

Regulatory and Fiscal Impact Analysis: Proposal of Administrative Rule 20 NCAC 02C .0505

Agency: Local Governmental Employees' Retirement System Board of Trustees

Rule Citation(s): 20 NCAC 02C .0505
(See Appendix B for proposed Rule text)

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Rulemaking Authority: G.S. 128-27(e); G.S. 128-28(g)

Impact Summary: State Government: Yes
Local Government: No
Private Entities: Yes
Substantial Impact: No

I. Introduction

The Local Governmental Employees' Retirement System ("LGERS") is administered by a Board of Trustees ("LGERS Board") pursuant to G.S. 128-22. Staffing for the Board is provided by the Department of State Treasurer (Chapter 143A of the General Statutes), through its Retirement Systems Division ("RSD"). The North Carolina Administrative Code contains Rules related to the administration of LGERS under Title 20 (State Treasurer), Chapter 02 (Retirement Systems), Subchapters 02A (Divisional Rules) and 02C (LGERS).

LGERS is a governmental pension plan under Section 414(d) of the Internal Revenue Code. The retirement benefits provided by LGERS include not only service retirement under G.S. 128-27(a) through (b22), which a member may receive after reaching certain age and service requirements, but also disability retirement under G.S. 128-27(c) through (e), which a member with at least five years of creditable service may receive after meeting conditions including medically confirmed disability.

G.S. 128-28(l) establishes a Medical Board, with members designated by the LGERS Board, providing that "the Medical Board shall arrange for and pass upon all medical examinations required under the provisions of this Chapter, and shall investigate all essential statements and certificates by or on behalf of a member in connection with an application for disability retirement."

The conditions for disability retirement under G.S. 128-27(c) include certification by the Medical Board that the "member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member should be retired."

G.S. 128-27(e) provides for possible medical re-examinations of individuals previously approved for disability retirement: "Once each year during the first five years following retirement of a member on a disability allowance, and once in every three-year period thereafter, the Board of Trustees may, and upon his application shall, require any disability beneficiary who has not yet attained the age of 60 years to undergo a medical examination." (Emphasis added.)

The Social Security Administration administers benefits including primary Social Security disability benefits for participants in the Social Security system. Nearly all local governments in North Carolina participate in the Social Security system. Section 223(d) of the Social Security Act defines "disability" for purposes of primary Social Security disability benefits. The definition and related provisions are reproduced in Appendix A because of their relevance to the matter addressed by this proposal.

This proposal contains a recommended administrative rule clarifying that where the LGERS Board has discretion due to the use of the word "may" in G.S. 128-27(e), the LGERS Board does not require medical re-examinations of disability retirees who have provided RSD with documentation of their approval for primary Social Security disability benefits.

II. Description and Impact Analysis

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| Purpose | Establish administrative rule clarifying that where the LGERS Board has discretion, the LGERS Board does not require medical re-examinations of disability retirees who have provided RSD with documentation of their approval for primary Social Security disability benefits. |
| Rule Section | Rule 20 NCAC 02C .0505. |
| Addition/Modification | Addition. |
| Background/Baseline | <p>G.S. 128-27(e) provides for possible medical re-examinations of individuals previously approved for disability retirement under LGERS: "Once each year during the first five years following retirement of a member on a disability allowance, and once in every three-year period thereafter, the Board of Trustees may, and upon his application shall, require any disability beneficiary who has not yet attained the age of 60 years to undergo a medical examination." (Emphasis added.)</p> <p><u>Baseline condition:</u> By its use of the word "may," the statutory provision provides discretion to the LGERS Board as to whether medical re-examinations are required (except upon the member's application for benefits, in which case a medical examination is required). There is currently no administrative rule clarifying the LGERS Board's interpretation of this discretion. LGERS is currently administered consistently with the proposal described below, and RSD is not aware of a dispute or contested case that has arisen where a member has claimed the Board misapplied its discretion to require a medical re-examination.</p> |
| Proposed Change | The proposal would clarify that the LGERS Board does not require medical re-examinations of disability retirees who have provided RSD with documentation of their approval for primary Social Security disability benefits. |
| Alternatives | One alternative would have been for the LGERS Board to require medical re-examination in all cases where G.S. 128-27(e) provides that the re-examination "may" be required. This would have included requiring re-examinations of disability retirees who have already provided RSD with documentation that they have been approved for primary Social Security disability benefits. The proposal is preferable to this alternative because it avoids paperwork on the part of disability retirees and their doctors, and avoids reviews by the Medical Board, all of which would be unnecessary under the assumptions described in this analysis. |

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| | <p>A second alternative would have been for the Board not to exercise its discretion to require medical re-examinations, even for disability retirees who have not been approved for primary Social Security disability benefits. The proposal is preferable to this alternative because it honors what appears to be the statutory intention for re-examinations to be conducted in some cases, and also honors the LGERS Board's fiduciary responsibility to pay benefits only to those who are eligible, all while acknowledging the validity of a medical review already performed by the Social Security Administration.</p> |
| Benefit | <p>Clarification of the Board's interpretation of discretion provided by statute, and transparency for future administration of LGERS which could help prevent possible future disputes.</p> |
| Impact | <p>This proposal would be the same as current administrative practice, and therefore represents no change compared to current administrative practice. There may be a change from the statutorily provided baseline conditions, since the statutory provision does not specify how the LGERS Board will use its discretion to require re-examinations. Below we address (1) any potential impact on members' eligibility for benefits, (2) the impact on private entities, and (3) the impact on State government resources that administer LGERS.</p> <p style="text-align: center;">(1) Members' Eligibility for Benefits</p> <p>As this discussion will describe, LGERS members whose medical details have already been reviewed and approved for disability retirement benefits by the Medical Board, and also have been approved for primary Social Security disability benefits by the Social Security Administration, are extremely unlikely to have their eligibility for disability retirement reversed if they were subject to medical re-examination by the Medical Board. Based on the experience of the LGERS Board, the likelihood can be estimated as zero.</p> <p>An underlying assumption of this analysis is that the Social Security Administration makes accurate determinations of eligibility for primary Social Security disability benefits according to the definition in Section 223(d) of the Social Security Act. Based on the assumption of accurate determinations by the Social Security Administration, additional re-examinations by the Medical Board of people who have already been approved for primary Social Security disability benefits are not necessary for the two reasons below.</p> <p><u>Reason One: Because Social Security's definition of disability is more restrictive than LGERS' definition, an incapacity causing "disability" under Social Security's definition can be assumed to meet the medical requirements of disability retirement under LGERS.</u></p> <p>According to Section 223(d)(1) of the Social Security Act, an individual determined by the Social Security Administration to be "disabled" must be unable to engage in any substantial gainful activity ("SGA") as the result of a medically determinable physical or mental impairment which can be expected to result in death or has lasted (or is expected to last) continuously for at least 12 months. (In the case of disability due to blindness, the individual must be unable to engage in any SGA requiring skills or abilities comparable to any SGA in which the individual has regularly engaged in the past.)</p> <p>For disability retirees subject to medical re-examination under G.S. 128-27(e), the Medical Board considers whether the individual's situation continues to satisfy the medical aspects of the disability criteria under G.S. 128-27(c). These criteria are, first, that the "member is mentally or physically incapacitated for the further performance of duty," and second, that the "incapacity is likely to be permanent."</p> <ul style="list-style-type: none"> • Taking the first of these criteria, an individual who is unable to engage in any SGA (the Social Security standard for all causes except blindness) will, by definition, be incapacitated for further performance of duty in their local government position. |

- Taking the second of these criteria, an impairment that can be expected to result in death (one possible Social Security standard) is permanent; and an impairment that lasts continuously for at least 12 months (the other possible Social Security standard) includes permanent impairments. Conceivably, an incapacitating impairment could last for at least 12 months while not "likely to be permanent." However, from RSD's experience, this distinction has not occurred in Medical Board reviews; and in any event, in the cases under contemplation, the required Medical Board examination upon application for disability retirement benefits would have already determined that the nature of the incapacity was "likely to be permanent."

In the event that an individual who has been approved for both LGERS disability retirement and primary Social Security disability benefits is able to engage in SGA, LGERS has provisions under G.S. 128-27(e)(1) requiring a permanent reduction in the disability retirement allowance. G.S. 128-27(e)(4) requires as a condition of receiving benefits that members report "all income received as compensation for services... and income received from business," so that LGERS may administer this reduction in benefits as required.

Reason Two: Because Social Security's review and documentation requirements for disability determinations are at least as rigorous as LGERS' requirements, the evidence necessary to support a determination of disability by the Social Security Administration would also support a determination of eligibility for disability retirement under LGERS.

According to Section 223(d)(5) of the Social Security Act, an individual determined by the Social Security Administration to be "disabled" will have already submitted "medical and other evidence" including "medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques," documenting the impairment. The Social Security Administration must "make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination." Before denying that an individual is under a disability, the Social Security Administration must "develop a complete medical history of at least the preceding twelve months."

For LGERS purposes, the Medical Board re-examination process requires a form submitted by a physician, RSD's "Form 7A – Medical Report for Disability Eligibility Review." This form requires the name and onset of each primary and contributing diagnosis, documentation reviewable by another physician supporting the diagnosis, a timeline of the condition, prescribed medications, surgical procedures, vital signs, mental assessment, description of how the condition prevents the carrying out of job responsibilities, and assessment of when the individual might be able to return to work and what limitations they might have upon their return.

If a member has been approved for primary Social Security disability benefits, a process at least as rigorous as that of LGERS has already occurred to document the disability from a medical perspective. It would be unnecessarily duplicative for the LGERS Board to require that it be submitted again and reviewed by LGERS.

In summary of the above, requiring medical re-examinations of individuals already approved for both disability retirement (upon their application) and primary Social Security disability benefits will have no practical effect on their eligibility for disability retirement benefits from LGERS.

(2) Impact on Private Entities

Compared to the baseline, the impact of the proposal on private entities is a reduction in the time and effort needed to comply with administrative requirements.

As of December 2023, there were 2,899 disabled retirees receiving monthly benefits from LGERS. Of these, 220 had initiated disability retirement benefits within the preceding year and therefore had very recently had their initial medical examination and review by the Medical Board. Of these, 961 had disability retirement effective dates within the four years before that, meaning that they were still within the possible five-year timeframe described by G.S. 128-27(e). The remaining 1,718 disabled retirees had been receiving disability retirement benefits for longer than five years.

RSD does not have complete data on how many local government disability retirees have been approved for primary Social Security disability retirement benefits, but it is possible to look to similar data for former State employees and teachers receiving long-term disability benefits from the Disability Income Plan of North Carolina ("DIPNC") as a point of reference. For such individuals, the definition of "disability" in G.S. 135-101(6) is "the mental or physical incapacity for the further performance of duty of a participant or beneficiary; provided that such incapacity was not the result of terrorist activity, active participation in a riot, committing or attempting to commit a felony, or intentionally self-inflicted injury." This definition is similar to the definition from G.S. 128-27(c) for local government disability retirees. Moreover, for individuals who did not have at least five years of membership service in the Teachers' and State Employees' Retirement System as of July 31, 2007, the provisions of DIPNC provide a strong incentive for them to report to RSD when they become eligible for primary Social Security disability benefits, as their DIPNC long-term disability benefits are terminated 36 months after disability absent such an approval by Social Security. G.S. 135-106(b).

To estimate how many DIPNC long-term disability recipients are approved for Social Security, RSD reviewed detailed data that are collected on monthly payees each December for purposes of the actuarial valuation. As of December 2022, there were 341 LTD recipients who had disability effective dates between December 1, 2019 and November 30, 2020, meaning that they would be expected to reach the 36-month mark in the following year. Of those 341 LTD recipients, 219 of them (64%) were still receiving LTD benefits for the month of December 2023. In order to be receiving such benefits, they would have had to have been approved for primary Social Security disability benefits. As for the remaining 122 (36%), there are various reasons that benefits may have been terminated in the intervening year, including death, recovery from the disability, or conversion to service retirement benefits; but the most common reason for LTD benefits terminating during the third year would be that the individual was not approved for primary Social Security disability benefits.

Therefore, for purposes of the current analysis, and in the interest of using an estimate that seems more likely to overstate than to understate the potential impact of the proposal, RSD believes it is reasonable to assume that 75% of disability retirees have been approved for primary Social Security disability benefits by the time they would otherwise have been subject to medical re-examination.

If the LGERS Board were to exercise maximum authority under G.S. 128-27(e) to require medical re-examinations, it is reasonable to expect that the LGERS Board could require up to 1,150 re-examinations each year of individuals who have already been approved for primary Social Security disability benefits. This number was derived by taking 75% of 961, plus 75% of one-third of 1,718 (since G.S. 128-27(e) provides that re-examinations could be required once every three years for those who have receiving benefits longer than five years).

The cost of the member complying with a re-examination requirement is difficult to estimate. Realistically, it depends on the time spent by the member coordinating and carrying out the response to the re-examination requirement. The amount and value of this time will vary significantly for different disability retirees. The amount of time will also vary depending on whether or not their physician requires the member to have an examination before completing

the paperwork. RSD believes it is reasonable to expect that, on average, a medical re-examination requires about four hours of a member's time, inclusive of reading and understanding RSD guidance, coordinating requested forms from a physician, submitting the forms, and visiting the physician for an exam, in some cases.

As compared to the statutory baseline and based on the assumptions above, if the LGERS Board exercised full discretion to require re-examinations in the estimated 1,150 additional cases per year, the proposed rule could result in an estimated 4,600 hours in time saved for retired members (1,150 cases x 4 hours per member). In practice, the proposed rule is consistent with current administrative practice as the LGERS Board rarely, if ever, requires re-examination for members already approved for Social Security primary disability benefits. As such, the potential time cost savings realized by members can be considered ongoing impacts.

An unquantified benefit for disability retirees is the transparency for future administration of LGERS, which could help prevent possible future disputes. Although the proposal is already consistent with current administration of LGERS, the proposed administrative rule would provide greater assurance to disability retirees in the future regarding how the Board interprets its discretion to require medical re-examinations. This could give retirees more information when weighing their options and going through the procedural requirements of approval for both LGERS disability retirement and Social Security benefits. (For example, it is conceivable that a retiree may be in a position of choosing between applying for primary disability benefits or age-based retirement benefits from Social Security, and the additional clarity from the proposed administrative rule may be useful in that analysis.) Similarly, the administrative rule would help to prevent possible disputes in the hypothetical scenario where a future Board might begin interpreting its discretion in a way that requires medical re-examinations for individuals already approved for primary Social Security disability benefits, and those individuals, perhaps due to their incapacity, are unable or unwilling to comply with the re-examination requirement.

(3) Impact on State Government

The impact to State government is a reduction in the State resources associated with the Medical Board, compared to if the Medical Board reviewed potentially 1,150 additional re-examinations per year as described above.

Currently RSD pays approximately \$150,000 per year to Medical Board members for their services. (This is derived as \$625 per member per meeting, multiplied by five members of the Medical Board, multiplied by approximately 48 weekly meetings during the year.)

During their meetings, the Medical Board reviews applications pertaining to both LGERS and the Disability Income Plan of North Carolina (covering State employees), and reviews both examinations in conjunction with initial application for benefit and re-examinations. During 2023, the Medical Board reviewed 2,068 cases in total.

If the LGERS Board were to exercise full discretion to require re-examinations in the estimated 1,150 additional cases per year, this would result in an approximate 56% increase in workload for the Medical Board ($1,150 \text{ additional cases} / 2,068 \text{ current cases} \times 100 = 56\%$). Compared to that scenario, the proposed rule would save RSD approximately \$84,000 per year in avoided costs (56% of \$150,000). However, as the proposed rule is consistent with current administrative practice, these avoided costs should be considered an ongoing impact.

Similarly, as the Medical Board spends approximately four hours in an average meeting, the total number of person-hours spent in annual meetings is approximately four hours per member per meeting, multiplied by five members of the Medical Board, multiplied by

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| | <p>approximately 48 weekly meetings, or a total of 960 person-hours per year. Compared to the scenario where the Medical Board's workload could be increased by 56%, the proposed rule would save Medical Board members approximately 538 person-hours of time (56% of 960). Medical Board members would likely recover the cost of this time through increased compensation, so neither a financial cost nor a financial benefit is included in this analysis; however, a time savings is noted as a benefit for Medical Board members. This time savings should be considered an ongoing impact as the proposed rule is consistent with current administrative practice.</p> <p>An unquantified benefit for the State government resources administering LGERS is the prevention of possible future disputes. In the scenarios where disputes could have arisen in the future in the absence of the proposed administrative rule (see "Impact on Private Entities" discussion above), the disputes would likely have been between private entities and State entities such as the Board, Medical Board, or RSD. It is not reasonably possible to quantify the likelihood or cost of these hypothetical future disputes, but a benefit would result to the State (in the form of avoiding costs to resolve the dispute, and ability to spend time and resources elsewhere) to the extent disputes would have arisen.</p> |
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III. Summary

The proposal contains recommendations with the following administrative benefits.

| <u>Section of Analysis</u> | <u>Purpose</u> | <u>Administrative Benefit</u> |
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| II | Establish administrative rule clarifying that where the LGERS Board has discretion, the LGERS Board does not require medical re-examinations of disability retirees who have provided RSD with documentation of their approval for primary Social Security disability benefits. | Clarification of the Board's interpretation of discretion provided by statute, and transparency for future administration of LGERS. |

The quantified benefits or costs are estimated as follows.

Estimated Annual Benefits – These benefits should be considered ongoing as they align with current practices.

- Retired LGERS Members
 - 4,600 hours' time saved from not having to complete re-examinations.
- Local Governments.
 - None.
- State Government.
 - \$84,000 avoided costs to RSD from not paying Medical Board for reviewing additional re-examinations.
- Medical Board
 - 560 person-hours' time saved from not having to review additional re-examinations (not a financial cost/benefit for reasons described in this analysis)

Estimated Annual Costs – These costs should be considered ongoing as they align with current practices.

None.

There are also unquantified ongoing benefits and costs as follows:

Unquantified Benefits

- Retired LGERS Members
 - Clarification of LGERS administrative processes, allowing for fully informed personal decisions.
 - Prevention of possible future disputes.
- Local Governments.
 - None.
- State Government.
 - Prevention of possible future disputes.

Unquantified Costs

None.

Appendix A

Provisions of Section 223(d) of Social Security Act

(Source: https://www.ssa.gov/OP_Home/ssact/title02/0223.htm. Accessed 3 April 2024.)

SOCIAL SECURITY ACT

TITLE II: Federal Old-Age, Survivors, and Disability Insurance Benefits

SEC. 223 [42 U.S.C. 423]: DISABILITY INSURANCE BENEFIT PAYMENTS

...

(d) (1) The term "disability" means –

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 216(i)(1)), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A) –

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

(C) An individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(4) [Contains provisions pertaining to ability to engage in substantial gainful activity.]

(5) (A) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require. An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered

with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability. Any non-Federal hospital, clinic, laboratory, or other provider of medical services, or physician not in the employ of the Federal Government, which supplies medical evidence required and requested by the Commissioner of Social Security under this paragraph shall be entitled to payment from the Commissioner of Social Security for the reasonable cost of providing such evidence.

(B) In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Commissioner of Social Security shall consider all evidence available in such individual's case record, and shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability. In making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on a consultative basis.

(C) [Provides limitations on the information that the Social Security Administration may consider from sources who have been convicted of certain crimes or had certain restrictions imposed.]

(6) [Provides limitations in the case of impairments arising from commission of, or confinement following, certain criminal offenses.]

(e) [Provides when benefits must cease following engagement in substantial gainful activity.]

Appendix B: Proposed Text of Administrative Rule

**20 NCAC 02C .0505 LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM DISABILITY
RETIREMENT REEXAMINATION**

20 NCAC 02C .0505 is proposed for adoption as follows:

(a) A beneficiary in receipt of disability retirement benefits under G.S. § 128-27(c), who has submitted to the Retirement Systems Division a letter from the Social Security Administration confirming eligibility for primary Social Security disability benefits, shall not be subject to medical reexamination set forth in G.S. § 128-27(e).

*History Note: Authority G.S. 128-27(e); 128-28(g);
Eff. MONTH DD, YYYY*