

Clearinghouse Rule 98-101

STATE OF WISCONSIN)
) SS
DEPARTMENT OF EMPLOYE TRUST FUNDS)

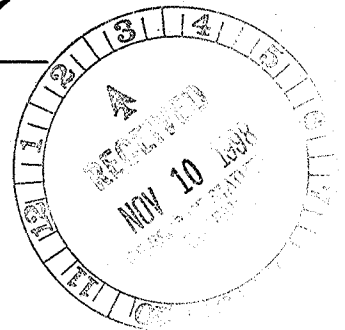
I, Eric O. Stanchfield, Secretary of the Department of Employee Trust Funds and custodian of the official records, certify that the annexed rule, relating to administration of the long-term disability insurance program, was duly approved and adopted by the State of Wisconsin Group Insurance Board on August 31, 1998, State of Wisconsin Retirement Board and Teachers Retirement Board on September 24, 1998, and by the State of Wisconsin Employee Trust Funds Board on September 25, 1998.

I further certify that this copy has been compared by me with the original on file in this department and that it is a true copy of the original, and of the whole of the original.

(no seal) IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the official
seal of the Department of Employee
Trust Funds at 801 West Badger
Road in the city of Madison, this

10th day of November 1998

Eric O. Stanchfield
Eric O. Stanchfield



1-1-99
98-101

State of Wisconsin
DEPARTMENT OF EMPLOYE TRUST FUNDS -- OFFICE OF THE SECRETARY
and
EMPLOYE TRUST FUNDS BOARD
GROUP INSURANCE BOARD

Clearinghouse Rule #CR-98-101.

AN ORDER creating ss. ETF 50.48 (4)(c), Wisconsin Administrative Code, relating to the administration of the long-term disability insurance program.

REPORT OF THE WISCONSIN DEPARTMENT OF EMPLOYE TRUST FUNDS
ON THE FINAL DRAFT RULE

This report, prepared in compliance with ch. 227, Wis. Stats., includes the following:

Part 1 - Analysis prepared by the Department of Employee Trust Funds;

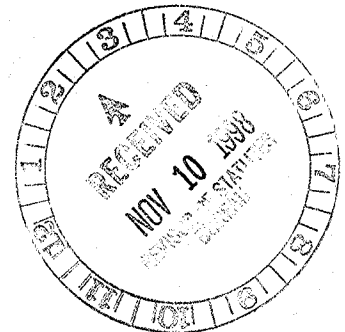
Part 2 - Rule text in Final Draft Form;

Part 3 - Recommendations of the Legislative Council Staff;

Part 4 - Report prepared pursuant to the provisions of s. 227.19 (3),
Wis. Stats., including:

- (a) Statement of the Need for the Rule;
- (b) Explanation of Modifications to the Rule after Public Hearings;
- (c) List of Persons Appearing or Registering an Opinion;
- (d) Response to Legislative Council Staff Recommendations;
- (e) Final Regulatory Flexibility Analysis.

Submitted by:
Disability Programs Bureau
Division of Insurance Services
Wisconsin Department Of Employee Trust funds
801 West Badger Road
P.O. Box 7931
Madison, Wisconsin 53707-7931
Telephone: (608) 267-9035



Analysis Prepared by the Wisconsin Department of Employee Trust Funds

Under §ETF 50.48(4)(b)1. and 3., Wis. Admin. Code, the Department shall deny the application for Long-Term Disability Insurance (LTDI) benefits if it determines the claimant does not meet the applicable requirements or if any of the following apply:

- The department receives a statement from the employer certifying that the employee's participating employment has been terminated, or the employee is on a leave of absence and not expected to resume active service, for a reason other than the medically determinable impairment described in the claimant's application.
- The department receives a certification from the employer denying that the claimant is totally and permanently disabled or with respect to a protective employee denying that the claimant is likely to be permanently disabled to the extent that the claimant can no longer perform the duties required by the claimant's position.

The rule will clarify that the Group Insurance Board shall approve the LTDI benefit if the sole basis for denial was the employer's negative certification and it finds that the employer was unreasonable and incorrect in submitting the negative certification.

General Summary of Rule

This rule applies to the LTDI program that is available to 1) employees who begin or resume covered Wisconsin Retirement System (WRS) employment on or after October 16, 1992, and 2) employees who have been continuously employed under the WRS since before October 16, 1992, and are eligible for coverage under the WRS disability program, but elect coverage under the LTDI program. The LTDI program will eventually replace the WRS disability program under §40.63, Wis. Stats.

To be eligible for a LTDI benefit, the participant must have earned at least .33 years of creditable service in five out of the last seven years. Two physicians approved or appointed by the Department must certify that the participant is totally and permanently disabled and that the disability prevents the participant from being gainfully employed in any occupation. Special eligibility requirements for certain protective participants apply if they become disabled after reaching age 50 but before reaching age 55 and have at least 15 years of creditable service. If the participant applies for the LTDI benefit under the special provisions, the two physicians must certify that the participant can no longer efficiently and safely perform the duties of the claimant's position as a protective occupation employee, and the condition is likely to be permanent. In addition to meeting the service requirement and the medical definition, the employer is also required to certify that the participant ceased employment because of a

disability and that the participant is totally and permanently disabled. In the case of the protective participant who is applying for LTDI benefits under the special provisions, the employer is required to certify that the employee ceased employment due to a disability that is permanently disabling to the extent that the employee can no longer efficiently and safely perform the duties required by the claimant's position.

The Department is required to deny a LTDI application for benefits if 1) the employer certifies that the employee's participating employment has been terminated, or the employee is on a leave of absence and not expected to resume active service, for a reason other than the claimed disability, or 2) the employer denies that the claimant is totally and permanently disabled. With respect to a claimant who is a protective participant who is applying under the special provisions, the employer denies that the claimant is likely permanently disabled to the extent that the claimant can no longer efficiently and safely perform the duties required by the claimant's position.

In the disability claims where the sole reason for denial of LTDI benefits is based on the negative certification by the employer, the rule provides authority to the Group Insurance Board to determine that the employer may have been unreasonable and incorrect in submitting the negative certification. If it is determined the employer's action was unreasonable and incorrect, the Group Insurance Board's decision shall include an order to the employer to amend the certification and an order to the Department to process the LTDI application when the amended certification is received. The rule provides consistent application of the Group Insurance, Wisconsin and Teachers Retirement Boards' authority in administering the LTDI and the regular disability programs.

Authority for Rule.

Wis. Stats., § 40.03 (6)

Statutes Interpreted.

Wis. Stats., § 40.03 (6)

Initial fiscal estimate. The Department estimates that there will be no direct fiscal impact from this rule making upon the state and anticipates no effect upon the fiscal liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district or sewer district.

Initial Regulatory Flexibility Analysis. The Department anticipates that the provisions of this proposed rule will have no direct adverse effect on small businesses.

Copies of Rule. Copies of this rule are available without cost by making a request to: Peg Narloch, Disability Programs Policy Specialist, Disability Programs Bureau, Department of Employee Trust Funds, P.O. Box 7931, Madison, Wisconsin 53707.

Contact Persons. Persons with questions about this rule may write to the above address or call Peg Narloch, Disability Programs Policy Specialist, Division of Insurance Services, (608) 267-9035. Legal questions about this rule may be addressed to Robert Weber, Wisconsin Department of Employee Trust Funds, P.O. Box 7931, Madison, WI 53707, telephone (608) 266-5804.

Part 2

TEXT OF RULE

SECTION 1. ETF 50.48 (4)(c) is created to read:

ETF50.48 (4) (c) If the department's denial is based solely on par. (b) 1. or 3., or both, the claimant may appeal to the group insurance board. The group insurance board's decision shall include a finding as to whether the employer's negative certification was reasonable and correct. If the group insurance board determines that the employer's action was unreasonable and incorrect, the group insurance board decision shall include an order to the employer to amend the certification and an order to the department to process the LTDI application when the amended certification is received.

(END OF RULE TEXT)

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

Signed at Madison, Wisconsin this 25th day of September, 1998.

WISCONSIN DEPARTMENT OF EMPLOYE TRUST FUNDS

Eric O. Stanchfield
Eric O. Stanchfield, Secretary

WISCONSIN LEGISLATIVE COUNCIL STAFF



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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 98-101

AN ORDER to amend s. ETF 50.48 (4) (b), relating to administration of the long-term disability insurance program.

Submitted by **DEPARTMENT OF EMPLOYE TRUST FUNDS**

07-16-98 RECEIVED BY LEGISLATIVE COUNCIL.

08-06-98 REPORT SENT TO AGENCY.

RS:JLK:jt;kjf

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 98-101

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

2. Form, Style and Placement in Administrative Code

a. Under s. 227.15 (1), Stats., an agency may not hold a public hearing on a proposed rule until after it has received a written report of the review by the Legislative Council Staff or until after the initial review period of 20 working days under s. 227.15 (2) (intro.), Stats., whichever comes first. In this case, the Legislative Council Staff received the proposed rule on July 16, 1998, and the initial review period expires August 13, 1998. Thus, a public hearing may not be held until after August 13, 1998 unless the Legislative Council Staff issues its report before that date.

Because the Department of Employee Trust Funds (DETF) has scheduled a public hearing for August 12, 1998, the Legislative Council Staff is issuing its report before its initial review period expires in order to permit DETF to hold the hearing as scheduled. In the future, arrangements should be made in advance with the Director of the Legislative Council Staff Rules Clearinghouse if DETF intends to hold a hearing before the date on which the Legislative Council Staff's initial review period is scheduled to expire.

b. In the second bullet point of the analysis and in the second paragraph of the general summary, use of the slashed alternatives "he/she" and "his/her" should be eliminated, and sex neutral language should be substituted. [See s. 1.01 (3), Manual.]

c. In the text of the rule, s. ETF 50.48 (4) (b) should be eliminated because it is not affected by the proposed order. The only provision in the rule should be the creation of s. ETF 50.48 (4) (c). The text should begin with a numbered SECTION and treatment clause which

should read: "SECTION 1. ETF 50.48 (4) (c) is created to read:". [See s. 1.04 (1), Manual. Also, the introductory and relating clauses and notice of hearings should be amended accordingly.] The text of s. ETF 50.48 (4) (c) should not be underscored because it is being created, not amended. [See s. 1.06 (1), Manual.]

d. In s. ETF 50.48 (4) (c), the reference to "subd. 1. or 3." should be changed to "par. (b) 1. or 3." [See s. 1.07 (2), Manual.]

e. In s. ETF 50.48 (4) (c), "Board" should not be capitalized. [See s. 1.01 (4), Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

The analysis should include a reference to any statute that the rule interprets and each statute that authorizes promulgation of the rule. [See s. 1.02 (2) (a), Manual.] The proposed order refers to s. 40.03 (6), Stats., as providing authority for the rule. It appears that s. 40.03 (2) (ig) and possibly s. 40.61 (1), Stats., should be cited as providing authority to promulgate the rule and that ss. 40.61 and 40.62, Stats., should be cited as statutes interpreted by the rule. The proposed order also should refer to approval of the Group Insurance Board. [See s. 40.03 (2) (ig), Stats.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the second bullet point in the analysis, the word "denies" should be changed to "denying."

b. The last paragraph of the analysis indicates that the rule will clarify:

. . . that the Department and Board may approve the LTDI benefit if the sole basis for denial was the employer's negative certification and it finds that the employer was unreasonable and incorrect in submitting the negative certification.

The following comments apply to this provision:

- (1) The reference to the "Board" in the analysis is unclear. Presumably, this is the Group Insurance Board. This should be specifically stated.
- (2) Section ETF 50.48 (4) (c) indicates that it is the Board that makes a decision about approval of benefits. In contrast, the analysis indicates that it is DETF *and* the Board. This discrepancy should be reconciled.
- (3) The analysis indicates that DETF and the Board "may" approve the LTDI benefit under certain conditions. In contrast, s. ETF 50.48 (4) (c) indicates that the Board must approve the LTDI benefit under those conditions. This discrepancy should be reconciled.
- (4) The analysis refers to the sole basis for denial as being the employer's negative certification. In contrast, s. ETF 50.48 (4) (c) refers to the

“employer’s negative certification *or* failure to certify” (emphasis added) as if these are two separate possibilities. If there are two separate possibilities, both should be referred to in the analysis, rather than only one. This comment also applies to what is now labeled the general summary. (Also see the comments in item g., below.)

- (5) The analysis indicates that the rule requires a finding that the employer was “unreasonable *and* incorrect” (emphasis added) before benefits are approved. In contrast, s. ETF 50.48 (4) (c) requires a finding that the employer’s action was “unreasonable *or* incorrect” (emphasis added). This discrepancy should be reconciled.

c. In the second sentence of the last paragraph of the general summary, the phrase “decision to shall” should be changed to “decision shall.”

d. Unlike in ch. ETF 41, ch. ETF 50 does not define the term “board.” Section ETF 50.48 (4) (a) refers to the “group insurance board.” In s. ETF 50.48 (4) (c), the reference to the “Board” should be changed to the “group insurance board” unless a definition of the term “board” is created to apply throughout ch. ETF 50 or s. ETF 50.48.

e. In s. ETF 50.48 (4) (c), the phrase “finding whether” should be changed to “finding as to whether.”

f. Section ETF 50.48 (4) (b) requires that DETF deny an application under certain circumstances, including the circumstances in s. ETF 50.48 (4) (b) 1. and 3. Section ETF 50.48 (4) (b) 1. refers to DETF’s receiving a statement from the employer certifying that employment has been terminated or the employe is on leave and not expected to return for a reason other than medical impairment. Section ETF 50.48 (4) (b) 3. refers to DETF’s receiving a certification from the employer denying that the claimant is totally and permanently disabled (with a slightly different test for those in protective occupations).

Section ETF 50.48 (4) (a) permits a claimant who wishes to contest DETF’s findings to appeal to the Group Insurance Board. Section ETF 50.48 (4) (c) apparently presumes, but does not state, that the claimant has made an appeal to the Group Insurance Board under s. ETF 50.48 (4) (a) to contest DETF’s findings. Is this the case? If so, this could be clarified by language in s. ETF 50.48 (4) (c) such as the following: “If the group insurance board receives an appeal under par. (a) and if the department’s denial is based solely on”

However, it appears that it is not DETF’s findings that are at issue because DETF is required to deny the application if DETF has received a certification which lists a nonmedical reason for termination or denies that the employe is totally and permanently disabled. Rather, the item that is at issue is the accuracy of the employer’s certification. Therefore, it may be more appropriate to specify the appeal rights with respect to this issue in s. ETF 50.48 (4) (c), for example, by stating at the beginning of s. ETF 50.48 (4) (c) that if DETF’s denial is based solely on par. (b) 1. or 3., or both, the claimant may appeal to the Group Insurance Board.

g. Section ETF 50.48 (4) (c) refers to the employer’s “negative certification or failure to certify.” However, under the cross-referenced provisions (that is, s. ETF 50.48 (4) (b) 1. and 3.),

the employer would have made a certification in either case (that is, either certification of nonmedical reasons for termination or certification denying total and permanent disability). Therefore, the phrase "failure to certify" is unclear. Was this intended to refer to situations under s. ETF 50.48 (3) (b) 8. when the employer certifies that it has no information on which to base an opinion regarding whether the employe is totally and permanently disabled? This should be clarified.

h. In order to avoid ambiguity, it would be preferable to begin the last sentence with the phrase: "If the group insurance board determines that the employer's action was unreasonable or incorrect,"

i. In s. ETF 50.48 (4) (c), the phrase "an order to the employer to make the certification" is unclear. As noted above, the employer would have made a certification under either s. ETF 50.48 (4) (b) 1. or 3. as those are the only provisions that could lead to the use of s. ETF 50.48 (4) (c). If the intent is to require that the employer "amend" its certification, it would be clearer to state this rather than referring to requiring the employer to "make" a certification.

Part 4

Report Required by s. 227.19 (3), Wis. Stats.

(a) Need for the Rule. As explained in the Analysis, the LTDI program will eventually replace the disability program provided by the Wisconsin Retirement System under §40.63, Wis. Stats. The Wisconsin and Teacher's Retirement Boards have been given the authority to determine whether the employer was unreasonable and incorrect in submitting the negative certification for the WRS regular disability program. The rule is needed to provide authority to the Group Insurance Board in administering the LTDI program so all disability programs are consistently administered.

(b) Modifications to the Rule.

The Department clarified the last sentence of the General Summary of Rule to indicate that the Group Insurance, Wisconsin and Teachers Retirement Boards have the same authority to find the employer unreasonable and incorrect in submitting the negative certification for the LTDI and the regular disability programs. Several non-substantive changes were made to the Analysis prepared by the Department.

(c) List of Persons Who Appeared or Registered For or Against the Proposed Rule at a Public Hearing.

A public hearing was held on August 12, 1998, at 1:00 p.m., in Room 2A, 2nd Floor, Department of Employee Trust Funds (DETF), 801 W. Badger Road, Madison, Wisconsin. Notice of the public hearing was published in the Administrative Register. In addition, information regarding the proposed rule and the public hearing was provided to all employers covered under the Wisconsin Retirement System. Ms. Peg Narloch, Disability Programs Policy Specialist, conducted the hearing. No one appeared at the hearing.

The record on the public hearing was held open until 4:30 p.m. on August 14, 1998, to receive written comments. The Department did not receive any written comments on the proposed rule.

(d) Response to Legislative Council Staff Recommendations.

Form, Style and Placement in the Administrative Code.

The DETF has amended the rule to incorporate all the suggestions of the Legislative Counsel staff with respect to form, style and placement in the Administrative Code.

Adequacy of References to Related Statutes, Rules and Forms.

The LCS suggested inclusion of s. 40.03 (2)(ig) and possibly s. 40.61 (1), Stats., as providing authority to promulgate the rule. In addition, the LCS suggested that ss. 40.61 and 40.62, Stats., be cited as statutes interpreted by the rule. The DETF did not amend the rule to include the suggestions of the Legislative Counsel staff with regards to the statutory authority and statutes interpreted by the rule. Sections 40.61 and 40.62, Stats., refers to the state and local income continuation insurance (ICI) programs. The DETF did not include those sections of the statutes because the LTDI program is not a part of the income continuation programs. In addition, s. 40.03 (2)(ig), Stats., was not indicated as a section providing rule authority because the LTDI program is not part of any of the insurance plans indicated in that section of the statutes.

The DETF did cite s. 40.03(6), Stats., as the statute interpreted by the rule.

Clarity, Grammar, Punctuation and Use of Plain language

The DETF has amended the rule to incorporate all the suggestions of the Legislative Counsel staff with respect to clarity, grammar, punctuation and use of plain language.

(e) Final regulatory flexibility analysis. The proposed rule itself does not directly affect small businesses.

(END OF FINAL DRAFT REPORT)



STATE OF WISCONSIN

Department of Employee Trust Funds

Eric O. Stanchfield
Secretary
801 West Badger Road
P.O. Box 7931
Madison, WI 53707-7931

November 10, 1998

In Reply Refer To:

GARY L. POULSON, DEPUTY REVISOR
REVISOR OF STATUTES BUREAU
8TH FLOOR
131 W WILSON ST
MADISON, WISCONSIN 53707

RE: Clearinghouse Rule No. 98-101

Dear Mr. Poulson:

Enclosed is a Certificate and two copies of an Order creating and adopting rules. A certified copy of this Order has been forwarded to the Secretary of State.

I request that the rule be published in the December 30 issue of the administrative register.

I also enclose a copy of the rule on disk, in Word format.

Please contact me if you have any questions.

Sincerely,

Thomas Korpady, Administrator
Division of Insurance Services
(608) 266-0207
FAX # (608) 267-0633
TDD # (608) 267-0676

