

L.A. CERA

Los Angeles County Employees Retirement Association

Procedures for Disability Retirement Hearings

***Board of
Retirement***

As Revised and Approved
By The Board of Retirement
September 2006

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PROCEDURES FOR DISABILITY RETIREMENT HEARINGS

1. HEARING DE NOVO ON APPEAL:

When a request for a hearing is received by the Board of Retirement, hereinafter called the Board, the matter shall be referred for hearing de novo before a Board-appointed referee. If the appeal is limited to a dispute concerning the proper date for the commencement of a pension, the hearing shall be limited to that issue.

2. NOTIFICATION OF REFERRAL TO HEARING; APPLICANT'S NOTIFICATION OF ASSIGNED REFEREE:

The Board shall notify the applicant that the matter will be placed on calendar. Notification shall be made within 10 days of the Board's action referring the matter for hearing and shall contain a copy of these procedures. This notification shall show that a copy is going to the assigned referee whose full name and address will be set forth and shall constitute notification to the applicant of the assignment of the referee.

3. NOTIFICATION OF ATTORNEY ASSIGNED TO REPRESENT THE RESPONDENT:

A copy of the Board's file shall be forwarded to the respondent's attorney for assignment. Within 10 days of his or her receipt of the file from the Board, the respondent's attorney will in writing notify the Board and the applicant of the respondent's attor-

ney's name, address and telephone number. Receipt of the Board's file by the respondent's attorney shall constitute notification to the respondent of the assignment of the referee.

4. PETITION FOR AUTOMATIC REASSIGNMENT:

Each party to a hearing shall be entitled to reassignment of the hearing to another referee in accordance with the provisions of this section. Each party shall be entitled to make only one such petition. Proceedings for such assignment shall be instituted by the making of a petition supported by a declaration under penalty of perjury in substantially the following form:

STATE OF CALIFORNIA)

SS.

COUNTY OF)

, declares under penalty of perjury: That (s)he is (a party) (an attorney for a party) to the above-named case. That affiant believes that (s)he cannot have a fair and impartial trial before the referee to whom the case is assigned. I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
at

_____, California.

(Signature)

The declaration shall be filed not more than ten days after the service of the notification of assignment of the referee and shall be directed to the attention of the Board of Retirement.

5. APPLICANT'S PREHEARING STATEMENT:

- (a) The applicant shall serve upon the referee and the respondent's attorney a prehearing statement no later than 90 days from the date the applicant is given notice of the assignment of the attorney representing the respondent. The prehearing statement shall contain the following:

 - (1) A statement of the issues and the contentions of the applicant, and a summary of the evidence to be presented;
 - (2) A list and copies of any medical reports and depositions of medical witnesses on which the applicant will rely;
 - (3) The names, business addresses and telephone numbers of any lay witnesses whose testimony the applicant intends to present at the hearing, and a synopsis of each witness's expected testimony.
 - (4) The names of any medical witnesses the applicant intends to call for oral testimony at a hearing or hearings set for that purpose and a synopsis of the expected testimony. Such a listing shall not constitute a waiver of a subsequent request for medical testimony under Rules 8 and 13 made prior to the submission of the case for decision.
- (b) If in the prehearing statement or at any time during the administrative appeal process, the applicant both alleges and offers medical proof that incapacity is the result of an injury or disease not listed on the application submitted to the Board, or, if listed, on which the applicant submitted no medical evi-

dence for the Board's review when it considered the application, the administrative appeal shall be suspended, the allegation shall be treated as an amendment to the application and the matter shall be referred back to the Board for its original determination on the application. Upon service of notification of the action taken by the Board on the application, the original appeal shall be considered active. The applicant shall have 90 days from the notice in which to serve on the referee and the respondent's attorney an amended prehearing statement.

- (c) If the applicant has a dispute with the date selected by the Board for the commencement of a pension or, if the Board in its initial decision found that the applicant asserts that the proper commencement date for the pension is a date other than the date of the application, the applicant shall raise the pension commencement date as an issue and shall state the applicant's contention in the prehearing statement. Nothing in this rule relieves the applicant from the requirements of Article VIII of the Bylaws of the Board of Retirement.

6. RESPONDENT'S PREHEARING STATEMENT:

The respondent shall serve upon the referee and the applicant a prehearing statement no later than 90 days from the date of service of the applicant's prehearing statement. The prehearing statement shall contain the following:

- (a) A statement of the issues and the contentions of the respondent, and a sum-

- mary of the evidence to be presented;
- (b) A list and copies of any medical reports and depositions of medical witnesses on which the respondent will rely;
 - (c) The names, business addresses and telephone numbers of any lay witnesses whose testimony the respondent intends to present at the hearing, and a synopsis of each witness's expected testimony.
 - (d) The names of any medical witnesses the respondent intends to call for oral testimony at a hearing or hearings set for that purpose and a synopsis of the expected testimony. Such a listing shall not constitute a waiver of a subsequent request for medical testimony under Rules 8 and 13 made prior to the submission of the case for decision.

7. EXTENSION OF TIME FOR FILING PREHEARING STATEMENT:

Any party may request an extension of time to submit a prehearing statement upon showing of good cause. A party requesting the extension of time to submit a prehearing statement shall direct the request in writing to the assigned referee. The request shall state the reason the prehearing statement cannot be submitted within the prescribed time limit. An adverse party shall have 10 days in which to file a written opposition to the request. The referee shall have the power to rule on such a request.

8. SETTING OF HEARING DATE:

Within 30 days of the filing of respondent's prehearing statement the applicant shall contact the respondent's attorney and the

referee to select a mutually agreeable hearing date. The hearing date selected must be within 90 days of the filing of respondent's prehearing statement. If the parties cannot agree on a hearing date within the time specified, either party may by letter petition the Board to set the matter for hearing. An adverse party shall have 10 days from the date of the petition to present a written opposition to the Board. The Board may then set the matter for hearing or refer the matter to the assigned referee, who shall either set the matter for a prehearing conference or for a hearing. Arrangements for hearings for the presentation of medical testimony after the close of testimony of lay witnesses may be made at any time prior to the submission of the matter for decision.

9. TWO-YEAR REVIEW HEARINGS:

The date selected for two-year review hearings must be within 90 days of the date the respondent's attorney is assigned to the case. Failure of the applicant to cooperate in setting a hearing within the prescribed 90 day limit shall be deemed a waiver of the right to a hearing. If the matter is not heard within this 90-day period without specific approval of an extension by the Board, the referee shall report this fact to the Board and the applicant will be deemed no longer incapacitated for duty.

10. TIME AND PLACE OF HEARINGS:

Unless the parties and the referee agree otherwise, a hearing shall be deemed set for one half-day. Morning sessions shall begin at 9:00 a.m. and end at 12:00 noon, and afternoon sessions shall begin at 1:30 p.m.

and end at 5:00 p.m. Hearings which are not concluded within either the half-day session, or whatever other time period to which there has been a stipulation, shall be continued to the next agreeable hearing date. When the hearing date and time have been selected, the Board staff shall arrange for a reporter and use of a hearing room and shall in writing notify the parties and the referee of the time and place of the hearing.

11. PENALTIES FOR FAILURE TO COMPLY WITH REQUIREMENTS OF THE RULES:

- (a) Failure of the applicant to comply with the requirements set forth in these rules shall result in the matter being taken off calendar until such time as said requirements have been met.
- (b) Failure of the respondent's attorney to comply with the requirements set forth in these rules shall result in an extension in favor of the applicant of any period in which the applicant must act. The extension shall be an amount equal to any delay resulting from the respondent's attorney's failure to comply.

12. WRITTEN MEDICAL REPORTS AS EVIDENCE:

(a) *Statement of Policy:*

It is policy of the Board that production of medical evidence shall be in the form of written medical reports attached to the parties' prehearing statements. A written medical report bearing the signature of the medical witness shall be admissible in evidence as the author's direct testimony. Such medical reports shall not be inadmissible on the basis

that they constitute hearsay, but each party shall have the right to cross-examine the authors of medical reports at a hearing or hearings held subsequent to the hearing of lay testimony.

(b) *“Medical Witness” Defined:*

A medical witness is a person who by profession is a physician, surgeon, holding an M.D. or D.O. degree, psychologist, optometrist, dentist, podiatrist, or chiropractic practitioner, licensed by the State of California or by such other jurisdiction in which such person maintains his or her regular practice.

(c) *Late Submission of Medical Reports:*

Submission of a medical report subsequent to the filing of the party’s pre-hearing statement shall be allowed only upon a showing of good cause. The party requesting submission of such a medical report shall address the request to the referee assigned the case. The request shall state the reason the medical report was not timely produced. The referee shall have the power to rule on such a request.

“Good Cause” shall include an opportunity to have a medical witness comment in a written report on testimony produced at a hearing.

However, if the medical report is allowed to be submitted into evidence, the adverse party shall have the right to a continuance to engage in further discovery, obtain rebuttal medical evidence and/or to cross-examine the medical witness.

13. ORAL TESTIMONY OF MEDICAL WITNESSES:

(a) *Hearings:*

- (1) Oral testimony of a medical witness on direct or cross-examination, for any purpose, shall be taken at a hearing set at a reasonable time as requested by the medical witness in the office of the medical witness, or such other reasonable place requested by the medical witness. If the parties and the referee so agree, the referee need not attend such a hearing and the referee shall consider the transcript of the medical witness's testimony as evidence in reaching the recommended decision.
- (2) Hearings for oral testimony of medical witnesses for any purpose shall be requested at any time prior to the submission of the case for decision and shall be set to take place after the completion of testimony of lay witnesses.

(b) *Depositions:*

A medical witness's deposition may be taken before the referee. The deposition shall be scheduled at a reasonable time as requested by the medical witness. The deposition shall take place in the office of the medical witness, or such other reasonable place as requested by the medical witness. If the parties and the referee so agree, the referee need not be present at such a deposition.

(c) *Subpoenas and Fees:*

- (1) Issuance of a subpoena for a medical witness's attendance at a hearing or deposition shall be contingent on the party accepting the ob-

ligation to pay the medical witness the fees set forth herein.

- (2) The party requesting oral testimony of a treating physician shall advance to the treating physician such fees and mileage as Government Code Section 68093 prescribes for ordinary, non-expert witnesses in the superior court. If the party requesting oral testimony of a treating physician intends to question the physician as to the physician's expert opinion, the party requesting the oral testimony shall advance to the medical witness an expert witness fee.
- (3) The party requesting oral testimony of a medical witness who is not the applicant's treating physician shall in all cases advance to the medical witness an expert witness fee. The witness shall be entitled to claim an expert witness fee on the same conditions that such witness would be entitled to claim under Government Code Section 68092.5 if subpoenaed to testify in a civil action or proceeding.
- (4) When payment of an expert witness fee is required, the party requesting the oral testimony shall contact the office of the medical witness and determine the witness's reasonable and customary hourly or daily fee and shall advise the office of the medical witness of the anticipated length of the deposition or hearing. The medical witness's fee, based on the witness's reasonable customary rate and anticipated length of the testimony, shall be delivered to the

medical witness at least 10 days in advance of the deposition or hearing. If a balance is due following the testimony, the party requesting the oral testimony shall pay the balance upon receipt of an itemized statement. Disputes as to fees between the medical witness and the party requesting the oral testimony shall be resolved by the referee in the manner prescribed in Rule 16.

- (5) Failure to serve a subpoena and/or pay the prescribed witness fee in advance may be treated by the referee and Board as a waiver of the right to question such witness. Failure to advance the expert witness fee will be deemed a waiver of the right to question the witness or require the witness's appearance at the deposition or hearing, and any subpoena which may have been issued to compel the witness's attendance shall be canceled and shall be of no further force or effect. Service of the subpoena and payment of the fee may be made by mail if the witness so agrees.

14. TESTIMONY OF WITNESSES WITHOUT NOTICE:

Upon request made to the referee, a witness not listed in the prehearing statement may be called to testify provided the party making the request presents a synopsis of the expected testimony and a showing of good cause as to why such witness was not originally listed in the prehearing statement.

The referee shall have the power to rule on the request. If the witness is allowed to tes-

tify, the adverse party shall have the right to a continuance to obtain rebuttal evidence and/or to cross-examine the witness. The party originally calling the witness to testify shall bear the responsibility of insuring the witness's attendance at a further hearing set for the witness's cross-examination.

15. DEPOSITIONS OF LAY WITNESSES:

Any party to the proceeding may cause the depositions of lay witnesses, including the applicant, to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this state. Attendance of lay witnesses and the production of records in regard to depositions may be required and appropriate subpoenas will be issued by the Board. The parties shall bear their own costs for such depositions. If the parties and the referee so agree, the referee need not be present at such a deposition. Depositions of medical witnesses shall be governed by Rule 13.

16. RESOLUTION OF DISPUTES IN REGARD TO DISCOVERY AND HEARING PROCEDURE:

Disputes in regard to depositions and other discovery and hearing procedure shall be resolved by the referee. If not made at a hearing, a request for resolution of a dispute shall be made in writing and may be supported by declarations, a copy of the deposition transcript if appropriate, a memorandum of points and authorities and a proposed resolution. The adverse party and the witness involved shall have 10 days after service of such a request in which to respond. The response may be accompanied by declarations, a copy of the

deposition transcript if appropriate, a memorandum of points and authorities and a proposed resolution.

The referee shall notify the parties and the witness involved of the referee's resolution of the dispute within 30 days of receipt of the request for resolution of the dispute.

17. ENFORCEMENT OF RIGHT OF DISCOVERY AND COMPELLING TESTIMONY:

If a deponent or witness refuses to appear at a deposition or hearing, refuses to answer questions or otherwise obstructs discovery contrary to the resolution made by the referee, upon the request of either party supported by a declaration as to the facts with proof of service on the adverse parties and the deponent or witness, and upon the referee's determination that good cause has been shown therefore, the referee shall refer the matter to the Board with a recommendation that the deponent or witness be held in contempt and that a report of the fact be made by the chair to a judge of the superior court under the provisions of Government Code Sections 31535 and 25170-25175. The referee shall serve his recommendation on the parties and the deponent or witness. The deponent or witness shall be personally served with a subpoena to attend the hearing before the Board in regard to contempt, a copy of the request of the moving party, the referee's recommendation, and a notice that the Board will consider the referee's recommendation following the deponent or witness being given an opportunity to be heard.

18. AGREED MEDICAL EXAMINERS:

Upon review of the medical evidence presented, the referee may at his discretion refer either the applicant, all of the medical reports submitted, or both, to a physician acceptable to both the respondent's attorney and the applicant for a medical evaluation by an Agreed Medical Examiner. A copy of the report of the Agreed Medical Examiner shall be furnished to each party. Each party shall have 10 days after service of the report to examine said report and demand in writing an opportunity to cross-examine the Agreed Medical Examiner who shall be deemed to be the referee's witness and may be examined by either party as if under cross-examination. Nothing in this section is intended to preclude any party from producing his or her own medical reports at the time of the hearing. Any physician selected under this section shall be compensated by the Board for the examination and report.

19. PREHEARING CONFERENCES; UNREPRESENTED APPLICANTS:

If either the respondent's attorney, the applicant, or the referee so desires, there may be a prehearing conference for the purpose of attempting a reconciliation of any dispute to include attempting to agree or to obtain the referee's ruling on a dispute as to the admissibility or inadmissibility of evidence.

A prehearing conference is required for any applicant not represented by counsel.

20. SUBPOENAS:

It shall be the responsibility of the applicant and the respondent's attorney to obtain those subpoenas which they deem necessary for the presentation of their respective portions of the case. All subpoenas are to be issued in accordance with Government Code Section 31535.1.

21. FURTHER MEDICAL AND LAY EVIDENCE:

- (a) On the request of the respondent's attorney the Board's disability retirement staff may obtain independent medical examinations and/or investigations. The fees for these medical examinations and/or investigations shall be paid by the Board.
- (b) The applicant shall submit to examinations by physicians appointed by the Board's disability retirement staff where reasonably necessary to the respondent's discovery of the claim. Such examinations shall be scheduled with due consideration to the applicant's convenience and ability to attend.
- (c) A referee may, at his or her discretion, direct the disability staff to refer the applicant or medical records submitted, or both, to a physician appointed by the Board, for further medical evaluation. The physician will provide a written medical report to the referee with copies to counsel for the parties.
The applicant shall submit to medical examinations pursuant to this rule.

22. DISABILITY APPLICATION; DISABILITY RETIREMENT EVALUATION REPORT:

- (a) The disability retirement application shall be admitted as an exhibit and made a part of the record in all hearings.
- (b) The disability retirement evaluation report shall be admitted as an exhibit and made a part of the record in all hearings, subject to the right of either party to object to portions thereof.

23. CONDUCT OF HEARINGS:

- (a) Oral evidence shall be taken only on oath or affirmation.
- (b) Each party shall have these rights: to call and examine witnesses; to introduce exhibits, to include reports and depositions of medical witnesses; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called the witness to testify; and to rebut adverse evidence. If the applicant does not testify, the applicant may be called and examined as if under cross-examination.
- (c) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant

and unduly repetitious evidence shall be excluded.

- (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. This section shall not be applicable to written medical reports received into evidence pursuant to Rule 12(a).

24. AFFIDAVITS:

- (a) A party may include as part of the party's prehearing statement a copy of any affidavit which the party proposes to introduce in evidence, together with a notice as provided in subdivision (b) below. Unless the opposing party, within 15 days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.
- (b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and

you will not be entitled to question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date [15] days after the date of mailing or delivering the affidavit to the opposing party).

25. OFFICIAL NOTICE:

If the referee takes or has taken or proposes to take judicial notice of any matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, Section 455 of the Evidence Code shall be followed to afford each party reasonable opportunity to be heard and submit evidence on the matter.

26. SERVICE OF PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION:

The proposed findings of fact and recommended decision of the referee shall be served on the parties by the referee who presided at the hearing.

27. OBJECTIONS TO PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION:

An unsuccessful party shall have 20 days after service of the proposed findings of fact and recommended decision to submit written objections to the referee and to the Board and to serve the objections on

adverse parties. Adverse parties shall have 10 days in which to respond. The objections and any response shall be incorporated in the record to be considered by the Board. Within 30 days after the referee has received the objections, the referee may:

- (a) Adopt the findings originally submitted, or
- (b) Make such changes in the findings as the referee deems appropriate in light of the evidence, the objections submitted by the unsuccessful party, and any response.
- (c) Upon a finding of good cause, reopen the record to admit additional evidence after allowing each party a reasonable opportunity to be heard and submit rebuttal evidence on the matter. A party must make the request to be heard within 30 days of service of notice that a matter is being judicially noticed.

28. FILING OF PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION AND RECORD ON APPEAL; ACTION BY THE BOARD:

The referee shall then submit to the Board's staff the Proposed Findings of Fact and Recommended Decision together with a summary of the evidence, the pleadings of the parties, and the exhibits offered by the parties, both those received into evidence and those not received. The Board's staff shall refer to the Board for its consideration the referee's Proposed Findings of Fact and Recommended Decision, the objections and any replies by the parties and the documents the Board considered at the time of its initial determination. After reviewing the documents referred to it by the Board's staff, the Board may:

- (a) Approve and adopt the proposed findings and the recommendations of the referee, or
- (b) Require a transcript or summary of all the testimony, plus all other evidence received by the referee. Upon the receipt thereof, the Board shall take such action as in its opinion is indicated by such evidence, or
- (c) Refer the matter back with or without instructions to the referee for further proceedings, or
- (d) Set the matter for hearing before itself. At such hearing the Board shall hear and decide the matter as if it had not been referred to the referee.

29. ORAL ARGUMENT IN SUPPORT OF OBJECTIONS TO REFEREE'S RECOMMENDED DECISION:

- (a) The Board will allow the presentation of oral argument in support of objections to the referee's recommended decision where the following requirements are met:
 - (1) Written objections to the referee's recommended decision must have been filed under Rule 27.
 - (2) Written notice of the intent to present oral argument must be given both to the chair of the Board and to opposing counsel no later than 10 days before the meeting at which the Board will consider the referee's recommended decision.
- (b) When a party has given notice of intent to present oral argument, a continuance to the next Board meeting will be granted only upon a showing of good cause made in writing and directed to the

chair of the Board. The Board shall determine if there is good cause for the continuance at the meeting at which the referee's recommended decision would otherwise be considered.

- (c) The order and time for oral argument shall be as follows:
- Party who requested oral argument (5 minutes)
 - Response (5 minutes)
 - Rebuttal to response (2-1/2 minutes)
 - Further argument and discussion (At Board's discretion)

If both parties submit objections, applicant's counsel shall address the Board first.

Time limits should not be construed as binding, but shall be at the discretion of the Board chair.

- (d) If a party who requested an opportunity to present oral argument wishes to withdraw the request, the party shall immediately notify the Board and opposing counsel.

30. BOARD'S DECISION AFTER REVIEW OF THE RECORD:

In any case where the Board makes a decision based upon a transcript or summary of all the testimony, plus all other evidence received by the referee, or where the Board sets the matter for hearing before itself, the Board may approve and adopt proposed findings and recommendations of the referee; otherwise, the Board shall direct the prevailing party to prepare proposed findings of fact and conclusions of law consistent with its tentative decision. The proposed findings of fact and conclusions of law shall be served on the unsuccessful

party who shall have 10 days after such service to serve and file written objections thereto. Thereafter, the Board shall consider such written objections, if any, and shall adopt such findings of fact and conclusions of law as it deems appropriate.

31. ALTERATION OF TIME REQUIREMENTS:

Nothing in these procedures is to be construed as preventing the parties from stipulating to lesser intervals than those prescribed above. The referee may for good cause shown, after giving both parties an opportunity to be heard, shorten or lengthen the times specified above.

32. DISMISSAL FOR LACK OF PROSECUTION:

(a) If, as a result of the applicant's failure to comply with the procedures specified above, the matter is not heard within three years after a request for hearing is granted by the Board, the case shall be dismissed with prejudice.

(b) Notwithstanding the above, no case shall be dismissed without six-months prior written notice to the applicant and the applicant's attorney that failure to commence a hearing within six months from the date of the notice will result in dismissal of the case with prejudice.

Rule 32 is not applicable to two-year review hearings.

33. SERVICE OF DOCUMENTS:

Unless otherwise provided, service of documents provided for in these rules may be made by mail or by personal service. The time requirements of Code of Civil Procedure Section 1013 shall govern all service by mail.

34. JUDICIAL REVIEW:

Code of Civil Procedure Section 1094.6 has been adopted and applies to judicial review of any decision of the Board or of the Los Angeles County Employees Retirement Association. (Adopted June 3, 1981.)



300 North Lake Avenue • Pasadena, Ca. 91101-4199
1-800-786-6464 • www.lacera.com