



## OCERS Administrative Procedure (OAP)

# Disability – Performance of Duty

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### I. Purpose

The purpose of this OCERS administrative procedure (OAP) is to describe how OCERS' Board of Retirement (Board) and the Board's Disability Committee evaluate incapacity for the performance of duty when determining eligibility for disability retirement. More specifically, how the member's "duty" is defined when assessing whether they are incapable of performing their job.

### II. Authority

This OAP is established pursuant to the Chief Executive Officer (CEO) Charter, section 8.f., which directs the CEO to develop staff policies and procedures to ensure effective and efficient administration of member benefits. The OAP is in conformance with Board Policy, the County Employees Retirement Law (California Government Code section 31450, et seq.) (CERL), and the Public Employees' Pension Reform Act (Government Code, sections 7522 - 7522.74) (PEPRA).

### III. Overview

A member of OCERS may be eligible for a disability retirement allowance if they become permanently incapacitated for the performance of duty.<sup>1</sup> If the member is incapacitated for duty due to an injury or illness arising out of and in the course of their employment, the disability is service-connected. If the member is incapacitated because of an injury or illness that did not arise

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<sup>1</sup> Gov. Code, § 31720:

Permanent incapacity

Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if:

- (a) The member's incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity, or
- (b) The member has completed five years of service, and
- (c) The member has not waived retirement in respect to the particular incapacity or aggravation thereof as provided by Section 31009.

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out of their employment, the disability is non-service connected. There are differences between service-connected and non-service-connected disability, including differences in the amount of the disability allowance, but those differences are not the topic of this OAP. The question of whether the member is permanently incapacitated from performing their usual and customary duties is the same for both.

The determination process for disability retirement is started once a member (or their employer) files an application for disability retirement with OCERS. The application must be filed while the member is still in service (still employed with the member employer), within four months of discontinuing from that service, within four months after the expiration of any period during which a presumption is extended beyond the discontinuance of service, or while, from the date of discontinuance to the time of application, the medical evidence shows they have been continuously unable to perform their regular job duties.<sup>2</sup>

It is the Board that must decide whether a member is permanently incapacitated for the performance of duty.<sup>3</sup> This factual issue is determined from the available information, including a medical examination.<sup>4</sup> If the proof received shows to the satisfaction of the Board that the member is permanently incapacitated, physically or mentally, for the performance of their duties, the Board will retire the member for disability. Usually, the disability retirement allowance is effective as of the date the application was filed.<sup>5</sup>

### **Finding permanent incapacity involves a two-step determination:**

1. Is the member substantially incapacitated from performing their usual duties; and, if so,
2. Is the incapacity permanent?

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<sup>2</sup> Gov. Code, §31722

<sup>3</sup> Gov. Code, § 31725

<sup>4</sup> Gov. Code, § 31723

<sup>5</sup> But not earlier than the day following the last day for which they received regular compensation (Gov. Code, § 31724).



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The focus of this OAP is on what constitutes the member's "usual duties." A "permanent incapacity" is a disability that is either permanent or of extended and uncertain duration, as established by the medical evidence and determined by the Board.

### IV. Evaluation of the Performance of Duty

Again, for a member to qualify for a disability retirement, the Board must find that the member is incapacitated for the performance of duty. The term "duty" is not defined in the Government Code, but OCERS is guided by the various court decisions that have interpreted what duty means in certain contexts.

OCERS will look to the member's usual and customary duties when evaluating incapacity. OCERS will consider whether the member's disability renders them incapable of performing the usual and customary duties of the job the member held at the time they became incapacitated. And by job, we mean any permanent position or assignment within the member's job classification.

In sum:

**To be incapacitated for the performance of duty, the member must be unable to substantially perform the usual and customary duties of any permanent position or assignment within the job classification they held at the time they became incapacitated, and that inability must be considered permanent.**

Furthermore, to establish disability, the member need not be incapable of performing *every single duty or task* that might arise within their job classification. Instead, the member's medical condition must result in a substantial inability to perform their usual duties.<sup>6</sup> A usual duty is a task regularly involved in the work, not one that is an unusual or uncommon occurrence.

**Thus, an inability to perform a job task that is a rare event does not demonstrate an incapacity for the performance of duty, unless the employer establishes that it is unable to accommodate the inability to perform that task.**

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<sup>6</sup> See *Mansperger vs. CalPERS* (1970) 6 Cal. App. 3d 873



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For example, consider a member whose job constitutes light work most of the time, but on rare occasions, they may have to lift heavy equipment without assistance from a co-worker. A medical limitation to avoid heaving lifting would not prove incapacitating because the medical limitation would not substantially interfere with performance of their usual duties.

It is also the case that an inability to perform a field assignment, which requires sustained standing and walking, does not necessarily establish incapacity when the employer offers an office assignment within the same job classification that does not include those physical requirements. The test is the ability to perform the job's usual duties, not whether the member can perform all the duties to which they might be assigned.<sup>7</sup> The member need not be able to perform any and all duties of the job.

OCERS first looks to the employer's official job classification or job description document to detail what those usual duties are. This information may be supplemented by other documentation provided by the employer and the member.

### **Alternate Work**

An employer may accommodate the employee's medical limitations within the member's existing job classification. If so, the member is not incapacitated if they can perform modified duties in their current assignment. In other words, OCERS will not consider the employee incapacitated even though they are unable to perform the "full range" of duties of a given job classification. The accommodation through modified duties, however, would have to be for an ongoing basis and not considered temporary.

For example, consider a member limited to light work due to their physical impairments, but heavy lifting is a usual duty of their job. As such, they could not perform the usual duties of their work. Their employer has a light-duty position within the member's job classification that the member can perform, but it is only temporary. Because it is a short-term assignment, the availability of that light-duty position would render the member eligible for disability retirement. On the other hand, if the employer permanently assigned them to that light job, the member would be denied disability retirement. By "permanent," we mean the position or assignment is not

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<sup>7</sup> See *Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 963

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limited to a specific duration. For example, a position would not be permanent if it would only continue until the employer hires the disabled member's replacement or will last only to the end of the current fiscal year.

**Hence, a member is not entitled to disability retirement if they are capable of modified work of ongoing and indeterminate duration within their job classification that is offered by their employer.**

The standard for disability is whether the member has lost the capacity to do the job they were performing when they became incapacitated. Their ability to work for their employer in a different job classification would not disqualify them for disability retirement. OCERS considers a member incapacitated for the performance of duty if their impairments preclude them from doing the job they were performing, regardless of whether there may be other positions in different job classifications with their employer they could still do. For example, an agency's general manager cannot be denied a disability retirement by proof that the duties of a caseworker remain within their capacity.

**Therefore, the usual duties of the member's position constitute the standard against which their incapacity is judged, not the functions of some other job to which they could be assigned.**

### Time Period Measured

An issue may arise as to what time period the Board will use to measure whether a member became incapacitated for the performance of duty. In circumstances where the member is an active on-leave employee, OCERS first measures their capacity at the point they were last performing their usual duties.<sup>8</sup> That is also the case where the member takes a regular retirement pending the resolution of their disability application.<sup>9</sup> There may be unusual circumstances where a member alleges that their disability began at some point after they were last on the job. If so, the latest time OCERS may measure to determine when the disability began is when the employer-

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<sup>8</sup> See *Meyers v. Board of Administration etc.* (2014) 224 Cal.App.4th 250

<sup>9</sup> Per Gov. Code, § 31725.7, a disability applicant who retires for service pending the disability determination and who is found not to be entitled to disability retirement waives the right to be returned to duty.

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employee relationship last existed, i.e., the last point where the member still had a right to return to the job if they had not become disabled.

It is important to note that there is a distinction between the availability of a member's job and their capacity to perform it. That is to say, the elimination of a member's job does not necessarily extinguish the member's right to a disability retirement. In that case, the member must establish that they became permanently incapacitated for the performance of duty at a time before the employer eliminated the position.

For example, a member would still be eligible for disability if they suffered a permanently incapacitating injury, filed a disability application, and then, at some point later, the agency eliminated their position. However, if their injury occurred *after* the position was eliminated, they would be ineligible because they could not show they were disabled when the job existed.

### **The Americans with Disabilities Act (ADA) and Workers' Compensation**

A member who files for disability retirement with OCERS may also have filed claims under the ADA or Workers' Compensation law. The rules that govern OCERS disability determinations are different than those of the ADA and Workers' Compensation. However, the terminology used may be similar and this could lead to confusion. OCERS disability determinations are governed by the CERL. The ADA is a federal law that requires covered employers to provide reasonable accommodations to employees with disabilities. The Board has no authority to enforce the ADA or to force an employer to provide reasonable accommodations to a member. However, in determining whether a member is permanently incapacitated for the performance of duty, the Board will consider those accommodations that have been or should be offered by the employer so that the member can continue to work in their position.

Also, the employer may find that the member is unable to perform an "essential job function," a standard under the ADA, and conclude that the employee is unable to continue working. The Board may determine, however, that the member is able to substantially perform their usual duties, even if they are unable to perform a duty the employer considers an essential job function.

In addition, the legal standards for disability retirement and those used in the Workers' Compensation context are different. A member's status or receipt of benefits in the Workers' Compensation system is not binding upon OCERS. For example, in Workers' Compensation, a "permanent and stationary" rating means the point in time when the employee has reached maximum medical improvement, in that their condition is unlikely to change substantially in the next year with or without medical treatment. It does not necessarily mean they are "permanently incapacitated" or even that they have any limitations at all, as they may have fully recovered.



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Disability retirement with OCERS is under an entirely different regulatory scheme than the ADA and Workers' Compensation and thus uses distinct terminology and legal standards.

Where the employer accommodates or reemploys the employee by placing them in a different position, that member will still be considered incapacitated for the performance of duty for disability retirement purposes with OCERS. Should that different position have a lower rate of pay than the position for which the member was incapacitated, OCERS will pay a "supplemental disability allowance" in an amount equal to the difference in salary between the two positions rather than a disability retirement allowance.<sup>10</sup> However, that allowance will not be greater than the disability retirement allowance to which the member would otherwise be entitled.

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<sup>10</sup> Gov. Code, § 31725.65