

**OPINION NO. 979****Syllabus:**

1. When a fireman becomes eligible for a pension due to disability as a result of heart disease, such fireman can be paid only for partial disability under Division (C) of Section 741.18, Revised Code.

2. When a fireman becomes eligible for a disability pension under Section 741.18, Revised Code, the total impairment of his earning capacity is determined by the extent to which his disability physically prevents him from engaging in other occupations.

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**To: James B. Patterson, Jr., Madison County Pros. Atty., London, Ohio**  
**By: William B. Saxbe, Attorney General, April 13, 1964**

Your request for my opinion poses the following question:

"Quary: Where a fireman duly appointed and qualified becomes eligible for a pension for disability as a result of heart disease and the question is whether or not he is partially or totally disabled; is said question determined on his partial or total and permanent disability to perform his duties for which he was hired; to-wit: a fireman; or is the question as to his partial or total and permanent disability determined by his ability or

inability to do any work of any kind whatsoever?"

You relate that the fireman concerned had been so employed for approximately 21 years before his first heart attack occurred on March 14, 1963, while in the course of his employment. Subsequently, after the fireman applied for retirement pay on November 1, 1963, seeking payment on the basis of total and permanent disability, he was examined by three physicians, pursuant to the provisions of Section 741.18 (C), Revised Code, who all found that he had a heart disease and was no longer able to perform the work of a fireman.

Division (C) of Section 741.18, Revised Code, provides in part:

"(C) A member of the fund who is partially disabled as a result of the performance of his official duties, as a member of the department, and such disability prevents him from performing those duties and impairs his earning capacity, shall be paid monthly disability benefits in an amount to be fixed by the board \* \* \* but in no event shall a monthly benefit paid to such member exceed fifty per cent of his average monthly salary for the five calendar years during which his total annual salary as a member of said fire department was the greatest \* \* \*.

"A member of the fund who is disabled as a result of heart disease \* \* \* is presumed to have incurred the disease while performing his official duties as a member of such department unless the contrary is shown by competent evidence.

"If such disability prevents the member from performing his official duties and impairs his earning capacity he shall be paid annual disability payments in accordance with this division."

(Emphasis added)

Division (B) of Section 741.18, Revised Code, provides:

"(B) A member of the fund who is permanently and totally disabled as a result of the performance of his official duties as a member of the department, shall be paid annual disability benefits until death, payable in twelve monthly installments, in an amount equal to sixty-six per cent of his annual salary for the last year he was in the active service of the department."

Consequently, a fireman who becomes disabled as a result of heart disease cannot be paid permanent and total disability benefits under Division (B) above, because Division (C) is specific and expressly provides that such fireman

"shall be paid \* \* \* in accordance with this division." This means that such fireman can never be paid benefits greater than the maximum allowance to a fireman who retires on partial disability status under Division (C). Hence, with respect to heart disease cases, since the disabled fireman cannot be paid benefits at the permanent and total disability rate, the question as to whether he is actually permanently and totally disabled becomes moot.

Therefore, it is my opinion and you are advised that in a case where a fireman applies for a pension due to disability as a result of heart disease, such fireman can be paid only for partial disability under Division (C) of Section 741.18, Revised Code, and a determination concerning whether such fireman is actually totally and permanently disabled is unnecessary.

The other question you raise inferentially pertains to the manner in which the applicant's extent of disability is to be measured and the related factors involved.

It is apparent from the first sentence of Division (C), *supra*, that a member of the fund becomes eligible for disability benefits as soon as the disability is such that it prevents him from performing the duties of a fireman. Since the applicant's earning capacity is automatically impaired by his inability to work as a fireman, it remains only for the board to ascertain the full extent of impairment of his earning capacity.

The total impairment of earning capacity necessarily would involve a consideration or evaluation of the applicant's physical ability to earn money from other types of occupations. In making this evaluation, the important factor to consider is not the potential amount of income available to the applicant from other occupations, but rather it is the extent to which his disability physically eliminates other occupations as potential sources of income.

Therefore, I conclude that when a fireman becomes eligible for a disability pension, the total impairment of his earning capacity is determined by the extent to which his disability physically prevents him from engaging in other types of occupations.