura, et al. (1982) 143 Cal.App.3d 783, 789
(Emphasis added).

The Board of Retirement has the sole authority to determine the issue of permanent incapacity and service-connection.

- **Permanent incapacity** for the performance of duty shall in all cases be determined by the Board of Retirement.

(Gov. Code §§ 31724 and 31725.)

- The Board's authority to determine **service connection** is found in Government Code section 31720 (a).

(*Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397, 407.)

Fiduciary Duty

The Board of Retirement has a fiduciary duty to pay benefits only to those members who are eligible for them.

(McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement (2001) 91 Cal.App.4th 730, 734.)

“The constitutional mandate by which a retirement system operates does not include an overlay of fiduciary obligations justifying an order to pay greater benefits than the statutes allow.”

(Chaidez v. Board of Administration (2014) 223 Cal.App.4th 1425, 1431.)

Burden of proving incapacity to the Board is on the applicant.

Applicants carry the burden of proving by a preponderance of the evidence that they are permanently incapacitated and that the incapacity is service-connected.

(Gov. Code § 31720; *Lindsay v. County of San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 160.)

Permanent Incapacity

The evidence must establish that an applicant is substantially unable to perform the **usual duties of the job**.

- **Usual duties:** the actual duties performed on a regular basis.
- **Remote or uncommon** duties are not usual duties.

(Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876; Schrier v. San Mateo County Employees' Retirement Association (1983) 142 Cal.App.3d 957, 961-962.)

Service Connection (3 elements)

Government Code section 31720 requires that the applicant's incapacity results from an injury or disease:

- **Arising out of employment:** Injury has its source in a **risk or hazard** of employment as opposed to a risk or hazard that is personal to the employee or the general community.
- **In the course of employment:** Injury or illness occurs in the **time, place,** and **circumstances of employment.**
- **The employment must substantially contribute to the incapacity:** There must be a "real and measurable" connection between the incapacity and the employment. "Infinitesimal" or "inconsequential" connection is not enough.

Bowen v. Board of Retirement (1986) 42 Cal.3d 572, 578;
Hoffman v. Board of Retirement (1986) 42 Cal.3d 590, 593.

Substantial Evidence

A finding of permanent incapacity and service-connection must be based on **substantial evidence**.

a) A determination of whether a member is eligible to retire for disability must be based on **competent medical evidence**.
(Gov. Code § 31720.3.)

b) A finding of permanent incapacity and service-connection must be based on a **preponderance of the evidence**.
(*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

The evidence that is deemed to be preponderate must amount to "**substantial evidence**."

(*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.)

Substantial evidence is:

- Relevant evidence that a reasonable mind might accept as adequate to support a conclusion.
(*Hosford v. State Personnel Board* (1977) 74 Cal.App.3d 302, 307.)
- Evidence that is reliable, solid proof—it must inspire confidence.
(*Estate of Teed* (1952) 112 Cal.App.2d 638, 644).

Substantial evidence is NOT:

A medical opinion that is merely a conclusion.

The value of a medical opinion lies in the facts on which the opinion is based and in the reasoning by which the physician progresses from the facts to the conclusion.

(People v. Bassett (1968) 69 Cal.2d 122, 141.)

Lay opinion on a medical issue is not substantial evidence.

A finding on a *medical issue* must be based on medical expert opinion.

(*Peter Kiewit & Sons v. Industrial Accident Comm.* (1965) 234 Cal.App.2d 831, 838.)

In *Kiewit*, the court specifically stated that a question of whether or not work aggravated or accelerated a back condition is a medical issue that can only be determined by a medical expert. The court specifically stated that laypersons (such as the members of the Industrial Accident Commission) are not qualified to determine this medical issue.

Workers' Compensation Decisions

The Board of Retirement is not bound by the factual determinations made against the county in the workers' compensation case. A retirement system under the CERL of 1937 is a "**nonintegrated system.**" It is not an administrative subdivision of the county or any district. It is a separate legal entity.

(Flaherty v. Board of Retirement (1961) 198 Cal.App.2d 397, 402-403.)

Disability Retirement Services' Role

Disability Retirement Services processes and investigates disability retirement applications.

(Gov. Code § 31522.1.)

Disability Retirement Services' Process

Intake Review:

- Review application for completeness
- Make an eligibility assessment
- Provide initial counseling

Disability Retirement Services' Process (cont.)

Intake Review (cont.):

Obtain records from:

- Medical providers
- Third-party administrators (TPA)
- Personnel and Return to Work
- Possible claims filed outside of the county service (e.g. nonindustrial injury claims)

Disability Retirement Specialist Investigation

Interviews:

- Applicant
- Supervisor
- Coworkers/relevant witnesses
- Return-to-Work office

Disability Retirement Specialist Investigation (cont.)

- Prepare Disability Retirement Evaluation Report
- Arrange for applicant to be evaluated by the appropriate panel physician(s)

Disability Retirement Specialist Investigation (cont.)

The panel physician provides an opinion on the following issues:

- Incapacity
- Service-connection
- Work restrictions (if any)
- The panel physician's opinion is "cropped" into the Disability Retirement Evaluation Report.

Resources available to the Board at the application level to determine incapacity and the service-connection

- **Disability Retirement Services:** processes and investigates the application. (Gov. Code § 31522.1.)
- **Panel physician evaluation:** The Board has the authority to require a medical examination to determine the existence of the disability. (Gov. Code § 31723.)
- **Medical advisor:** The county health officer shall advise the board on medical matters and, if requested by the board, shall attend its meetings. (Gov. Code § 31530.)
- **Disability legal advisor** (Gov. Code § 31529.1.)

Board of Retirement's Decision at the Application Level

At the time an application is being considered by the Board for a decision, the Board and its medical advisor are provided with a "Board Packet." This packet contains a copy of the application, the panel physician report(s), and the Disability Retirement Evaluation Report which includes a Disability Retirement Evaluation Summary coversheet.

Appeal process when the Board of Retirement denies an application.

Upon receiving notice that the Board denied the disability retirement application, an applicant has 30 days to file an appeal and request a hearing.

(Gov. Code § 31533 and Board of Retirement Regulation VIII.)

- If no appeal is filed, the denial is final.

Appeal is de novo.

When an appeal of the Board's decision is filed, the appeal is set for a hearing de novo before a Board-appointed referee.

(LACERA's Procedures for Disability Retirement Hearing Rule 1.)

Hearing de novo: "1. A reviewing court's decision of a matter anew, giving no deference to a lower court's findings. 2. A new hearing of a matter, conducted as if the original hearing had not taken place."

(Black's Law Dictionary.)

The Board is the quasi-judicial body at the appeal level

During the appeal process, the Board sits as the quasi-judicial body before which appeals are heard.

(McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement (2001) 91 Cal.App.4th 730, 734.)

Hearing Referee

The appeal is assigned to a Board-appointed referee.

The Board-appointed referee is the quasi-judicial agent of the Board.

(Gov. Code § 31533; McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement (2001) 91 Cal.App.4th 730, 734.)

Disability Litigation Office Client Identification

The Disability Litigation Office is assigned to represent LACERA as the respondent.

(Gov. Code § 31529.1.)

Disability Litigation Office

The Disability Litigation Office is a legal office independent of LACERA's Legal Office and its Chief Counsel. The Chief Counsel, Disability Litigation, and the Chief Counsel, Legal Office, independently report directly to the Chief Executive Officer.

Contact with referees, members of the Board, the staff of Disability Retirement Services, and attorneys in LACERA's Legal Office must be in accordance with the Policy on Ex Parte Communications.

Disability Litigation Office's Relationship with the Board

While the Board has a tripartite role in governing LACERA—executive, legislative, and quasi judicial—its relationship to the Disability Litigation Office is that of a judicial body to a party appearing before it. The Board is the quasi-judicial body before which the administrative hearing is held. The Board's appointed referee is the quasi-judicial agent of the Board.

Disability Litigation Mission

- Team provides timely and effective legal representation to LACERA in a disability retirement and service-connected survivor's benefit appeals.
- The goal is to achieve impartial justice based on the facts and the law.
- **Impartial Justice:** Appeals are handled in a fair, evenhanded, and respectful manner. The goal is not to win. The team will recommend to the Board to grant the benefit when the evidence conclusively shows entitlement to it.

Applicant Representation

Applicants may represent themselves or be represented by a member of the state bar. An applicant may not be represented by one who is not a member of the bar.

(People By and Through Dept. of Public Works v. Malone (1965) 232 Cal.App.2d 531; Bus. & Prof. Code § 6125.)

Administrative Record

Before the hearing, applicant and respondent submit prehearing statements. Each party's prehearing statement states the issues to be decided by the referee and includes copies of the documents (medical records/reports and other relevant documents) being relied upon to support each party's position. These documents are marked as exhibits and entered into evidence. The entered exhibits and hearing testimony transcripts constitute the completed administrative record.

Referee's Proposed Findings of Fact and Recommended Decision

Initial Decision: After reviewing the parties' briefs or closing arguments presented orally, the referee serves an Initial Proposed Findings of Fact and Recommended Decision on the parties.

(Gov. Code § 31534 and Rule 26, LACERA's Procedures for Disability Retirement Hearings.)

Objections to Proposed Findings of Fact and Recommended Decision

An unsuccessful party shall have 20 days to submit written objections to the referee's decision. Adverse parties shall have 10 days to respond.

(Gov. Code § 31534, Rule 27, LACERA's Procedures for Disability Retirement Hearings.)

Final Recommended Decision

After reviewing the decision, the referee submits a Final Proposed Findings of Fact and Recommended Decision to the Board of Retirement.

(Rule 28, LACERA's Procedures for Disability Retirement Hearings.)

Board of Retirement's Quasi-Judiciary Role

During the appeal process, the Board sits as the quasi-judicial body before which appeals are heard. The Board has a duty to:

- Read the referee's Proposed Findings of Fact and Recommended Decision
- Read the objection brief and the reply-to-objection brief
- Listen to the oral arguments presented by the parties
- Decide whether or not the preponderance of evidence supports the referee's decision

(Rules 27, 28, 29, and 30 of LACERA's Procedures for Disability Retirement Hearings; Gov. Code § 31534; *Strumsky v. San Diego County Employee's Retirement Assoc.* (1974) 11 Cal.3d 28, 45.)

During the appeal process, the Board can only consider evidence contained in the administrative record.

Administrative tribunals which are required to make a determination after a hearing **cannot** act upon their own information and nothing can be considered as evidence that was not introduced at a hearing.

(English v. City of Long Beach (1950) 35 Cal.2d 155, 158.)

Board of Retirement's Quasi-Judiciary Role

After hearing the parties' arguments, the Board has the following options:

- Approve and adopt the referee's recommended decision
- Review the transcript or summary of all the testimony, plus all other evidence received by the referee
- Refer the matter back with or without instructions to the referee for further proceedings
- Set the matter before itself

(Gov. Code § 31534; Rule 28, LACERA's Procedures for Disability Retirement Hearings.)

Board's Rejection of the Referee's Recommended Decision

- If the Board decides to reject the referee's recommended decision, the Board shall direct the prevailing party to prepare proposed findings of fact and conclusions of law consistent with its tentative decision.
- The unsuccessful party has 10 days to file objections. The Board will then consider the objections, if any, and adopt such findings of fact and conclusions of law as it deems appropriate.

(Rule 30, LACERA's Procedures for Disability Retirement Hearings.)

Writ of Mandate—Code of Civil Procedure section 1094.5

The Legal Office's Disability Legal Advisor represents the Board when a Writ of Mandate is filed.

The court will exercise its independent judgment on the evidence developed before the Board of Retirement and determine whether or not there has been an abuse of discretion on the part of the Board if its decision is not supported by the weight (or preponderance) of the evidence.

(Strumsky v. San Diego County Employees Retirement Assoc. (1974) 11 Cal.3d 28, 44-45.)



QUESTIONS?

