



BOARD OF RETIREMENT

Staff Report

File #: 19-1279.1

Agenda Date: 3/4/2021

Agenda #: 18.

FROM: Barbara Hannah, Chief Counsel

SUBJECT: Disability Retirement Procedures

RECOMMENDATION:

Approve the proposed changes to the *Procedures for Disability Retirement Applications and Formal Hearings*.

BACKGROUND:

SBCERA adopted the *Procedures for Disability Retirement Applications and Formal Hearings* ("Rules") to govern the disability retirement process. Since the last update in November 2019, there are matters that have arisen which are not addressed in the Rules and specific Rules that require an update.

Attached as Exhibit A is a redlined version of the Rules which incorporates the substantive edits as follows:

1. Rule 1 - Definitions:

In the current version of the Rules, there are terms used throughout the document or on forms provided to an Applicant that are not defined. It was important for staff to have a definition for commonly used terms, as well as have definitions drafted in a way that an Applicant could easily understand. As part of the update to Rule 1, staff added several terms. In addition, the proposed change assigns definitions to those terms. Also, a helpful indicator to the reader is capitalizing defined terms throughout the document. Along with capitalizing the letters, the terms are in alphabetical order for ease of reference.

2. Rule 4 (a)(2) - Attending or Forensic Physician's Report:

Rule 4 requires an Applicant to submit a Physician's Report completed by a medical doctor or doctor of osteopathy or doctorate level psychologist. However, when an Applicant has submitted a Physician's Report completed by a doctor of podiatric medicine (DPM), staff rejects the Application on the grounds that a DPM is not specifically listed in the Rules as a doctor authorized to complete a Physician's Report. Given that a DPM is a qualified physician or surgeon capable of rendering an assessment of a member's incapacity, staff agrees that a DPM should be added to the list of acceptable licensed professionals to complete a Physician's Report. For similar reasons, staff proposes to add a dentist (doctor of dental surgery or doctor of medicine in dentistry) to the list.

An additional proposed change concerning the submission of a Physician's Report would require SBCERA to forward a copy of a completed Physician's Report to the Applicant if a Physician's Report

is received from any other person other than the Applicant. This usually occurs in the event an employer files on behalf of an Applicant.

3. Rule 4(b) - Independent Medical Examinations:

Rule 4(b) is silent as to the submission of medical records or documents by an Applicant days prior to a scheduled Independent Medical Examination (IME). The proposed change requires an Applicant to submit any additional records or documents no later than five (5) business days before the scheduled IME appointment. This requirement will provide the IME sufficient time to review the records ahead of a scheduled appointment.

4. Rule 5 (d) - Amending An Application:

Rule 5(d) is a new addition to the Rules. Generally, an Applicant may amend his or her original Application; however, the current Rules are silent in outlining the requirements of amending an Application prior to the Board's initial determination. The proposed change allows an Applicant to amend an Application for purposes of changing, deleting or adding a claimed injury or disease, or to change the request for a service connected disability or non-service connected disability. In addition, the proposed change requires that any amendment to the original Application must be provided within 60 days after the acceptance of the original Application.

Staff may reject an amendment for failure to be complete and timely. In the event, the amendment to the Application is rejected, the Applicant may appeal to the Board. On appeal, the Applicant has the burden of proof to show good cause that the Applicant could not with the exercise of reasonable diligence have included the substance of the Amendment on the Application Date of the original Application.

5. Rule 13B - Formal Hearing Amending an Application:

Under Rule 13B, when an Applicant alleges a new claimed injury or disease not listed in the pre-hearing statement or during the formal hearing, the allegation is treated as an amendment. However, the Rule fails to go further in requiring an Applicant to submit an amendment form. In the past, failure to actively submit an amendment meant there would be a delay in completing the formal hearing and as a result, an Applicant's case would remain suspended.

The proposed update requires the Applicant to follow through with submitting an amendment form with a Physician's Report supporting the allegations stated in the amendment. In addition, the proposed change requires the Applicant to submit the amendment within 60 days versus 30 days from the suspension of the formal hearing; otherwise, an Applicant effectively waives their right to file an amendment and the formal hearing will proceed on the initial claims. The 60-day timeframe is in line with the requirements of amending an Application under Rule 5(d).

6. Rule 8 - Consultation and Rule 15 Formal Hearing Time and Place of Hearing:

Under Rule 8, a formal hearing is conducted in person; however, while working remotely, the formal hearings have been conducted via videoconferencing. The proposed change formalizes this

practice. In addition, the proposed change would allow an Applicant the option to have a disability retirement consultation conducted via videoconference.

7. Rule 11 (e) - Formal Hearing - Court Reporter:

The proposed change formalizes the practice of SBCERA bearing the cost of transcription.

8. Rule 11A - Expedited Review:

Under the current Rule 11A, a hearing officer's jurisdiction is set at 90 days for expedited hearings. However, the constricted time does not allow for situations that may require a continuance or any other unforeseen issue. The proposed change expands the jurisdiction of a hearing officer to 120 days to account for any requests for a continuance or extension.

The Rule is silent as to a request for extension by a hearing officer to submit her Proposed Findings of Fact and Recommended Decision. The proposed change allows the hearing officer to request an extension of 30 days to submit a recommendation.

Regarding an Applicant's ability to request an extension beyond the 30 days to submit records, the Rules permit the records to be admitted into evidence if there is an unusually good cause. This issue recently came up and staff discovered that the term "unusually good cause" was not defined. In defining this term under this Rule, "unusually good cause," is established if the documents did not exist prior to the deadline for submission or the Applicant, through no fault of his or her own, could not obtain the documents prior to the deadline for submission despite evidence of repeated good faith attempts to obtain the documents.

9. Rule 30 - Action By the Board:

An assigned hearing officer to an Expedited Review or Formal Hearing matter is required to return to the Board a Proposed Findings of Fact and Recommended Decision on the Application for disability retirement benefits. Once the recommendation is returned and ready for submission to the Board, it is placed on the Board's agenda for consideration. The current Rules require the Recommendation to be placed on the consent calendar if the Recommendation supports the requested benefits, or where the recommendation does not support the requested the benefit and the member failed to submit objections including a written request to present to the Board.

The proposed change removes the requirement of placing items on the consent calendar. Moreover, for those cases where the Recommendation does not support the requested benefit, the proposed change removes any conditions (e.g. submit objections and written request to be heard) for the case to be heard in closed session and outlines the time limit for the Applicant, SBCERA's Counsel, and/or Applicant's attorney to present to the Board.

10. Rule 34 - Service of Document:

The proposed change formalizes the process of accepting service of documents, except for a Petition of Writ or any other court filing, by electronic service.

11. Non-Substantive Edits:

The document contains minor non-substantive edits to help with the readability.

COMMITTEE REVIEW:

This item was reviewed by the Administrative Committee at its February 18, 2021, meeting.

Trustee Hatch requested that an additional term be inserted into Rule 1 -“Definitions” to reference words that are not specifically defined in the procedures. Therefore, an additional term has been added to this section as a “disclaimer” stating that any definition not specifically listed herein shall be defined in accordance with the definition as listed in: (a) Government Code sections in the CERL adopted by SBCERA; (b) PEPRA; (c) SBCERA Amended By-Laws; (d) similar statutes; and/or (e) SBCERA Board Policies. If the definition is not provided in any of the above-mentioned resources, the definition shall default to the definition as listed in the Meriam-Webster Dictionary in effect at the time of the required interpretation of the definition.

After discussion of the above, the Administrative Committee voted to recommend Board approval with a 4-0 vote.

BUDGET IMPACT:

Costs for this item are included in the current year administrative budget.

STRATEGIC PLANNING GOAL/OBJECTIVE:

Operational Excellence & Efficiency

STAFF CONTACT:

Barbara Hannah
David Lantzer

ATTACHMENTS:

Exhibit A: Procedures for Disability Retirement Applications and Formal Hearings - Redline
Exhibit B: Disability Retirement Procedures Updates