

OPINION NO. 68-172**Syllabus:**

In the absence of specific statutory authority the board of trustees of the Police and Firemen's Disability and Pension Fund is without authority to change the disability classification of a member who is receiving such benefit.

To: Franklin A. Kropp, Exec. Secretary, Police and Firemen's Disability and Pension Fund

By: William B. Saxbe, Attorney General, December 30, 1968

Before me is your request for my opinion wherein the following questions are set forth:

"1. Does the Pension Board have authority to re-classify a man already placed on a certain type of disability benefits by a local pension board prior to January 1, 1967 to another classification or type of disability benefit?"

"2. May the Pension Board change the disability classification of a man placed on a certain type of disability benefit by the statewide Pension Board since January 1, 1967, the action of a local pension board not being involved?"

In substance the question is the authority of the board of trustees of the Police and Firemen's Disability and Pension Fund to reclassify a member who is receiving partial disability benefits to the status of permanent and total disability to the end that benefits payable to the member would be increased. The question is twofold in that some members of the fund were awarded disability benefits by local pension funds prior to such funds being superseded by the state system on January 1, 1967.

First considering those members who were awarded partial disability benefits by the board of trustees of the Police and Firemen's Disability and Pension Fund subsequent to January 1, 1967, and who now seek to be reclassified as permanently and totally disabled, your attention is directed to Section 742.37 (C), Revised Code, which provides in part as follows:

"(C) Members of the fund who have not elected to receive benefits and pensions from a police relief and pension fund or a firemen's relief and pension fund in accordance with the rules and regulations of such fund in force on April 1, 1947, shall receive pensions and benefits in accordance with the following provisions.

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"(2) A member of the fund who is permanently and totally disabled as the result of the performance of his official duties as a member of a police or fire department of a municipal corporation or a fire department of a township, 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 such police or fire department.

"(3) A member of the fund who is partially disabled as the result of the performance of his official duties as a member of a police or fire department of a municipal corporation or a fire department of a township, 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. The board may increase or decrease such monthly benefits whenever the impairment of the member's earning capacity warrants an increase or decrease, 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 police or fire department was the greatest. Each such member who has completed twenty-five or more years of active service in the department shall receive annual disability benefits, payable in twelve monthly installments, in an amount equal to two per cent of his average annual salary for the five calendar years during which his total annual salary as a member of said police or fire department was the greatest multiplied by the number of years he was in the active service of such department, or an annual disability benefit of

fifteen hundred dollars whichever amount is the greater. Such annual disability benefit shall not exceed sixty-six per cent of the member's average annual salary for the five calendar years during which his total annual salary as a member of said police or fire department was the greatest.

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In section 742.37 (C) (3), supra, the General Assembly provided that a member with less than twenty-five years of service who is partially disabled as the result of the performance of his official duties may receive benefits not to exceed 50% of his average monthly salary for the five calendar years during which his total annual salary was the greatest, whereas a member who has completed twenty-five or more years of service may receive not more than 66% of such average annual salary.

Accordingly, it is apparent that the General Assembly intended to grant greater benefits to a member who is partially disabled and who has twenty-five or more years of service than to a member with less than twenty-five years of service.

Upon examination of Section 742.37 (C) (2), supra, it is noted that a member who is partially disabled and who has more than twenty-five years of service may receive benefits as a percentage of salary equal to that received by a member who is permanently and totally disabled. That subsection provides that a member who is permanently and totally disabled as the result of the performance of his official duties shall receive annual disability benefits in an amount equal to 66% of his annual salary for the last year of active service regardless of the number of years of service. There is no provision for the partially disabled member with less than twenty-five years of service to be awarded the same percentage of salary as may be awarded a member who is permanently and totally disabled or as may be awarded a member with twenty-five or more years of service who is partially disabled.

Furthermore, upon examination of Section 742.37, Revised Code, I find no provision for changing a partial disability awarded to one of permanent and total disability. The determination of disability, partial or permanent and total, must be made by the board when the member originally makes application for disability benefits.

Considering now those persons who were awarded disability benefits by local boards prior to January 1, 1967, your attention is directed to Section 742.37 (A), Revised Code, which provides as follows:

"Persons who were receiving benefit or pension payments from a police relief and pension fund, established under section 741.32 of the Revised Code, or from a firemen's relief and pension fund, established under section 521.02 or 741.02 of the Revised Code, at the time the assets of such fund were transferred to the police and firemen's disability and pension fund, as provided by section 742.26 of the Revised Code, shall receive benefit and pension payments from the police and firemen's disabil-

ity and pension fund in the same amount and subject to the same conditions as such payments were being made from such fund on the date of such transfer."

(Emphasis supplied)

Accordingly, the General Assembly charged the board of trustees of the Police and Firemen's Disability and Pension Fund with the duty to continue making pension payments subject to the same conditions as payments were being made by the local boards at the time the assets of the local funds were transferred on January 1, 1967.

One of the conditions under which pension benefits had been awarded and were being paid by the local boards was based on a determination by the local boards as to whether the recipient should be placed on partial disability or permanent and total disability. Pursuant to the provisions of Section 742.37 (A), supra, the board of trustees of the Police and Firemen's Disability and Pension Fund is without authority to alter the conditions under which the local board had awarded benefits, and may not reclassify the type of disability benefit.

Therefore, it is my opinion and you are hereby advised, that in the absence of specific statutory authority the board of trustees of the Police and Firemen's Disability and Pension Fund is without authority to change the disability classification of a member who is receiving such benefit.