



Recent Remand Trends



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Is This Statement True or False?

“PERAC is remand happy. In conducting its disability application review, PERAC affirmatively tries to find a reason to send the application back to the retirement board.”

FALSE!

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PERAC's Section 21(1)(d) Review

- PERAC reviews “all accidental and ordinary disability pensions, and termination retirement allowances under section 10” which have been “granted by the retirement boards.”
- PERAC has 30 days to either approve or remand these application approvals.
- Exception: PERAC does not review the accidental, ordinary or termination retirement allowances of PERAC employees. 840 CMR 10.23.

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NOTES:

Four Possible Remand Grounds

PERAC may remand the decision of the retirement board if it finds that the decision:

- Is made upon unlawful procedure
- **Is unsupported by substantial evidence**
- Is arbitrary or capricious
- Is made as a result of fraud or misrepresentation.

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What Does PERAC See?

- Board Findings of Fact (often)
- Medical records
- Medical panel reports
- Other key forms:
 - Application for Disability Retirement
 - Employer's Statement
 - Injury Report
 - Proof of pre-employment physical (presumption only)

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NOTES:

Eligibility For A Disability Retirement Allowance

Ordinary Disability Retirement

- A member is incapacitated from performing the essential duties of his or her job and
- The incapacity is permanent and
- The member has 10 years of creditable service, but several systems require 15 years.

Accidental Disability Retirement

- A member is incapacitated from performing the essential duties of his or her job and
- The incapacity is permanent and
- The member was injured as a result of and while in the performance of his or her duties.

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Trend No. 1: The Member is Still Working

- Member still working at his or her job, without modification or restriction.
- First prong “incapacitated from performing the essential duties of his or her job” not met.

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NOTES:

Page 6, Member's Application

1. For the period of the last year, please describe your physical activities, including:
 - Medical rehabilitation activities
 - Activities of daily living (for example, driving, cleaning, etc.)
 - Sports or other strenuous activities
 - Other employment since the onset of your disability

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Page 6, Member's Application

- Typical responses to page 6's prompts:
 - I can clean my home for short periods.
 - I can drive for short periods of time.
 - Moderate levels of housework, cooking, cleaning and parenting.
 - I'm doing light chores at home; local driving.
 - No employment.
 - No sports.
 - Light activities /light housekeeping which are spaced out appropriately.
 - My physical activity since the injury has been minimal.
 - I currently still need assistance when doing activities such as showering and getting dressed.

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NOTES:

Employer Statement, Top of Page 4

- Has the applicant's medical condition affected his or her attendance or job performance? If yes, please explain.
- Typical responses:
 - *The applicant has been out of work and on FMLA.*
 - *Applicant unable to perform essential duties as a result of the medical condition.*
 - *Yes, employee was unable to return to work after incident.*
 - *After a period of temporary modified duty, never returned to work.*
 - *Applicant has been on a continuous leave since March 30, 2022.*

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Trend 1: It Was Apparent From the Forms.

From the member's application, p. 6:

- I drive to and from work.
No sports, no exercise, and no other employment since onset of my disability.

From the employer's statement, p. 4:

- Has the applicant's medical condition affected his or her attendance or job performance?
- Employer's Answer: No.

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NOTES:

Trend 2: Former Employer Files for a Former Member's Retirement

Chapter 32, Section 16(1), in pertinent part:

Section 16. (1) Involuntary Retirement and Right to a Hearing. – (a) Any head of a department who is of the opinion that any member employed therein should be retired for superannuation, ordinary disability or accidental disability, in accordance with the provisions of section five, six, or seven, as the case may be, may file with the board on a prescribed form a written application for such retirement. Such application shall include a fair summary of the facts upon which such opinion is premised...

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Trend 2: Dates Listed in the Application

- Employer's Involuntary Retirement Application dated February 24, 2022
- From the Fair Summary of the Facts:
 - X was a great employee and we were sorry to see him go. Because of his injury, and because of the lack of a light duty option, he was terminated from his employment on August 3, 2018.
- From the Employer's Statement:
 - In response to the question of "date employment ended" the Employer writes: 8/3/2018.

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NOTES:

Trend 3: Vest

“The statutory language and the case law direct us to the conclusion that an employee who has left government service without an established disability may not, after termination of government service, claim accidental disability retirement status on the basis of a subsequently matured disability.” *Vest v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 191, 194 (1996)

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Trend 3: The Sudden Realization

- Member is placed on paid administrative leave for misconduct on October 28, 2020.
- While on paid administrative leave, member realizes he is disabled by virtue of an injury he sustained in 2017, and files a supplemental injury report for that injury.
- Member working full-time with no restrictions when he was placed on administrative leave.

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NOTES:

Trend 3: Presumption Only

- Police officer works until August 31, 2020, the maximum age for his group.
- On October 11, 2020, he suffers a heart attack, and files for ADR under Section 94.
- Argument “the condition must have been present while he was still actively serving” fails because:
 - He was never incapacitated from performing the essential duties of his position prior to his retirement for superannuation.

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Other Recent Remands

- Member working in an accommodated position for a long time, but Medical Panel not given the accommodated job description.
- Treating physician certifies that member did NOT die of the cause for which he retired.
- Member injured “walking up the stairs” but it’s not clear what job duty he was performing when he was injured.

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NOTES:

Key Takeaways

- You are not eligible to retire for disability if you are still working without accommodation in the same position from which retirement is sought.
- An employer may not seek the involuntary retirement of a former employee.
- A member must establish that they were permanently incapacitated from performing the essential duties of their position while still a member in service.

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Conclusion

- Happy to answer any questions you may have, but should one arise after this conference is over:
- Please call me at **(617) 591-8904**.
- Please email me at judith.a.corrigan@mass.gov

Thank you!

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NOTES:

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

COMMONWEALTH OF MASSACHUSETTS

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