

OCERS Administrative Procedure (OAP) Disability Presumptions

I. Purpose

The purpose of this OCERS administrative procedure (OAP) is to describe how OCERS' Board of Retirement (Board), the Board's Disability Committee, and the OCERS Chief Executive Officer (CEO) apply the rules governing disability presumptions under Government Code sections 31720.5, 31720.6, 31720.7, 31720.9, 7523.1, and 7523.2.

II. Authority

This OAP is established pursuant to the CEO Charter, which directs the CEO to develop staff policies and procedures to ensure the 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. Introduction

A member of OCERS is eligible for a service-connected disability retirement allowance if:

1. The Board finds the member permanently incapacitated, physically or mentally, from performing the usual duties of any permanent assignment within their job classification;ⁱ and
2. The incapacity arose out of and in the course of their employment, and such employment contributed substantially to their being incapacitated.ⁱⁱ

This "arose out of and in the course of employment" element (sometimes referred to as AOE/COE or industrial causation) is necessary for service-connection. The member must establish that the incapacitating injury or disease arose out of and in the course of employment by offering evidence of a real and measurable connection between the employment and the injury or illness that causes the permanent incapacity.ⁱⁱⁱ The member has the burden to prove this connection by a preponderance of the evidence.

Ultimately, the Board determines from the evidence whether there is or is not a sufficient causal connection between the employment and the incapacity for the disability to be service-connected.

The disability presumptions ("heart trouble" at Gov. Code, § 31720.5, cancer at § 31720.6, blood-borne infectious disease or MRSA skin infection at § 31720.7, and exposure to biochemical substances at § 31720.9) provide a means of establishing the service-connected element for disability retirement when the member is unable to prove directly that their employment substantially contributed to their incapacity. In addition, there is a COVID-19 presumption that is effective until January 1, 2024.

OCERS Administrative Procedure (OAP)

Disability Presumptions

These presumption statutes do not create a presumption that the member is incapacitated for duty. **The member must still prove that they are permanently incapacitated. Then, if a preponderance of the evidence establishes the other prerequisites for triggering the presumption, the incapacity is presumed to be service-connected.**

When the criteria of a disability presumption are met, the member is relieved of the burden of proving that the incapacitating injury or illness arose out of and in the course of employment, and industrial causation is presumed to exist. Accordingly, the member's burden is only to prove the existence of the prerequisites specified in the Government Code section that give rise to the presumption of service-connection.

By establishing the criteria of one of the disability presumptions, the member does not have to prove industrial causation; instead, OCERS must disprove it.

The presumptions are rebuttable, i.e., they may be overcome by contrary evidence. A rebuttable presumption establishes the existence of a fact unless evidence is introduced which would support a finding that the presumed fact does not exist.^{iv} For example, the heart trouble presumption (Gov. Code, § 31720.5) shifts the burden of proof on the issue of service-connection from the public safety worker, who would otherwise have to prove that their heart trouble arose out of and in the course of employment and that the employment contributed substantially to the disability, to the employer to prove that the heart trouble did not arise out of and occur in the course of employment.

IV. Heart Trouble Presumption

If a member in one of the designated occupations has at least five years of service credit and becomes permanently incapacitated due to heart trouble, it will be presumed that the heart trouble developed out of and in the course and scope of their employment, unless there is evidence of a contemporaneous non-industrial cause. The member's resulting disability retirement will be deemed service-connected.

Prerequisites for application of the heart trouble presumption under Gov. Code, § 31720.5

1. The member must be a safety member,^v a fireman member, or a member in active law enforcement

- "Fireman member" and "member in active law enforcement" includes a member engaged in active fire suppression or active law enforcement *regardless* of whether they are a safety member.
- "Active law enforcement" includes positions with principal duties which pertain to the active investigation and suppression of crime, the arrest and detention of

OCERS Administrative Procedure (OAP) Disability Presumptions

criminals, and the administrative control of such duties in the offices of the sheriff and district attorney, including Sheriff's Special Officers (SSOs).^{vi}

2. The member must have at least five years of service

- The member must have completed five years or more of service with OCERS, another retirement system established under the CERL or the Public Employees Retirement System (CalPERS), or a pension system established by the County Peace Officers' Retirement Law (Gov. Code, §§ 31900, *et seq.*), or the County Fire Service Retirement Law (Gov. Code, §§ 32200, *et seq.*). The "five years or more of service" does not have to be entirely with the county from which the member is retiring.

3. The member must develop heart trouble

- "Heart trouble" is any disease or malfunction of the heart.
- The heart trouble must begin prior to the termination of service or the last day on which the member worked in the specified occupation.

Once the member establishes that they are in one of the designated occupations, have sufficient years of service, and developed heart trouble that is permanently incapacitating, the presumption of service connection will apply unless OCERS rebuts it.

The presumption includes a non-attribution provision stating that the heart trouble will not be attributed to any disease existing before the development or manifestation of the heart trouble. However, the presumption may be rebutted by, for example, proof that a contemporaneous nonwork-related event was the cause of the heart trouble.

V. Cancer Presumption

If a specified safety member with at least five years of service credit becomes permanently incapacitated due to cancer and establishes they were exposed to a known carcinogen as a result of the performance of their job duties, it will be presumed that the cancer developed out of and in the course of employment. The resulting disability retirement allowance will be service-connected.

Prerequisites for application of the cancer presumption under Gov. Code, § 31720.6

1. Occupation

- The member must be, or must have been, a safety member,^{vii} a firefighter, or a member in active law enforcement.^{viii}

OCERS Administrative Procedure (OAP) Disability Presumptions

- "Firefighter" and "member in active law enforcement" includes a member engaged in active fire suppression or active law enforcement *regardless* of whether they are a safety member.
- "Member in active law enforcement " includes Sheriff's Special Officers (SSOs).

2. At least five years of service

- The member must have completed five years or more of service with OCERS, another retirement system established under the CERL or the Public Employees Retirement System (CalPERS), or a pension system established by the County Peace Officers' Retirement Law (Gov. Code, §§ 31900, *et seq.*), or the County Fire Service Retirement Law (Gov. Code, §§ 32200, *et seq.*). The "five years or more of service" does not have to be entirely with the county from which the member is retiring.

3. The member develops cancer

4. Permanent Incapacity

- The member must be permanently incapacitated for the performance of duty because of the cancer to be entitled to the presumption.

5. Exposure to carcinogen

- The member must demonstrate that they were exposed to a "known carcinogen" due to the performance of job duties.
- "Known carcinogen" is defined as a carcinogenic agent recognized by the International Agency for Research on Cancer (IARC) or the Director of the Division of Industrial Accidents.^{ix}
- There must be substantial evidence of a real and measurable exposure to a known carcinogen, albeit not necessarily a carcinogen that causes the cancer from which the member suffers.

6. Time limit

- The time limitation in Section 31720.6, subdivision (c), must not have been exceeded. This presumption is extended to a member following termination of service for a period of three calendar months for each full year of the requisite service. The extension is from termination, but not to exceed sixty months commencing with the last day actually worked in the specified capacity, not from the date that service is discontinued. Therefore, if the member last worked in the specified occupation sixty months or more before the termination of service, the presumption does not apply.

OCERS Administrative Procedure (OAP) Disability Presumptions

Once the member establishes the six prerequisites above, the presumption of service connection will apply unless it is rebutted by OCERS.

The presumption is rebuttable by OCERS and may be controverted by evidence that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer, *provided* that the primary site of the cancer has been established. Therefore, to rebut the presumption of service-connection, evidence must be provided that (1) the primary site of the cancer is established and (2) that exposure to the identified carcinogen is not reasonably linked to the member's disabling cancer.

The presumption includes a non-attribution provision stating that the cancer will not be attributed to any disease existing prior to the development or manifestation of the cancer. Therefore, OCERS may not rebut the presumption by attributing the cancer to disease the member had previously.

VI. Blood-borne Infectious Disease Presumption

If a member in one of the designated occupations and becomes permanently incapacitated due to exposure to a blood-borne infectious disease or methicillin-resistant *Staphylococcus aureus* skin infection (MRSA), it will be presumed that the disease developed out of and in the course of their employment, unless rebutted by contrary evidence. The resulting disability retirement will thus be considered service-connected.

Prerequisites for application of the blood-borne infectious disease presumption under Gov. Code, § 31720.7

1. Occupation

- The member must be, or must have been, a safety member,^x a firefighter, a county probation officer, or a member in active law enforcement.^{xi}
- A "member in active law enforcement" includes those who are not classified as a safety member and Sheriff's Special Officers (SSOs).
- *Absent from the blood-borne infectious disease presumption is the requirement that the member have five years of service.*

2. Member develops blood borne disease or MRSA

- "Blood borne infectious disease" is defined as "a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including, but not limited to, those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations"(Gov. Code, § 31720.7, subsection (d)).

OCERS Administrative Procedure (OAP) Disability Presumptions

- The Department of Industrial Relations has defined the following as blood borne pathogens: hepatitis B virus (HBV), hepatitis C virus (HCV), and human immunodeficiency virus (HIV).^{xii}
- Proof of on-the-job exposure to a blood borne infectious disease or MRSA is *not* required for the presumption to arise.

3. Member becomes incapacitated for duty

- The permanent incapacity must result from blood borne infectious disease or MRSA skin infection.

4. Time limitation to develop disease not exceeded

- In the case of a blood-borne infectious disease, this presumption is extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed sixty months, commencing with the last date actually worked in the specified capacity. For example, a firefighter with three years of service would be eligible for the presumption if the disease developed within nine months of the date they stopped working.
- In the case of a MRSA skin infection, the presumption is extended to a member following termination of service for a period of ninety days, commencing with the last day actually worked in the specified capacity.

The presumption is rebuttable by other evidence. To rebut the presumption, OCERS must prove the member did not meet one or more prerequisites.

The presumption includes a non-attribution provision stating that the blood-borne infectious disease or MRSA will in no case be attributed to any disease or skin infection existing prior to its development or manifestation.

VII. Exposure to Biochemical Substances Presumption

If a member in one of the designated occupations becomes ill or dies due to exposure to a biochemical substance, it will be presumed that the illness or injury resulting from exposure to a biochemical substance developed out of and in the course of employment, unless rebutted by contrary evidence. Thus, the resulting disability will be considered service-connected.

OCERS Administrative Procedure (OAP) **Disability Presumptions**

Prerequisites for application of the biochemical substance exposure presumption under Gov. Code, § 31720.9

1. Occupation

- The member must be a Peace Officer (as defined in Penal Code sections 830.1 to 830.5) or Firefighter
- Section 31720.9 does not expressly include those who are engaged in active law enforcement or active firefighting who are not safety members but does exclude a member whose principal duties are clerical or otherwise do not fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers (Gov. Code, § 31720.9, subsection (d)).
- *Absent from the biochemical substance presumption is the requirement that the member have five years of service.*

2. Exposure to a biochemical substance

- The member must identify the actual exposure to a weaponized biological or chemical agent, or nuclear or radiological agent, as defined in Penal Code §11417.^{xiii}

3. Member must be permanently incapacitated from exposure to a biochemical substance

- The member must become ill (or die) due to exposure to a biochemical substance, and the illness must render them permanently incapacitated for the performance of duty.

4. The illness (or death) resulting from the exposure must manifest while in service or within the extended period.

- This presumption is extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed sixty months from the last date actually worked in the specified capacity.

The presumption may be rebutted by other evidence. The presumption includes a non-attribution provision, stating that the illness that develops or manifests due to the exposure will not be attributed to any illness existing prior to that development or manifestation. However, OCERS may rebut the presumption by, for example, evidence that there was no exposure, that the member is not incapacitated by the resulting illness, or by scientific evidence that there is no reasonable link between the specific exposure and the incapacitating illness.

OCERS Administrative Procedure (OAP) **Disability Presumptions**

VIII. COVID-19 Presumption *(effective only until January 1, 2024)*

If a member retires for disability due, in whole or in part, to a COVID-19-related illness, it will be presumed that the disability arose out of, or in the course of, the member's employment.^{xiv} Thus, the resulting disability retirement will be service-connected unless the presumption is rebutted by contrary evidence.

Note that this presumption is not restricted to safety members and there is no requirement of at least five years of service.

This COVID-19 disability retirement presumption will remain in effect until January 1, 2024.^{xv}

ⁱ See OCERS Administrative Procedure: Disability – Performance of Duty

ⁱⁱ Gov. Code, § 31720

ⁱⁱⁱ *Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 577-579

^{iv} Evid. Code, §§ 604 and 606

^v § 31469.4. "Safety members" defined

"Safety member" means persons employed as probation officers, juvenile hall or juvenile home group counselors, and group supervisors who are primarily engaged in the control and custody of delinquent youths who must be detained under physical security in order not to be harmful to themselves or others.

The provisions of this section shall not be applicable in any county until the board of supervisors by resolution make the provisions applicable.

Gov. Code, § 31469.4

^{vi} 22 Ops.Cal.Atty.Gen. 227 (1953) at p. 229

^{vii} "Safety member" as defined by Gov. Code, § 31469.4

^{viii} "Active law enforcement" includes positions with principal duties which pertain to the active investigation and suppression of crime, the arrest and detention of criminals, and the administrative

OCERS Administrative Procedure (OAP) Disability Presumptions

control of such duties in the offices of the sheriff and district attorney, including Sheriff's Special Officers (SSOs).

^{ix} For the IARC list of carcinogens go to the IARC web site at www.iarc.fr/. For the list of carcinogens recognized by the Director of the Division of Industrial Accidents, see Cal. Code Regs., tit. 8, § 330.

^x "Safety member" as defined by Gov. Code, § 31469.4

^{xi} "Member in active law enforcement" for purposes of Section 31720.7 means members employed by a sheriff's office, including Sheriff's Special Officers (SSOs), by a police or fire department of a city, county, city and county, or district or another public or municipal corporation or political subdivision, or who are described in Chapter 4.5 of the Penal Code, or members who are employed by a county forestry or firefighting department or unit, except any of those members whose principle duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers, and includes a member engaged in active law enforcement who is not classified as a safety member.

^{xii} Cal. Code Regs., tit. 8, § 5193

^{xiii} § 11417. Definitions

(a) For the purposes of this article, the following terms have the following meanings:

(1) "Weapon of mass destruction" includes chemical warfare agents, weaponized biological or biologic warfare agents, restricted biological agents, nuclear agents, radiological agents, or the intentional release of industrial agents as a weapon, or an aircraft, vessel, or vehicle, as described in Section 34500 of the Vehicle Code, which is used as a destructive weapon.

(2) "Chemical Warfare Agents" includes, but is not limited to, the following weaponized agents, or any analog of these agents:

(A) Nerve agents, including Tabun (GA), Sarin (GB), Soman (GD), GF, and VX.

(B) Choking agents, including Phosgene (CG) and Diphosgene (DP).

(C) Blood agents, including Hydrogen Cyanide (AC), Cyanogen Chloride (CK), and Arsine (SA).

(D) Blister agents, including mustards (H, HD [sulfur mustard], HN-1, HN-2, HN-3 [nitrogen mustard]), arsenicals, such as Lewisite (L), urticants, such as CX; and incapacitating agents, such as BZ.

OCERS Administrative Procedure (OAP) Disability Presumptions

(3) "Weaponized biological or biologic warfare agents" include weaponized pathogens, such as bacteria, viruses, rickettsia, yeasts, fungi, or genetically engineered pathogens, toxins, vectors, and endogenous biological regulators (EBRs).

(4) "Nuclear or radiological agents" includes any improvised nuclear device (IND) which is any explosive device designed to cause a nuclear yield; any radiological dispersal device (RDD) which is any explosive device utilized to spread radioactive material; or a simple radiological dispersal device (SRDD) which is any act or container designed to release radiological material as a weapon without an explosion.

(5) "Vector" means a living organism or a molecule, including a recombinant molecule, or a biological product that may be engineered as a result of biotechnology, that is capable of carrying a biological agent or toxin to a host.

(6) "Weaponization" is the deliberate processing, preparation, packaging, or synthesis of any substance for use as a weapon or munition. "Weaponized agents" are those agents or substances prepared for dissemination through any explosive, thermal, pneumatic, or mechanical means.

(7) For purposes of this section, "used as a destructive weapon" means to use with the intent of causing widespread great bodily injury or death by causing a fire or explosion or the release of a chemical, biological, or radioactive agent.

(b) The intentional release of a dangerous chemical or hazardous material generally utilized in an industrial or commercial process shall be considered use of a weapon of mass destruction when a person knowingly utilizes those agents with the intent to cause harm and the use places persons or animals at risk of serious injury, illness, or death, or endangers the environment.

(c) The lawful use of chemicals for legitimate mineral extraction, industrial, agricultural, or commercial purposes is not proscribed by this article.

(d) No university, research institution, private company, individual, or hospital engaged in scientific or public health research and, as required, registered with the Centers for Disease Control and Prevention (CDC) pursuant to Part 113 (commencing with Section 113.1) of Subchapter E of Chapter 1 of Title 9 or pursuant to Part 72 (commencing with Section 72.1) of Subchapter E of Chapter 1 of Title 42 of the Code of Federal Regulations, or any successor provisions, shall be subject to this article.

Pen. Code, § 11417

^{xiv} Gov. Code, § 7523.1

^{xv} Gov. Code, § 7523.2