



November 15, 2017

## Disabled Members Return to Work

### COMPREHENSIVE REPORT

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### ISSUE STATEMENT

Members who recover from their disabilities are stuck in limbo if their previous employer refuses to hire them back.

### OVERVIEW

This is one of the issues that came out of working with the Department of Retirement Systems (DRS) on the duty disability rule making project, as an issue that they were hoping that policymakers would take notice of. Current disability statute for LEOFF 2 members states that when a member is determined to have recovered from their disability, the members' previous employer is required to hire them back at their previous rank. They will begin earning service credit again and become eligible for an active member benefit.

Issues arise when the employer disagrees with the DRS decision that the member has fully recovered from their disability. This leaves the member in limbo pending the appeals decision because:

- Duty Disability payments have been stopped.
- They are not earning a salary, because their previous employer refuses to hire them back.

### BACKGROUND

#### Disability Payments Stopped

Any member who receives a disability allowance is subject to comprehensive medical examinations as required by DRS. If those medical examinations reveal that the member has recovered from their incapacitating disability, they are no longer entitled to their duty disability pension benefit. The members' retirement allowance is therefore canceled and the member shall be restored to duty.

## **Previous Employer**

Once the determination has been made that the member has recovered from their disability, the member's previous employer is required to hire them back at the same civil service rank they held at the time of their disability retirement<sup>1</sup>. The employer may appeal if they disagree with the DRS determination.

## **Current Case**

DRS is aware of one current case where they have made the determination that the member has recovered from their disability, but the previous employer has refused to hire them back. DRS has chosen to continue paying the members disability benefit while the appeal works its way through the process.

## **Who determines that the member is no longer disabled?**

All pension statutes are written giving DRS that determination authority. As soon as DRS says the member is no longer disabled, all of the pension statutes are written to say that the member's disability benefit is terminated. In this instance, there are two parties trying to decide whether the member is disabled: DRS and the previous employer.

These parties have a differing opinion about whether the member is actually recovered from their disability. This is the area in statute where the member can be caught in limbo. Sometimes it's a good faith disagreement between the two parties on the member's level of recovery. Sometimes, though, it's the employer not wanting to follow the statute, so they use the appeal process to delay their rehiring as long as possible.

The question then is: If DRS determines the member has recovered, what do they do in the situation where the employer disagrees? If the determination is upheld during the appeal process, who pays for those extra disability payments? The way it works now, the benefits are paid for by the fund, which means all the other members, employers, and state pay for those extra disability payments that were made during the appeals process.

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<sup>1</sup>RCW 41.26.470 (2)

## **POLICY ISSUES**

- Should DRS continue to pay a disability benefit to members who are in the appeals process?
- Should DRS be able to bill the employer for the disability payments they made to the member while they were stuck in limbo?

## **SUPPORTING INFORMATION**

Appendix A: Different types of disabilities

## **APPENDIX A: DIFFERENT TYPES OF DISABILITIES<sup>2</sup>**

### **Temporary Duty Disability**

If you do not earn full service credit because of leave associated with a duty disability, you have the option to purchase up to 24 months of service credit for each covered duty disability. To establish service credit, you must meet the following criteria:

- Your disability must have occurred in the line of duty.
- You must have received your injury on or after July 1, 2002, and be eligible to receive workers' compensation benefits.
- You and your employer must make employer and member contributions on the compensation you would have earned had you been working. If the payments are made for a retroactive period, interest is charged. If your employer offers a disability leave supplement or similar benefit, your first six months of service credit are interest free.

If your duty disability occurred between July 23, 1989, and June 30, 2002, the amount of service credit you can purchase is limited to six months and requires that you be receiving a disability leave supplement or similar benefit from your employer.

### **Duty Disability**

If your disability occurred in the line of duty, you may choose between a nontaxable:

- One-time payment equal to 150% of your eligible retirement contributions
- Minimum monthly benefit of at least 10% of your FAS

If you have fewer than 60 service credit months when you become disabled, the average will be based on your actual total of service credit months. If the normal retirement benefit calculation rule yields a monthly benefit greater than 10% of your FAS, you will receive the higher benefit amount. However, only the amount equal to 10% of your FAS is nontaxable. Contributions made to restore service credit after the deadline are refunded at 100% only.

### **Disaster Response Disability**

There are certain circumstances, on or after March 22, 2014, when you might qualify for disaster response benefits and service credit. In the two situations listed below, your disability must have occurred while you were in eligible federal service providing eligible emergency management services.

*Working for a LEOFF Plan 2 employer:* You might qualify for a disability benefit if you leave the employment of your LEOFF Plan 2 employer to provide a disaster response, and you become

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<sup>2</sup> <http://www.drs.wa.gov/publications/member/leoff/leoff2disability.htm>

disabled on or after March 22, 2014. Your benefit won't be reduced if you retire early. The benefit will be a minimum 10% of your Final Average Salary.

*Working in eligible federal service:* You might qualify for service credit for a leave of absence if you become disabled when you leave the employment of your LEOFF Plan 2 employer to provide a disaster response, on or after March 22, 2014.

### **Non-duty Disability**

If your disability didn't occur in the line of duty, you might receive a monthly benefit calculated as follows:  $2\% \times FAS \times \text{service credit years}$

Final Average Salary (FAS) is the monthly average of your 60 consecutive, highest-paid service credit months. Your monthly benefit will be reduced to reflect the difference between your age at the time of your disability retirement and age 53. If you are age 50 and have 20 years of service credit, the reduction is 3% per year (prorated monthly) from age 53.

### **Catastrophic Duty Disability**

If your disability occurred in the line of duty and is so severe it prevents you from performing substantial gainful activity or substantial gainful employment in any capacity in the future, you might be entitled to receive a catastrophic duty disability benefit.

The Social Security Administration defines "substantial gainful employment" as working in a position whose average earnings are more than a set dollar amount each month, a figure it updates annually.

The catastrophic duty disability benefit can be calculated in three ways:

- 70% of your FAS
- 100% of your FAS, offset by Social Security disability and workers' compensation disability payments
- $<2\% \times FAS \times \text{service credit years}$

In addition to your monthly benefit, you will be reimbursed for premiums you pay for employer-provided health insurance, COBRA, and Medicare Parts A and B.

If you are entitled to Medicare, you must enroll and maintain enrollment in both Medicare Parts A and B to remain eligible for the reimbursement. These premium reimbursements are not taxable. Medical insurance reimbursements are available for current, past and eligible COBRA enrollees. Reimbursement for these members is never greater than the COBRA coverage they are eligible for.



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# Issue

- Members who recover from their disabilities are stuck in limbo if their previous employer refuses to hire them back.

# Overview

- Issue came out of working with the Department of Retirement Systems (DRS) on the duty disability rule making project.
- Current disability statute for LEOFF 2 members.
  - When a member is determined to have recovered from their disability, the members' previous employer is required to hire them back at their previous rank.
- Issues arise when the employer disagrees with DRS decision that the member has fully recovered from their disability.
- This leaves the member in limbo pending the appeals decision because:
  - Disability payments have been stopped.
  - They are not earning a salary, because their previous employer refuses to hire them back.

# Limbo

## Disability Payments Stopped

- Any member who receives a disability allowance is subject to comprehensive medical examinations as required by DRS.
- If those medical examinations reveal that the member has recovered from their incapacitating disability, they are no longer entitled to their duty disability benefit.
- The members' retirement allowance is therefore canceled and the member shall be restored to duty.

# Limbo cont.

## Previous Employer

- Once the determination has been made that the member has recovered from their disability, the member's previous employer is required to hire them back at the same civil service rank they held at the time of their disability retirement. 41.26.470 (2)

# Background

## Current Case

- DRS is aware of one current case where they have made the determination that the member has recovered from their disability, but the previous employer has refused to hire them back.
- DRS has chosen to continue paying the members disability benefit while the appeal works its way through the process.

# **Who determines that the member is no longer disabled?**

- All pension statutes are written giving DRS disability determination authority.
  - As soon as DRS says the member is no longer disabled, all of the pension statutes are written to say that the member's disability benefit is terminated.
- In this instance, there are two parties trying to decide whether the member is disabled:
  - DRS
  - Previous employer
- These parties have a differing opinion about whether the member is actually recovered from their disability.

## Determination cont.

- This is the area in statute where the member can be caught in limbo.
  - Could be a good faith disagreement between the two parties on the member's level of recovery.
  - Or the employer not wanting to follow the statute and is using the appeal process to delay their rehiring as long as possible.
- The question: If DRS determines that the member has recovered, what do they do in the situation where the employer disagrees?
  - If the determination is upheld during the appeal process, who pays for those extra disability payments?
  - The way it works now, the benefits are paid for by the fund, which means all the other members, employers, and state pay for those extra disability payments that were made during the appeals process.

# Policy Issues

- Should DRS continue to pay a disability benefit to members who are in the appeals process?
- Should DRS be able to bill the employer for the disability payments they made to the member while they were stuck in limbo?

# Questions?

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