



City of Milwaukee
Employees' Retirement System

Bernard J. Allen
Executive Director

David M. Silber, CFA, CAIA
Chief Investment Officer

Melody Johnson
Deputy Director

April 20, 2018

REVISED

Mr. Jim Owczarski
City Clerk
Room 205, City Hall

Dear Mr. Owczarski:

Please be advised that a Special Meeting of the Legislative Committee of the Annuity and Pension Board has been scheduled for Wednesday, April 25, 2018 starting at 9:00 a.m. at the Employees' Retirement System, 789 North Water Street, Suite 300. **If a quorum of the Board is present, this meeting will convene as a Special Board Meeting.** The agenda is as follows:

- I. Review and Approval of Contracts.
Proposed amendment to Board Rule VII.G. regarding contracting authority of Investment Committee.

Please be advised that the Annuity and Pension Board may vote to convene in closed session on the following item (II.), as provided in Section 19.85(1)(g), Wisconsin State Statutes, to confer with legal counsel concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved. The Board may then vote to reconvene in open session following the closed session.

- II. Proposed amendment of Board Rule XVII.G. regarding Earnings Capacity Evaluation of DDR Beneficiaries pursuant to MCC-36-07-2-a and Case Review pursuant to MCC-36-05-3-c-1-b.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bernard J. Allen", is written over a faint, larger version of the same signature. Below the signature, the name "Bernard J. Allen" and title "Executive Director" are printed.

Bernard J. Allen
Executive Director

BJA:jmw

PLEASE NOTE - Upon reasonable notice, efforts will be made to accommodate the needs of disabled individuals through sign language interpreters or other auxiliary aids. For additional information or to request this service, please call 286-3557.



Disability Earnings Capacity Offset and Case Review

Legislative Committee

April 25, 2018

Authority and Affected Population

- **Outside Earnings impact two groups of retirees:**

- Disability retirees are impacted by 36-07-2-a, and
- Early retirees are impacted by 36-05-6-c
- Early retirees are impacted by the outside earnings restriction, however, the language for their offset relates directly to true earnings, as opposed to an “earning capacity.” For this reason, early retirees are not being considered in this analysis.

- **36-07. Re-examination of Disability Beneficiaries.**

- 2. ADJUSTMENT OF ALLOWANCE.
- a. **In the event the board shall determine, based upon information received** by it from the medical council or **from other sources**, that a disability beneficiary is **able to engage in a gainful occupation** which pays more than the difference between the current salary for the position held by such person at the time of retirement and the retirement allowance granted to him, in such instance **the pension of such person shall be reduced by the amount of such excess earnings. If the earning capacity of such person be later changed, then the amount of his pension may be modified**, provided the new pension shall at no time exceed the amount of the pension granted at the time of his retirement. This provision shall not apply in the instance of a disability beneficiary having attained the age for service retirement.

Case Review

- MCC 36-05-3-c-1-b. Case Review. In the event a member receiving a duty disability retirement allowance is later determined to be fit for service he shall be restored to service in his department and he shall no longer be entitled to receive a duty disability retirement allowance. The board may at any time request information concerning such person or investigate his status or request a medical examination of such person. The provisions of ss. 36-07-2 and 3 and 36-12 shall apply in all respects to such person entitled to receive a duty disability retirement allowance.

"Earnings Capacity" Defined

"Section 36.07(2)(a) clearly provides that disability benefits are to be offset by the amount that the beneficiary's earning capacity exceeds the difference between the current salary for the position held by the beneficiary at the time of his retirement and the disability allowance granted to him. We have emphasized the importance of the fact that the excess earnings referred to in sec. 36.07(2)(a) are to be calculated on the basis of the beneficiary's "earning capacity". 80 OCA 581. It is well established in case law that "earning capacity" has an entirely separate and distinct meaning from "actual earnings". Earning capacity refers to the ability or power to earn rather than wages actually received. Trzoniec v. General Controls Co., 216 A.2d 886 (1966). "Earning capacity means the potential for earning money in the future, which is not necessarily based on the amount of money being earned at the time of injury". Taenzler v. Burlington Northern, 608 F.2d 796, 798 (8th Cir. 1979)."

Excerpted From CA Opinion Dated
May 20, 1982

Earnings Capacity Factors Requiring Professional Evaluation

“Finally, you will recall that factors which may be considered in assessing a disability beneficiary’s earning capacity include, among others, health, age, mental and physical condition, training of the beneficiary and the beneficiary’s education, general background, occupational and general expertise, nature of the work performable with physical impairment and the availability of such work. (82 O.C.A. 761)”

Excerpted From CA Opinion, Dated June 20, 1986

A&P Board Has Discretion Over Implementing Earnings Capacity Provision

“In our view, the law permits the Annuity and Pension Board to exercise discretion as to how best to measure earning ability and as to how best to assure compliance. We emphasize that the exercise of this discretion rests with the Board, and not the City Attorney as the Board’s legal advisor.”

Excerpted From CA Opinion, Dated June 20, 1986

DISABILITY POPULATION

- As of the March 2018 payroll, the following is a breakdown of the total population of disability retirees (in their own right, i.e. ignoring spouses, survivors, etc.):

Table 1

Type	GC	PD	FD	Total
90% DDR		9	6	15
75% DDR	55	91	139	285
Lifetime DDR		24	61	85
Ordinary Dis	372	26	14	412
Total	427	150	220	797

DISABILITY POPULATION

- Removing from consideration the retirees that have attained the minimum service retirement age for their group (GC – age 60; PD/FD – age 57), we have the following breakdown:

Table 2

Type	GC	PD	FD	Total
90% DDR		3	1	4
75% DDR	31	37	57	125
Lifetime DDR		4	7	11
Ordinary Dis	125	18	4	147
Total	156	62	69	287

DISABILITY POPULATION

- Another way to look at these 287 people is to consider their injury types, and whether they are exempt from a medical re-examination. The exemption from a medical re-examination may be an indication that these people are not capable of holding a job, and therefore should not be subject to an FCE/Vocational Assessment.

Table 3

Class	Injury Type	Not Subject to Re-exams			Subject to Re-exams			Overall		
		Count	Average Mthly Base Benefit	Total Mthly Base Benefit	Count	Average Mthly Base Benefit	Total Mthly Base Benefit	Count	Average Mthly Base Benefit	Total Mthly Base Benefit
GC	mental	2	\$647	\$1,293	12	\$992	\$11,906	14	\$943	\$13,200
GC	mental/physical	3	\$969	\$2,908	1	\$1,776	\$1,776	4	\$1,171	\$4,685
GC	physical	36	\$1,189	\$42,797	102	\$1,197	\$122,058	138	\$1,195	\$164,855
PD	mental	2	\$5,174	\$10,349	26	\$4,504	\$117,113	28	\$4,552	\$127,462
PD	mental/physical	1	\$5,733	\$5,733	2	\$4,617	\$9,235	3	\$4,989	\$14,968
PD	physical	6	\$3,940	\$23,639	25	\$3,658	\$91,438	31	\$3,712	\$115,076
FD	physical	8	\$4,709	\$37,675	61	\$4,727	\$288,340	69	\$4,725	\$326,015
Total		58	\$2,145	\$124,393	229	\$2,803	\$641,867	287	\$2,670	\$766,260

For the purposes of this review, the injuries were broken down into Mental, Physical, or Mental/Physical. This was a preliminary assessment of the condition, and will require a second review by a medical professional to confirm the categorization.

Current Outside Earnings Test

- Per Board Rule XVII-G. ERS currently utilizes IRS 1040's from the individuals to determine the actual outside earnings for a particular year. The offset for a particular year is applied to the pension that is disbursed starting the following year in July through June (e.g. earnings in 2017 would be offset, if applicable, against the pension payable between July 2018 through June 2019).

Board Rule XVII-H. Referral of Complaints Relative to DDR Beneficiaries

- H. All complaints relative to disability recipients will be referred to Employee Benefits Administration ("EBA"). Referrals from EBA relative to a disability recipient shall be presented to the Board for a determination as provided in Section 36-05-3-c-1-b.

Cost Analysis

- The only quote for a Functional Capacity Evaluation (FCE) that we have currently is one that has been provided by MMRO. They have quoted \$985.00 per FCE. For the purposes of this document, \$1,000/FCE is being used.
- A Vocational Assessment (VA) may also be needed. There is no formal quote available for this service, however, review of various sources publically available indicate a range of \$3,000 to \$5,000 per assessment. Additional costs may apply if the examiner has to become a witness in a case.
- For the purposes of the estimates below, a rate of \$5,000 per combined FCE/VA is being utilized.
- Based on the population breakdown in Table 3 above:
 - a. If we do an FCE and/or VA for the entire population of people who are subject to the outside earnings capacity test of 36-07, the cost could approximate **\$1,435,000** for the entire current population to be examined once.
 - b. If we do an FCE and/or VA only for those who are subject to re-examinations (i.e. a waiver has not been granted), then the cost could approximate **\$1,145,000** for the population to be examined once.
- Other implications and costs that will be associated with such a process, along with administrative overhead, include staff time, systems modifications, litigation, etc.

Implementation Considerations

If we proceed down this path, here are some preliminary questions that need to be discussed.

1. Who would be required to be subject the earnings capacity evaluation?
 - a. All retirees who are subject to outside earnings pursuant to 36-07?
 - b. Retirees who are subject to outside earnings pursuant to 36-07, but are not already totally offset?
 - c. Retirees who are subject to outside earnings pursuant to 36-07, but have not had their medical re-examinations waived due to the severity of their injury? The implication would be that if the re-exam is not required, then their injury may be severe enough that they are not employable and are eligible to apply for the 90% DDR benefit.
2. How do we put a dollar value on the “earning capacity” for the purpose of assessing an offset?
 1. Will the examiner give a dollar value? Is it a single value or a range? If a range, do we use the lowest possible value?
3. What timeline should be followed? Should the FCEs and or Vocational Assessments be required prior to July, or on a rolling basis?
4. What will the frequency of the FCE and/or Vocational Assessment be? Annually, every three years, at the discretion of the Board? If the last option, then we would likely need to need rules to remove subjectivity.
5. What action should be taken if a person doesn't adhere to the evaluation and/or attempts to circumvent it? Options may include the benefit being fully offset until the person complies (as authorized by 36-07), or potentially initiating surveillance, if lawful (which would add more cost to the process).
 - a. Who would make the decision that the person should be subject to a secondary review and/or surveillance?
6. A pool of Vocational Experts and Functional Capacity Examiners will need to be developed. How will people living outside the Milwaukee area be handled? These exams may require multiple visits.
7. Legal/Litigation Considerations?

Legal Considerations

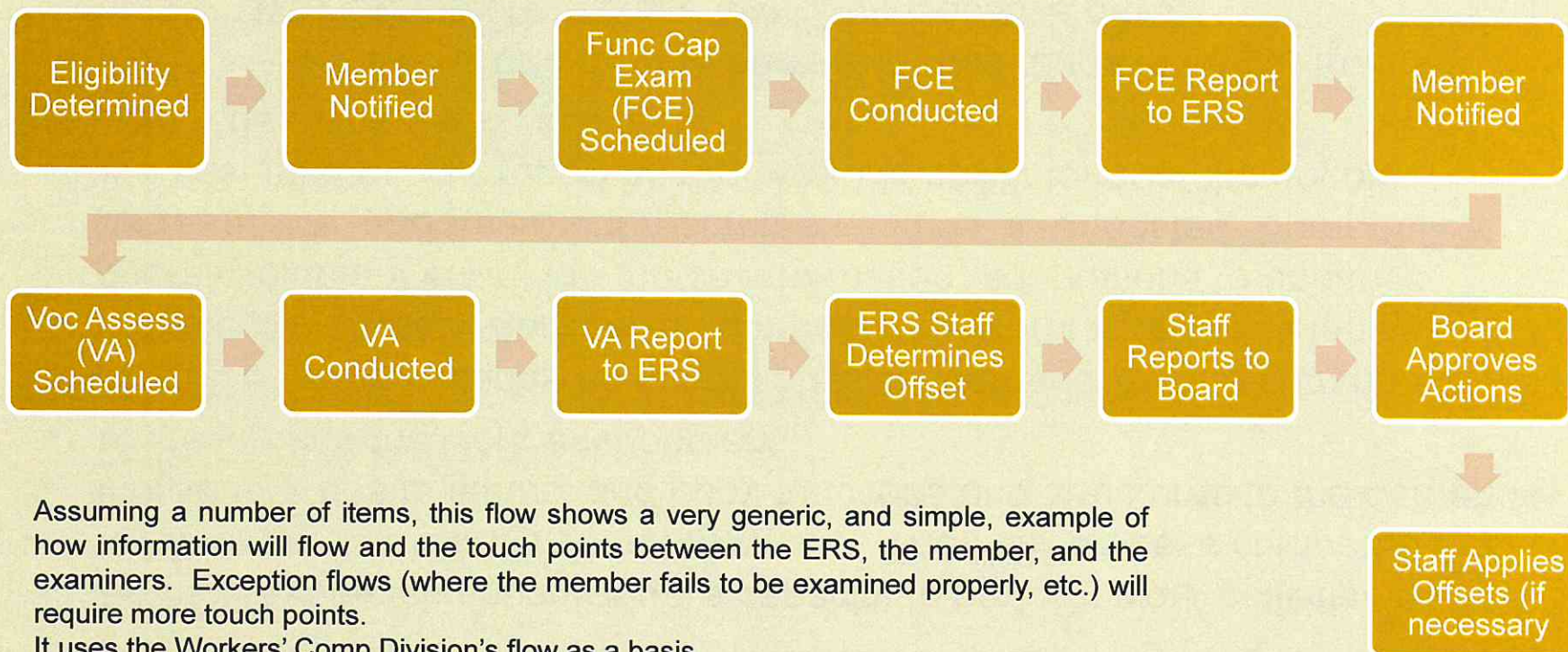
- DDR benefits are contractual and property rights of the DDR beneficiary subject to the terms and conditions of MCC-36 and as such are protected by state and federal law.
- Any Board Rule which seeks to lawfully narrow the group of DDR beneficiaries subject to Earnings Capacity Assessment pursuant to 36-07-2-a must be based on a reasonable (e.g. non-discriminatory) classification.
- Standard for requiring Earnings Capacity Offset must be applied uniformly and consistently to all those similarly situated in order to be enforceable and avoid liability for ERS (e.g. referral for Earnings Capacity Evaluation as medically indicated by Medical Panel/Council physician or directly by ERS Board acting on information from any appropriate source pursuant to 36-05-3-c-1-b).

Proposed Amendment to Board Rule XVII-G

- 4. The Medical Council may at any time refer any disability beneficiary for professional Earnings Capacity Evaluation as it in its discretion deems appropriate and the ERS Board may do so as well at any time acting on information from any source pursuant to 36-05-3-c-1-b).

Appendix

Illustration of a Possible High Level Flow (normal processing)



Assuming a number of items, this flow shows a very generic, and simple, example of how information will flow and the touch points between the ERS, the member, and the examiners. Exception flows (where the member fails to be examined properly, etc.) will require more touch points.

It uses the Workers' Comp Division's flow as a basis.

The ERS's flow may be different; WC has a job description to measure against, while the ERS will first have to determine what job the person has the skills to perform based upon a number of factors, before actually being able to determine the person's ability to do the work.

Functional Capacity Examination (FCE)

- An FCE evaluates an individual's capacity to perform work activities related to his or her participation in employment. The FCE process compares the individual's health status, and body functions and structures to the demands of the job and the work environment.
- The FCE report includes an overall physical demand level, a summary of job-specific physical abilities, a summary of performance consistency and overall voluntary effort, job match information, adaptations to enhance performance, and treatment recommendations, if requested. Some FCEs are designed to also report on the worker's ability to meet the cognitive demands of the job in question.
- FCEs are done on a one-on-one basis and may range in length from 4 to 6 hours. The FCE may take place over 2 consecutive days.

Source: <https://www.aota.org/About-Occupational-Therapy/Professionals/WI/Capacity-Eval.aspx> (The American Occupational Therapy Association)

Vocational Assessment (VA)

- Vocational assessment is the process of determining an individual's interests, abilities and aptitudes and skills to identify vocational strengths, needs and career potential.¹
- A vocational assessment typically includes an evaluation of medical factors, psychological makeup, educational background, social behaviors, attitudes, values, work skills and abilities.²
- Skill assessment evaluations may take between one to three days.³

¹Source: http://www.ilo.org/public/english//region/asro/bangkok/ability/download/voc_assessment.pdf (International Labor Organization)

²Source: <https://www.oasinc.org/the-importance-of-vocational-assessment-and-evaluation/> (Occupational Assessment Services)

³Source: <https://www.wwrc.net/VocationalEvaluation.htm> (Wilson Workforce & Rehabilitation Center)