

CR 13-029

State of Wisconsin
Department of Employee Trust Funds
Wisconsin Retirement Board

FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #13-029

AN ORDER to renumber and amend ETF 52.02 (4m); to amend 52.02 (2), 52.04 (4), 52.06 (3) (b), 52.06 (3) (c), 52.06 (3) (d), 52.06 (3) (e), 52.06 (5) (a), 52.06 (5) (Note), 52.06 (6) (a), 52.06 (7) (a), 52.06 (7) (b), 52.06 (7) (b) 1, 52.06 (7) (b) 2, 52.06 (7) (b) 3, 52.06 (7) (c), 52.07 (3) (b), 52.07 (3) (c), 52.07 (3) (d), 52.07 (4), 52.08 (3), 52.12 (1) (a) 1, 52.12 (1) (b), 52.12 (1) (c), 52.16 (4) (a), 52.16 (4) (c), 52.28 (2) (a) and to create ETF 52.06 (7)(bm), 52.15 and 52.22 (3) relating to the administration of the Duty Disability Program under § 40.65, Stats.

Agency Person to be Contacted for Questions

Please direct any questions about this rule-making to Mary Alice McGreevy, Compliance Officer, Office of Policy, Privacy and Compliance, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Telephone: (608) 267-2354. E-mail address: maryalice.mcgreevy@etf.wi.gov.

Statement Explaining Need for Rule

This rule-making is needed to clarify the existing rule regarding the administration of the Duty Disability Program and streamline the process of applying for and making determinations regarding the Duty Disability benefit.

Analysis Prepared by the Department of Employee Trust Funds

1. Statutes Interpreted:
Sections 40.65, 891.45, 891.453 and 891.455 Stats., relating to the Duty Disability Program.
2. Statutory Authority:
Section 40.65 Stats.
3. Explanation of Agency Authority:

By statute, the ETF Secretary is expressly authorized, with appropriate board approval, to promulgate rules required for the efficient administration of any benefit plan established in ch. 40 of the Wisconsin statutes. Also, each state agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency if the agency considers it necessary to effectuate the purpose of the statute.

This rule is intended to clarify the existing rule regarding the administration of the Duty Disability Program and streamline the process of applying for and making determinations regarding the Duty Disability benefit. The chapter was promulgated in its entirety in 1998, and has not been amended since.

This rule is not subject to s. 227.135 (2), as affected by 2011 Wis. Act 21.

4. Related Statute or Rule:

Sections 40.65, 891.45, 891.453 and 891.455, Stats.

5. Plain Language Analysis:

Definitions: ETF 52.02 (1) (m) – “fire fighter” is from the renumbered and amended 52.02 (4m) so as to not conflict with s. 40.02 (48), Stats., that an employer determines principal duties for the protective classification. The renumbering is required because the term “municipal” was removed, and the section would have been out of alphabetical order.

ETF 52.02 (2) “light duty” is amended to clarify that either an employer or physician may determine the limiting of a participant’s job duties.

ETF 52.04 (4) is amended to include payments to spouse, domestic partner or adjudicated guardian.

ETF 52.06 (3) (b) is amended to clarify that either an employer or physician assigns an employee to light duty irrespective of the availability of such a position.

ETF 52.06 (3) (c), (d) & (e) are amended to remove “merely” from the phrase “merely temporary” and clarify when written rules, ordinances, policies or agreements are necessary.

ETF 52.06 (5) (a) is amended to clarify that medical reports for applicants are paid for by the applicant, and one must be from a specialist, and the Department does not approve or certify specialists.

ETF 52.06 (5) (Note) is amended to fix the mailing address of the Department.

ETF 52.06 (6) (a) is amended to clarify when an applicant may withdraw an application for duty disability benefits.

ETF 52.06 (7) (a) is amended to clarify language.

ETF 52.06 (7) (b) is amended to clarify requirements for submitting certain duty disability applications under presumption statutes for heart, lung disease and certain cancers.

ETF 52.06 (7) (b) (1) & (2) are amended to clarify that service need not have been continuous and the current employer of a fire fighter may verify and certify past qualifying service.

ETF 52.06 (7) (b) (3) is amended to clarify how an employer certifies a fire fighter’s qualifying medical examination.

ETF 52.06 (7) (bm) is created to clarify requirements for employer certification when applying for duty disability benefits pursuant to s. 891.453, Stats.

ETF 52.06 (7) (c) is clarified regarding the use of evidence when the Department determines eligibility for duty disability benefits based on certain presumptive diseases.

ETF 52.07 (3) (b) is amended to clarify that the employer assigns the applicant to light duty even if a light duty position isn't available.

ETF 52.07 (3) (c) & (d) are amended to clarify what constitutes a reduction in pay for purposes of duty disability benefits administration.

ETF 52.07 (4) is amended to clarify and remove "merely" from the phrase "merely temporary."

ETF 52.08 (3) is amended to clarify that an employer or a physician may characterize a disability as temporary and then amend that determination.

ETF 52.12 (1) (a) 1, (1) (b) & (1) (c) are amended to clarify what is included in "monthly salary" for the purpose of administering duty disability benefits.

ETF 52.15 is created section to clarify how duty disability benefits are reduced based on years of service.

ETF 52.16 (4) (a) & (4) (c) are amended to clarify how worker's compensation benefits payable to a participant affect the participant's duty disability benefit.

ETF 52.22 (3) is created to clarify the limitations of applying for duty disability benefits based on certain presumptive diseases.

ETF 52.28 (2) (a) is amended to include certain determinations for duty disability benefits under presumptive disease statute 891.453, Stats. among appealable determinations.

6. Summary of, and Comparison with, Existing or Proposed Federal Regulations:
None
7. Comparison with Rules in Adjacent States
Please see attached Fiscal and Economic Impact Analysis.
8. Summary of Factual Data and Analytical Methodologies:
The proposed rule is intended to clarify ETF's rules regarding the Duty Disability Program.
9. Accuracy, Integrity, Objectivity and Consistency of Data:
The present rule changes were a result of examination of the Duty Disability Program, as administered, by the Disability Bureau of ETF. ETF conducted analysis with integrity in an accurate, objective, and consistent manner in accordance with its fiduciary responsibilities to its members.
10. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of Economic Impact Report:
The rule does not have an effect on small businesses because private employers and their employees do not participate in, and are not covered by, the Wisconsin Retirement System.
11. Effect on small business:

There is no effect on small business.

12. Agency contact person:

Mary Alice McGreevy, Compliance Officer, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Phone: 608-267- 2354; E-mail: maryalice.mcgreevy@etf.wi.gov

13. Place where comments are to be submitted and deadline for submissions:

Comments may be submitted to the contact person no later than 4:30 p.m., Wednesday, May 29. The public hearing will be held at 11 a.m. on Wednesday, May 15, 2013 in conference room GB of the Wisconsin Employee Trust Fund building at 801 W. Badger Rd, Madison, WI 53713.

14. Proposed Effective Date:

This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided by s. 227.22 (2) (intro.), Stats.

15. Free Copies of Proposed Rule:

Copies of the proposed rule are available without cost from the Office of the Secretary, Department of Employee Trust Funds, P.O. Box 7931, Madison, WI 53707-7931. The telephone number is: (608) 266-1071.

Text of Proposed Rule

- Section 1. ETF 52.02 (4m) is renumbered ETF 52.02 (1m) and amended to read:**
ETF 52.02 (1m) "Municipal fire "Fire fighter" means:
An employee of the fire department of a participating employer ~~other than the state or a state agency,~~ who was classified for that employment as a protective occupation participant ~~and whose employment by the fire department was not subject to title II of the federal social security act. The term does not include a fire department employee who spends more than 49% of his or her working hours engaged in duties other than active fire suppression or prevention. Telephone operator, clerk, stenographer, machinist or mechanic duties, for example, are not active fire suppression or prevention.~~
~~(b) For purposes of s. 891.455, Stats., the term does not include a person who did not meet the qualifications of par. (a) for a period of at least 10 years and who spent at least two-thirds of his or her working hours for that period engaged in active fire suppression or prevention as defined in s. 40.02 (48) (b) (2), Stats.~~
- Section 2. ETF 52.02 (2) is amended to read:**
ETF 52.02 (2) "Light duty" means the employer's limiting of the participant's job duties as determined by the employer or the participant's physician because of medically imposed restrictions associated with an apparent disability, or the employer's assignment of the participant to another position, the duties of which the participant is capable of performing notwithstanding the apparent disability, and which does not cause the participant to be reclassified to a category other than protective occupation participant.
- Section 3. ETF 52.04 (4) is amended to read:**
ETF 52.04 (4) PAY BENEFITS. The department shall pay the net duty disability benefits payable to a participant, spouse or domestic partner, or to an adjudicated guardian, as applicable. Payment shall be made on the first day of each month for the previous month.
- Section 4. ETF 52.06 (3) (b), (c), (d), (e), (5) (a), (5) (Note), (6) (a), (b) and (7) (a) 2 and (b) are amended to read:**
ETF 52.06 (3)(b) Assigned to light duty by employer or physician due to disability, on other than a ~~merely~~ temporary basis regardless of whether a light duty position is available.
(c) Pay reduced due to disability, on other than a ~~merely~~ temporary basis.
(d) Position reduced due to disability, on other than a ~~merely~~ temporary basis.
(e) Promotion specifically prohibited due to disability by employer rules, ordinances, policies or written agreements, on other than a ~~merely~~

temporary basis. The rule, ordinance, policy or ~~written~~ agreement shall be written and expressly identified or a copy attached to the application.

ETF 52.06 (5) (a) Application materials; medical reports.

Upon request, the department shall provide a blank copy of the currently approved application form and a blank copy of the currently approved medical report form to a participant. ~~Upon receipt of an application form and a medical report from a physician chosen by the applicant, the department shall provide the applicant with the name of at least one physician approved by the department to complete a second medical report at the applicant's expense. The applicant shall provide 2 medical reports at the applicant's expense. One report must be from a physician who specializes in the area of disability. If the first medical report from the physician chosen by the applicant received by the department is not a qualifying medical report, the department shall advise the applicant that it will be required to the department will deny the application but that the applicant may nevertheless wish to obtain the second medical report from a physician approved by the department. another physician to include in the applicant's file as supporting evidence if the applicant chooses to file an appeal under ETF 52.28.~~ The department may, by written notice to the applicant, establish a time limit of at least 60 days for submission of the second report.

ETF 52.06 (5) Note: The "Duty Disability Application," form ET-5311, and ~~an initial "Duty Disability Medical Report," form ET-5312,~~ are available free upon request from the Department of Employee Trust Fund, ~~Division of Insurance Services, Disability Programs Bureau, Funds,~~ P.O. Box 7931, Madison WI 53707. Outdated versions should not be used and may be rejected.

ETF 52.06 (6)(a) Voluntary withdrawal. A Except as otherwise provided in this paragraph, a participant may withdraw his or her application and, upon withdrawal, the application is void. An applicant may not withdraw his or her application after it has been approved by the department, but may waive future benefits by requesting a waiver from the department.

(b) Failure to submit medical reports. If the applicant fails to submit two qualifying medical reports within one year after the date on which the application was filed, and the department has not already denied the application, the application shall be ~~deemed to have been withdrawn with the same effect as under par. (a).~~ cancelled.

ETF 52.06 (7) (a) For each application for duty disability benefits, the department shall obtain from the employer one of the following:

1. A certification that the applicant is disabled as described in s. 40.65 (4), Stats., indicating the specific criterion under s. 40.65 (4) (c), Stats., which

has been satisfied, and an admission that the injury or disease leading to the disability was duty-related.

2. A statement by the employer that the employer believes the applicant does not qualify for duty disability benefits and the general basis for that belief.

(b) In addition to the requirements of par. (a), for each application for duty disability benefits pursuant to ss. 891.45 or 891.455, Stats., by a municipal fire fighter, the department shall obtain from the employer a certification including the following:

1. Whether the participant had served a total of 5 years or more ~~for that employer as a municipal~~ as a fire fighter within the meaning of s. ETF 52.02 ~~(4m)-(a) (1) (m)~~. The service need not have been continuous service. The current employer of a fire fighter may verify and certify past qualifying service as a firefighter for the purposes of this subsection.

2. Whether the participant had served at least 10 years ~~for that employer as a municipal~~ as a fire fighter within the meaning of s. ETF 52.02 ~~(4m)-(b) (1) (m)~~. The service need not have been continuous service. The current employer of a fire fighter may verify and certify past qualifying service as a fire fighter for the purposes of this subsection.

3. An attached copy of the qualifying medical examination given prior to the time the participant became a fire fighter for that employer ~~or a certification~~. If no qualifying medical examination is available, the employer must certify that there is no record of a medical examination- but one would have been required prior to the participant's hire date.

Section 5. ETF 52.06 (7) (bm) is created to read:

(bm) In addition to the requirements of par. (a), for each application for duty disability benefits pursuant to s. 891.453, Stats., the department shall obtain from the employer a copy of the qualifying medical examination given prior to the time the participant worked for that employer in a position listed in s. 891.453, Stats. If no qualifying medical examination is available, the employer must certify that there is no record of a medical examination, but that one would have been required prior to the participant's hire date.

Section 6. ETF 52.06 (7) (c) is amended to read:

(c) The department shall determine whether s. 891.45, 891.453 or 891.455, Stats., applies. ~~If either presumption applies the department may grant an application for duty disability benefits despite an employer assertion that the cancer or heart or respiratory impairment or disease underlying the disability is not due to the participant's occupation.~~ The presumptions under ss. 891.45, ~~891.453~~ and 891.455, Stats., are rebuttable. The department shall determine whether the applicant is eligible for benefits under s. 40.65, Stats., on the basis of evidence submitted pursuant to s. 40.65 (2) (b) 2. Stats.

Section 7. ETF 52.07 (3) (b), (c), (d) and (4) are amended to read:

52.07 (3) (b) The employer or physician assigns the applicant to light duty- regardless of whether a light duty position is available.

(c) The employer reduces the applicant's pay. Only a reduction in base pay regular monthly earnings meets the criteria requirement of this subsection. ~~Loss of shift differential payments, uniform allowances, or other collateral payments is~~ are not a reduction reductions of pay within the meaning of s. 40.65 (4) (c) 2., Stats. Receipt of temporary disability compensation under s. 102.43, Stats., in lieu of regular pay may be a reduction of pay for purposes of duty disability benefit eligibility when the employer does not make up the difference between workers' compensation and regular monthly earnings, and if the participant terminates employment while still receiving temporary disability compensation. A situation in which the participant is not working and is not receiving any earnings would be considered a reduction in pay.

(d) The employer reduces the applicant's position. Assigning a formerly full-time employee to a part-time position or reducing a part-time employee's hours is considered a reduction of position- for the purposes of this chapter. An employee who never returns to work is also considered to have received a reduction in position for the purposes of this chapter. Assigning the applicant to a position which does not satisfy the criteria under s. 40.02 (48), Stats., defining a protective occupation participant is a reduction of position- for the purposes of this chapter.

(4) TEMPORARY ACTIONS NON-QUALIFYING. Assignments to light duty, or reductions in pay or position or promotional opportunities, which are ~~merely~~ temporary in nature, such as actions taken to allow recovery, are not consistent with a permanent disability and do not qualify a participant for duty disability benefits.

Section 8. ETF 52.08 (3) is amended to read:

(3) REDUCTION OF PAY OR POSITION; ASSIGNMENT TO LIGHT DUTY. If eligibility for duty disability benefits is based upon a reduction of pay or position or assignment to light duty, then the qualifying date is the date on which the employee began the permanent reduction or assignment. For purposes of this subsection, a reduction or assignment is permanent even if initially characterized as temporary by the employer, or physician, if the reduction or assignment remains continuously in effect while the participant is recovering or his or her permanent condition is being assessed and the employer or physician then determines that it is necessary, because of the participant's disability, to make the reduction or assignment permanent, or that employment be terminated. If the participant is restored to the unreduced pay or position then a previous reduction in pay or position was not permanent. If the participant is assigned to full duty then a previous assignment to light duty was not permanent.

Section 9. ETF 52.12 (1) (a) 1, (1) (b) and (1) (c) are amended to read:

ETF 52.12 (1) (a) Regular monthly earnings. The participant's monthly earnings, as defined by s. 40.02 (22), Stats., as of the qualifying date, except as provided in subds. 1. and 2.

1. [https://docs.legis.wisconsin.gov/document/administrativecode/ETF52.12\(1\)\(a\)1](https://docs.legis.wisconsin.gov/document/administrativecode/ETF52.12(1)(a)1). Exclusions. All overtime—“Regular monthly earnings” for the purposes of this section do not include:

a. Overtime pay, any.

b. Any payments excluded from earnings by s. 40.02 (22) (b), Stats., or any.

c. Any periodic payments made during that any month which covered other periods of time, such as a lump sum longevity award, shall be subtracted from the earnings under this paragraph. Additions to pay which the participant was not eligible to receive on the qualifying date and amounts .

d. Amounts which are not earnings reportable to the Wisconsin retirement system may not be included in the amount under this paragraph.

ETF 52.12 (1) (b) Prorated cash payments. A prorated amount reflecting the monthly equivalent of periodic cash payments which are includable in the participant's annual Wisconsin retirement system earnings, except that any category or type of payment for which the participant did not qualify as of the qualifying date may not be included in this proration, regardless of the participant's previous receipt of, or entitlement to, the payments. This includes lump sum payments for accumulated leave that are made at least once per calendar year to all employees, within a bargaining unit, specific employment category, classification or those whose job description contains the same primary job duties, regardless of whether an employee terminates employment during that year. This includes any unused compensatory time that is converted to pay in a lump sum payment if not due to termination of employment. Such payments are divided by 12 and the result is added to the participant's regular monthly earnings. Lump sum payments may only be included as prorated cash payments if, as of the participant's duty disability qualifying date:

1. The participant would have been in a position that was eligible for the pro-rated lump sum payment regardless of if or when paid; and

2. The participant would have received the lump sum payment in the calendar year of the participant's duty disability qualifying date.

ETF 52.12 (1) (c) Regular and dependable overtime pay. A monthly prorated amount for overtime pay which was regularly and dependably received For the purposes of this chapter, regular and dependable overtime pay means hours that are worked or for which an employee is required to be on call or standby by the employer, above the normal work hours. For the purposes of this paragraph, normal work hours are 80

hours in a biweekly pay period unless otherwise specifically designated by union contract. Subject to subds. 1. and 2., As set forth in this paragraph, this amount shall be calculated by taking the number of overtime hours for which the participant was paid in the 5 calendar years preceding the calendar year of the qualifying date, dividing by 60, and multiplying the result by the hourly overtime rate to which the participant was entitled as of the qualifying date. If the participant has been employed by the employer for less than the preceding 5 years, the monthly average of all overtime hours paid shall be multiplied by the hourly overtime rate as of the qualifying date.

[https://docs.legis.wisconsin.gov/document/administrativecode/ETF52.12\(1\)\(c\)1](https://docs.legis.wisconsin.gov/document/administrativecode/ETF52.12(1)(c)1). ~~1. If the participant received no overtime from the employer in whose service the disability occurred during one of the 5 years preceding the calendar year of the qualifying date, then no overtime was regularly and dependably received.~~

~~2. If the participant was in a position not eligible for overtime pay on the qualifying date then no overtime pay may be included in the calculation of monthly salary. Eligibility for compensatory time off is not eligibility for overtime. No form of compensatory time off or paid, even if converted to pay, is overtime pay under this paragraph.~~

Section 10. ETF 52.15 is created to read:

ETF 52.15 Reduction of Duty Disability Monthly Salary Based on Years of Service.

(1) As of the date of receipt of the duty disability application, the department shall apply s. 40.65 (5) (a) Stats., as follows:

(a) If creditable service is 25 years or less, no reduction will be applied.

(b) If the participant is eligible for benefits under subchapter II of ch. 40, Wis. Stats., the reduction will be 0.5% for each month of creditable service over 25 years.

(c) If the participant is not eligible for benefits under subchapter II of ch. 40, Wis. Stats., the reduction will be 0.5% for each month of creditable service over 30 years.

(d) The duty disability monthly salary will not be reduced to less than 50% if the participant qualifies for benefits under s. 40.63, Stats., subchapter III of ETF 50, or disability benefits under OASDHI.

(2) For purposes of this section, to be eligible for benefits under subchapter II of ch. 40, Wis. Stats., on the date the duty disability application is received by the department, the participant must have terminated from covered employment and the participant may not have been approved for benefits under s. 40.63, Stats., or benefits under subchapter III of ETF 50.

(3) Except as otherwise provided in subsection (4), for purposes of this section, creditable service includes military service if, as of the date of receipt of the application:

(a) The service has already been credited to the participant's WRS record; or

(b) The department has received all documentation required for crediting military service for the participant.

(4) Military service will not be considered if the documentation required for crediting military service is received by the department after the date the department receives the duty disability application.

Section 11. ETF 52.16 (4) (a) and 52.16 (4) (c) are amended to read:

ETF 52.16 (4) Worker's Compensation. (a) Withholding requirement. Until the worker's compensation permanent disability benefits payable to the participant are paid or otherwise determined, the department shall withhold from each monthly payment of duty disability benefits an amount equal to 5% of the maximum monthly duty disability benefits, except as otherwise provided by s. ETF 52.14. ~~For purposes of this subsection, worker's compensation benefits become determined on the following date:~~
1. ~~For a case resolved by a compromise agreement, on the date one year after the later of the date the compromise was filed with the department of workforce development or its predecessor or the date an award was entered based on the compromise, provided no application is then pending to review, set aside, or modify the agreement.~~
2. ~~In all other cases, on the date an award decision becomes final and is not subject to further review.~~

ETF 52.16 (4) (c) Payable to the participant. Worker's compensation benefits payable to the participant, within the meaning of s. 40.65 (5) (b) 3., Stats., are all worker's compensation benefits other than amounts expressly identified in the worker's compensation order, or order approving a compromise settlement, as being paid ~~to an~~ as attorney fees, as medical expenses or as reimbursement for other costs, ~~or any~~ amounts awarded under ss. 102.18 (1) (bp) or 102.22 (1), Stats.

Section 12. ETF 52.22 (3) is created to read:

ETF 52.22 (3) LIMITATIONS. If a protective occupation participant who was approved for duty disability benefits dies of a disease listed under ss. 891.45, 891.453 or 891.455, Stats., but the benefit was not approved based on that disease, the surviving spouse or domestic partner is not eligible to apply for death benefits as a result of that disease.

Section 13. ETF 52.28 (2) (a) is amended to read:

ETF 52.28 (2) (a) The employer may appeal a determination granting an application for duty disability benefits, including determinations based upon ss. 891.45, 891.453 and 891.455, Stats.

(END OF RULE TEXT)

Section 14. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided by s. 227.22 (2) (intro.), Stats.