

OPINION NO. 93-072

Syllabus:

1. R.C. 742.22 requires the Board of Trustees of the Police and Firemen's Disability and Pension Fund (PFDPF) to terminate a grant of partial or permanent and total disability benefits on the first day following restoration of the recipient PFDPF member to active duty as a member of a police or fire department.
2. Existing statutes do not permit a PFDPF member to receive permanent and total disability benefits under R.C. 742.37(C)(2) while the individual is employed as a member of a police or fire department, but they do not prohibit a PFDPF member from being employed in another position for which the member receives compensation while the member receives permanent and total disability benefits under R.C. 742.37(C)(2).
3. Existing statutes do not permit the Board of Trustees of PFDPF to revoke a grant of permanent and total disability benefits made under R.C. 742.37(C)(2) if an individual becomes employed in a position for which he receives compensation, other than a position as a member of a police or fire department.
4. Existing statutes do not permit the Board of Trustees of PFDPF to reduce a grant of permanent and total disability benefits to a grant of partial disability benefits under R.C. 742.37 if there is a change in the level of disability.
5. Existing statutes permit the Board of Trustees of PFDPF to reduce a grant of partial disability benefits awarded under R.C. 742.37(C)(3) to a member who has completed less than twenty-five years of active service, or a grant of partial disability benefits awarded under R.C. 742.37(C)(5), if there is a change in the member's earning capacity warranting such a reduction.
6. Apart from R.C. 742.22, which requires the Board of Trustees of PFDPF to terminate the disability benefits of a PFDPF member who is restored to active duty as a member of a police or fire department, existing statutes do not permit the Board to reduce a grant of partial disability benefits awarded under R.C. 742.37(C)(3) to a member who has completed twenty-five or more years of active service if there is a change in the member's earning capacity or level of disability.
7. Apart from the periods of forfeiture established under R.C. 145.38, R.C. 3307.381, and R.C. 3309.341, relating to employment under other public retirement systems, existing statutes do not directly prohibit a PFDPF member from receiving a partial disability benefit while the member is employed in a non-police or fire position, or in a police or fire position that is not covered by PFDPF, provided that other statutory requirements are met.

8. Existing statutes permit the Board of Trustees of PFDPF to cease to provide a partial disability benefit to a member, other than a member with twenty-five years or more of service who receives a benefit pursuant to R.C. 742.37(C)(3), if the member's employment in a non-police or fire position, or in a police or fire position that is not covered by PFDPF, when considered with any other relevant factors, establishes that the member does not suffer from an impaired earning capacity.
9. Existing statutes do not establish a limit on the amount of earnings that a reemployed recipient of partial disability benefits can receive while the individual continues to receive partial disability benefits.
10. Existing statutes do not authorize the Board of Trustees of PFDPF to require a recipient of partial disability benefits to substantiate post-retirement income.
11. Existing statutes do not require the fact that a recipient of PFDPF disability benefits did not receive income during a given period to be considered as prima facie evidence that the individual's earning capacity is impaired.

To: Henry Helling III, Executive Director, Police and Firemen's Disability and Pension Fund, Columbus, Ohio
By: Lee Fisher, Attorney General, December 22, 1993

You have requested an opinion on various disability retirement issues affecting the Police and Firemen's Disability and Pension Fund (PFDPF). Your specific questions are as follows:

1. Can a PFDPF member receiving permanent and total disability benefits under R.C. 742.37(C)(2) be employed in any position for which he receives compensation?
2. Does the Board of Trustees have the authority to revoke a permanent and total disability grant if an individual becomes employed in a position for which he is compensated?
3. Does the Board have the authority to reduce a grant of permanent and total disability to a partial disability under R.C. 742.37 if there is a change in the level of disability?
If so, can the Board restore the permanent and total disability grant at a future date if there is a subsequent change in the level of disability?
4. Can a PFDPF member continue to receive a partial disability benefit if he becomes re-employed in a non-police or fire position?
5. Can a PFDPF member continue to receive a partial disability benefit if he or she becomes re-employed in a law enforcement or fire fighting position which is covered by another retirement system, and is not included within the definition of a member of a police department or a member of a fire department under R.C. 742.01(A) and (B)?
6. Is there a limit on the amount of earnings a re-employed partial disability retiree can receive, and does the Board have the authority to require the retiree to substantiate post-retirement income?
7. Is the fact that an individual did not receive income during a given period prima

facie evidence that his other earning capacity is impaired?

8. Does the Board have the authority to reduce a grant of a partial disability benefit if there is a change in the member's earning capacity and/or level of disability?

The Board of Trustees of PFDPF Has Only the Authority That It Is Granted by Statute

The Police and Firemen's Disability and Pension Fund was created pursuant to R.C. 742.02 for the purpose of providing disability benefits and pensions to members of the fund and their surviving spouses, children, and dependent parents. The administration, control, and management of the fund is vested in the Board of Trustees of PFDPF. R.C. 742.03; *see, e.g.*, R.C. 742.06-.07, .10-.11. The PFDPF is a creature of statute and "has no authority beyond that which is expressly or impliedly conferred by statute." *Dreger v. Public Employees Retirement System*, 34 Ohio St. 3d 17, 20-21, 516 N.E.2d 214, 217 (1987). As was stated in *State ex rel. Henderson v. Schuele*:

The state board [Board of Trustees of PFDPF] is a creature of statute. Its powers and its duties are established by statute. It can exercise no power or discretion not invested in it by statute. Consequently, it has only the duties imposed upon it by statute....It can do no more and no less.

25 Ohio St. 2d 179, 182, 267 N.E.2d 590, 592 (1971).

The Board of Trustees of PFDPF is directed by statute to "adopt rules for the management of the fund and for the disbursement of benefits and pensions as set forth in [R.C. 742.37]." R.C. 742.37. While the board has adopted various rules, *see* 3 Ohio Admin. Code Chapters 742-1 to -19, those rules do not directly address the issues considered in this opinion. Further inquiries have disclosed no established guidelines, policies, or other written documents of PFDPF relating to such matters.

Permanent and Total Disability Benefits

R.C. 742.37(C)(2) provides for permanent and total disability benefits to be granted to PFDPF members as follows:

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 *shall be paid annual disability benefits until death*, payable in twelve monthly installments, in an amount equal to seventy-two per cent of his annual salary for the last year he was in the active service of such police or fire department. (Emphasis added.)

The relevant definitions¹ of "total disability" and "permanent disability" appear in R.C. 742.01 in these words:

(F) "Total disability" means inability to perform the duties of any gainful occupation for which the member of the fund is reasonably fitted by training,

¹ There are various governmental funds and programs other than PFDPF that provide for disability benefits. Each of those has its own statutory scheme and governing provisions. Accordingly, definitions and conclusions applicable to other funds and programs are

experience, and accomplishments, provided that absolute helplessness is not a prerequisite of total disability.

(G) "Permanent disability" means a condition of disability with respect to which the board of trustees of the police and firemen's disability and pension fund finds there is no present indication of recovery. For purposes of making such a determination, the board shall consider and base its findings on all competent evidence, including medical testimony, opinions, and statements, made available to it.

A PFDPF Member Who Receives Permanent and Total Disability Benefits May Not Be Employed as a Member of a Police or Fire Department But May Have Other Employment

Your first question is whether a PFDPF member receiving permanent and total disability benefits under R.C. 742.37(C)(2) may be employed in any position for which he receives compensation. It is clear that an individual may not continue to receive a permanent and total disability benefit from PFDPF if the individual is reemployed as a member of a police department or fire department as defined in R.C. 742.01(A) and (B).² On this point, R.C. 742.22 states expressly that a PFDPF member's disability benefits "shall be terminated on the

not directly applicable to PFDPF. *See, e.g., State ex rel. Boehnlein v. Poland*, 1 Ohio St. 2d 179, 205 N.E.2d 906 (1965) (rules for determining earning capacity in tort cases or workers' compensation cases are different from those applicable to a police disability and pension fund); *Kinsey v. Board of Trustees of PFDPF*, No. 86AP-1168 (Ct. App. Franklin County June 28, 1988) (adopting referee's report concluding that disability determinations pursuant to R.C. Chapter 742 are not controlled by the standards applicable to social security disability determinations), *rev'd on other grounds*, 49 Ohio St. 3d 224, 551 N.E.2d 989 (1990), *mandamus granted*, 76 Ohio App. 3d 763, 603 N.E.2d 356 (Franklin County 1991). *But see, e.g., State ex rel. Montague v. PFDPF*, 78 Ohio App. 3d 661, 605 N.E.2d 1009 (Franklin County 1992) (like the Industrial Commission, PFDPF must, in granting or denying benefits, specifically state what evidence has been relied upon and briefly explain the reason for its decision); *accord State ex rel. Kidd v. Board of Trustees of PFDPF*, 66 Ohio App. 3d 647, 585 N.E.2d 930 (Franklin County 1991), *mandamus granted*, No. 93AP-200 (Ct. App. Franklin County Sept. 28, 1993).

² R.C. 742.01 contains the following definitions, applicable to the statutory provisions governing PFDPF:

As used in this chapter:

(A)(1) "Police department" means the police department of a municipal corporation.

(2) "Member of a police department" means both of the following:

(a) Any person who receives an original appointment as a full-time regular police officer in a police department from a duly established civil service eligible list or pursuant to section 124.411 of the Revised Code, or who is described in section 742.511 of the Revised Code [certain full-time police officers transferred from PERS to PFDPF], or who transfers from the public employees retirement system to the police and firemen's disability and pension fund pursuant to section 742.513 [certain full-time police officers], or who is appointed pursuant to section

first day following restoration to active duty" as a member of a police or fire department.³ It should, however, be noted that a part-time employee of a police or fire department is not a "member" of the department as defined in R.C. 742.37(A) and (B). See note 2, *supra*; see also, e.g., *Dreger v. Public Employees Retirement System*.

Statutes governing other public retirement systems provide for the forfeiture of disability benefits for limited time periods if a PFDPF disability benefit recipient is employed within those time periods. For example, R.C. 145.38 provides that a PFDPF retiree who has received his disability benefit for less than two months when employed by a public employer under the Public Employees Retirement System (PERS) must forfeit his disability benefit until the two-month period expires. See also R.C. 3307.381 (similar provisions under the State Teachers Retirement System (STRS)); R.C. 3309.341 (similar provisions under the Public School Employees Retirement System (SERS)). It is clear that an individual who receives permanent and total disability benefits under R.C. 742.37(C)(2) will be subject to these periods of forfeiture if he accepts employment under another public retirement system.

Apart from the periods of forfeiture imposed by other public retirement systems and the prohibition of R.C. 742.22 against receiving disability benefits while serving as a member of a police or fire department, no statutes prohibit the recipient of permanent and total disability benefits under R.C. 742.37(C)(2) from accepting employment for compensation. Compare, e.g., 1947 Ohio Laws 614, 617, 622, 627 (providing under prior law -- G.C. 4612-4, G.C. 4615-9, and G.C. 4628 -- that a firefighter or police officer could not receive pension or disability payments "while he is holding an elective or appointive full time salaried office or position in

737.15 or 737.16 of the Revised Code as a full-time regular police officer and is paid solely out of public funds of the employing municipal corporation;

(b) Any person who, on October 1, 1965, was contributing four per cent of his annual salary to a police relief and pension fund established under former section 741.32 of the Revised Code.

(B)(1) "Fire department" means a fire department of the state or an instrumentality of the state or of a municipal corporation, township, joint fire district, or other political subdivision.

(2) "Member of a fire department" means all of the following:

(a) Any person who commences employment after November 8, 1990, as a full-time fireman with a fire department, in a position in which he is required to satisfactorily complete or have satisfactorily completed a fire fighter training course approved under former section 3303.07 or section 4765.55 or conducted under section 3737.33 of the Revised Code;

(b) Any person who has elected under section 742.515 of the Revised Code [certain full-time firefighters] to be transferred from the public employees retirement system to the police and firemen's disability and pension fund;

(c) Any full-time fireman who, on November 8, 1990, is a member of the police and firemen's disability and pension fund.

(C) "Employee" means any person who is a member of a police department or a member of a fire department.

(D) "Employer" means the government entity by which an employee is employed and paid.

³ In contrast, a PFDPF member who receives a retirement allowance other than a disability benefit from PFDPF is permitted to be employed as a member of a police or fire department, subject to applicable statutory provisions. See R.C. 742.26.

the service of the state or any political subdivision thereof"); 1949 Op. Att'y Gen. No. 746, p. 409; 1948 Op. Att'y Gen. No. 2641, p. 32. It must, therefore, be concluded that such employment is permissible, provided that other relevant statutory requirements are met.

This conclusion is consistent with R.C. 742.01(F), which specifies that absolute helplessness is not a prerequisite of total disability. See also *Kinsey v. Board of Trustees of PFDPF*, 49 Ohio St. 3d 224, 227, 551 N.E.2d 989, 993 (1990) ("determining that appellant is qualified to do some kind of work, such as sedentary or nonstressful work, does not necessarily mean that he is not totally disabled for purposes of [PFDPF]. Instead, in order to determine that appellant is not 'totally disabled' within the meaning of R.C. 742.01(F), there must be 'some evidence' in the record that the gainful occupation he can now engage in, after his disability, is an occupation for which he is reasonably fitted by way of training, experience, and accomplishments"), *mandamus granted*, 76 Ohio App. 3d 763, 603 N.E.2d 356 (Franklin County 1991); *State ex rel. Kidd. v. Board of Trustees of PFDPF*, 66 Ohio App. 3d 647, 585 N.E.2d 930 (Franklin County 1991), *mandamus granted*, No. 93AP-200 (Ct. App. Franklin County Sept. 28, 1993).

It does, however, seem paradoxical to suggest that an individual who is permanently and totally disabled may be able to perform a job of any sort, and that anomaly is discussed in connection with your next two questions.

The Board of Trustees of PFDPF Has Authority to Revoke a Grant of Permanent and Total Disability Benefits if the Recipient Becomes Employed as a Member of a Police or Fire Department, But Not If the Recipient Accepts Other Employment

The second question is whether the Board of Trustees of PFDPF has authority to revoke a permanent and total disability grant if a recipient becomes employed in a position for which the recipient is compensated. As discussed above, R.C. 742.22 mandates that the Board terminate disability benefits when a member is restored to active duty as a member of a police or fire department, and other public retirement systems impose periods of forfeiture upon employment of a PFDPF disability recipient. There is, however, no provision requiring or authorizing the revocation of a permanent and total disability grant when a recipient becomes employed in a position other than as a member of a police or fire department.

The statutes defining permanent and total disability and authorizing the award of benefits for permanent and total disability are quoted above. See R.C. 742.01(F), (G); R.C. 742.37(C)(2). Those provisions indicate that a finding of permanent and total disability is made by the Board when it considers an application. The finding reflects the Board's determination that the member is unable, at that time, to perform the duties of any gainful occupation for which the member is reasonably fitted by training, experience, and accomplishments, and also the Board's determination that, at that time, there is no indication of recovery. R.C. 742.01(F), (G). The statutory scheme does not directly address the possibility that the member may subsequently obtain additional training that fits the member for a different type of job. Instead, the statutory scheme provides that a member of the fund who is permanently and totally disabled (within the definitions set forth in the statute) as a result of the performance of his official duties "shall be paid...disability benefits until death," unless the member is restored to active service as a member of a police or fire department. R.C. 742.37(C)(2); see R.C. 742.22. R.C. 742.37(C)(2) thus "obviously contemplates that the inability to work will never change." *State ex rel. Chime v. Board of Trustees of PFDPF*, No. 92-2364, slip op. at 4 (Ohio Sup. Ct. Dec. 8, 1993).

If, at the time an application for a disability award is considered, there is evidence that the claimant has re-employment potential, that evidence may provide a basis for a finding that the claimant does not meet the criteria for permanent total disability. See *State ex rel. Chime v. Board of Trustees of PFDPF*. Once an award of permanent and total disability benefits has been granted, however, the statutes do not authorize the Board to revoke the grant if an individual becomes employed in a position for which he is compensated, other than a position as a member of a police or fire department. Since, as discussed above, the Board has only such powers as it has been granted by statute, the Board may not take actions that exceed its statutory authority. The statutes provide for a determination of permanent and total disability to be made when the application is considered and do not provide for periodic reconsideration of the determination. See generally 1968 Op. Att'y Gen. No. 68-172, at 2-213 ("[t]he determination of disability, partial or permanent and total, must be made by the board when the member originally makes application for disability benefits"). A grant of permanent and total disability is made to a member of PFDPF who is permanently and totally disabled as the result of the performance of his official duties and is in effect for life. The Board has no authority to revoke a grant of permanent and total disability on the basis of subsequent employment other than active duty as a member of a police or fire department.

It might be argued that, as a matter of reason and logic, the statutory scheme should be read as authorizing the Board, by necessary implication, to revoke a permanent and total disability grant if a recipient becomes employed in any position for which the recipient receives substantial compensation. This argument would be supported by the contention that prudent administration of the fund requires that its dollars not be distributed to individuals who no longer come within the definitions of "total disability" and "permanent disability." Under this argument, an individual who receives compensation for performing a job would be found to be reasonably fitted by training, experience, and accomplishments for a gainful occupation and to have adequately recovered from any permanent disability.

The basic problem with this argument is that it is not supported by the language of the statute. Where the General Assembly has intended that a disability benefit be subject to modification or revocation, it has expressly so stated. The General Assembly has provided for termination of disability benefits upon restoration to active duty as a member of a police or fire department. R.C. 742.22. It has not provided for termination of an award of permanent and total disability in any other circumstances. Language in R.C. 742.37 that provides for certain types of partial disability benefits expressly authorizes the Board to increase or decrease the benefits; those provisions are discussed more fully below in connection with questions four through eight. See R.C. 742.37(C)(3), (5). Various other retirement systems are expressly given authority to terminate disability benefits in certain circumstances. See, e.g., R.C. 145.362 (an individual who receives disability benefits from PERS may be required to file an annual statement of earnings and current medical information, and disability benefits terminate if the individual is found capable of resuming service; such an individual is considered on leave of absence for the first five years of benefits); R.C. 3307.44 (similar provisions governing an individual who receives disability benefits from STRS); R.C. 3309.41 (similar provisions governing an individual who receives disability benefits from SERS); R.C. 5505.18 (the State Highway Patrol Retirement System (HPRS) may require the reexamination of a disability recipient under age fifty-five; if the recipient is found capable, he is restored to his prior rank and his disability pension terminates); 1990 Op. Att'y Gen. No. 90-002. In contrast, no statutory language authorizes the Board of Trustees of PFDPF to reexamine the condition of a recipient of permanent and total disability benefits or to terminate the benefits of such a recipient unless the recipient is restored to active duty as a member of a police or fire department. Accordingly, there is no basis for implying such authority.

It was held in *State ex rel. Lemperle v. McIntosh*, 145 Ohio St. 107, 60 N.E.2d 786 (1945), under statutes then in effect, that trustees of the police relief fund of a municipal corporation had authority to adopt a rule requiring that disability beneficiaries undergo a periodic medical examination and that their benefits be subject to reduction on the basis of ability to engage in a profitable occupation or, if applicable, on the basis of money actually earned. G.C. 4628, as then in effect, authorized the trustees to "make all rules and regulations for distribution of the fund, including the qualifications of those to whom any portion of the fund shall be paid, and the amount thereof." 145 Ohio St. at 109, 60 N.E.2d at 787. In contrast, existing provisions authorize the Board of Trustees of PFDPF to "adopt rules for the management of the fund and for the disbursement of benefits and pensions *as set forth in this section.*" R.C. 742.37 (emphasis added). But R.C. 742.37 does not provide for revocation of a permanent and total disability benefit on the basis of subsequent employment or employability.

R.C. 742.46 states that the granting of a benefit or pension to any person under R.C. 742.01-.49 "vests a right in such person to obtain and receive the amount of such benefit or pension granted to him subject to [R.C. 742.01-.49]." If the statute under which the benefit or pension is granted provides for modifications of the amounts received, such modifications are permissible in accordance with R.C. 742.46 and the relevant provisions of R.C. 742.01-.49. See *State ex rel. Brunson v. Bedner*, 28 Ohio App. 2d 63, 274 N.E.2d 565 (Franklin County 1971); see also *State ex rel. Henderson v. Schuele*. Thus, the Board may revoke or modify a disability grant when it has been given statutory authority to take that action. Apart from R.C. 742.22, which provides for the termination of disability benefits upon restoration to active duty in a police or fire department, no provision of R.C. Chapter 742 grants the Board any right to modify a grant of permanent and total disability benefits.

The Board of Trustees of PFDPF Has No Authority to Reduce a Grant of Permanent and Total Disability Benefits to Partial Disability Benefits

The third question is whether the Board has the authority to reduce a grant of permanent and total disability benefits to partial disability benefits under R.C. 742.37 if there is a change in the level of disability and, if so, whether the Board can restore the permanent and total disability grant at a future date if there is a subsequent change in the level of disability. As discussed above, the statutory scheme does not provide for a grant of permanent and total disability benefits to be changed upon a subsequent change in the individual's job skills or physical condition, except for the periods of forfeiture applicable to employment under other public retirement systems and the termination of disability benefits if the recipient is restored to active duty as a member of a police or fire department. The statute provides that, once granted, permanent and total disability benefits shall be paid "until death." R.C. 742.37(C)(2). Because the Board has only such powers as it is granted by statute, it must be concluded that the Board does not have authority to reduce a grant of permanent and total disability benefits to partial disability benefits if there is a change in the level of disability.

Again, it might be argued that this result is unreasonable, because it may require PFDPF to pay permanent and total disability benefits in instances where the actual disability at a particular time is only partial. As discussed above, however, the statutory scheme does not provide for modifications to an award of permanent and total disability benefits. It may be argued that the General Assembly has determined that, when an individual's service as a police officer or firefighter results in that individual's being "permanently and totally disabled as the result of the performance of his official duties," that individual is entitled to continue receiving permanent and total disability benefits for the rest of his life, regardless of any subsequent job training or unexpected recovery, because of the sacrifice made by that individual in the cause of promoting public safety and welfare. R.C. 742.37(C)(2). The only exceptions provided by

statute are for termination of disability benefits upon restoration to active duty as a member of a police or fire department and for the periods of forfeiture established under other public retirement systems. There is no statutory basis for providing other exceptions.

Statutory provisions granting lifetime benefits for police officers and firefighters who suffer permanent and total disability as the result of the performance of their duties have been part of Ohio law since 1947. See 1947 Ohio Laws 614, 616, 620, 625 (H.B. 195, filed June 26, 1947). At that time, the language governing permanent and total disability benefits contained no provision for adjustments or modifications except for termination if the recipient returned to full-time public service, but the statutes did provide for modification of partial disability benefits on the basis of a change in the impairment of earning capacity. See 1947 Ohio Laws 614, 616-17, 620-22, 625-27. See generally *State ex rel. Boehnlein v. Poland*, 1 Ohio St. 2d 179, 205 N.E.2d 909 (1965) (upholding a decrease in partial disability benefits). As discussed more fully below, this distinction between an established lifetime grant of permanent and total disability benefits and a modifiable grant of partial disability benefits has been retained in existing statutes. If any changes are to be made to the scheme for providing established lifetime permanent and total disability benefits to Ohio's police officers and firefighters, those changes must be made by the General Assembly. Such changes cannot be made by opinion of the Attorney General, or by the Board of Trustees of PFDPF, whose authority is limited to that granted by statute.

Partial Disability Benefits

Your remaining questions relate to partial disability benefits. The payment of partial disability benefits to PFDPF members who are partially disabled as the result of the performance of their duties is governed by R.C. 742.37(C)(3), which states:

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 shall, if such disability prevents him from performing those duties and impairs his earning capacity, receive annual disability benefits, payable in twelve monthly installments, in an amount to be fixed by the board. The board may increase or decrease such benefits whenever the impairment of the member's earning capacity warrants an increase or decrease, but in no event shall a benefit paid to such member exceed sixty per cent of his average annual salary. 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 a percentage of his average annual salary. Such percentage shall be the sum of two and one-half per cent for each of the first twenty years he was in the active service of such department, plus two per cent for each of the twenty-first to twenty-fifth years he was in the active service of such department, plus one and one-half per cent for each year in excess of twenty-five years he was in the active service of such department. Such annual disability benefit shall not exceed seventy-two per cent of the member's average annual salary. (Emphasis added.)

The term "partially disabled" is not defined by statute, but is generally understood to refer to an individual who is unable to perform the duties of a member of a police or fire department but may be able to perform other gainful employment. See, e.g., *Kinsey v. Board of Trustees of PFDPF*, 49 Ohio St. 3d at 225-26, 551 N.E.2d at 992; see also *State ex rel. Montague v. PFDPF*, 78 Ohio App. 3d 661, 665-66, 605 N.E.2d 1009, 1012 (Franklin County 1992) ("presumably [partial disability] is a disability which is not total, as defined by R.C. 741.01(F),

which prevents the member from performing his duties as a member of the police or fire department and which impairs his earning capacity. Arguably, it also includes 'total disability' if such total disability is not permanent as defined by R.C. 741.01(G)".

Pursuant to this provision, there are two classes of PFDPF members who may receive partial disability awards -- members who have completed twenty-five or more years of active service and members who have not completed twenty-five or more years of active service. A member who is partially disabled as the result of the performance of his official duties may receive a partial disability award if the disability prevents him from performing those duties and impairs his earning capacity. When a member who has not completed twenty-five years of service receives a partial disability award, the award is in an amount fixed by the Board, and the Board "may increase or decrease such benefits whenever the impairment of the member's earning capacity warrants an increase or a decrease," provided that the benefit may not exceed sixty percent of the member's average annual salary. R.C. 742.37(C)(3). When, however, a partial disability award is made to a person who has completed twenty-five years or more of active service, the benefits must be made in an amount equal to a specified percentage of the member's average annual salary, not to exceed seventy-two percent. In such circumstances, the amount of the benefit is not dependent upon the amount of the member's earning capacity or the degree of disability. Instead, by clear statutory directive, the amount of the benefit is dependent solely upon the member's length of service. See Op. No. 68-172.

Partial disability benefits are also provided, in certain circumstances, to PFDPF members who suffer disability resulting from causes other than the performance of official duties. R.C. 742.37(C)(5) states:

A member of the fund who has completed five or more years of active service in a police or fire department and has incurred disability not caused or induced by the actual performance of his official duties as a member of such department, or by his own negligence, such disability preventing him from performing his official duties as a member of the department and impairing his earning capacity, shall receive annual disability benefits, payable in twelve monthly installments, in an amount to be fixed by the board. The board may increase or decrease such monthly benefits whenever the impairment in the member's earning capacity warrants an increase or decrease, but in no event shall a benefit paid to such member exceed the greater of five thousand dollars or an amount equal to a percentage of his average annual salary. The percentage shall be the sum of two and one-half per cent for each of the first twenty years he was in the active service of such department, plus two per cent for each of the twenty-first to twenty-fifth years he was in the active service of such department, plus one and one-half per cent for each year in excess of twenty-five years he was in the active service of the department, or sixty per cent of such average annual salary, whichever is smaller. (Emphasis added.)

Partial disability benefits under this provision are available only to a member who has completed five or more years of active service and who has incurred disability not caused or induced by the performance of official duties or by the member's own negligence, when the disability prevents the member from performing his official duties and impairs his earning capacity. The Board is expressly granted power to increase or decrease the benefits when the impairment in the member's earning capacity warrants an increase or decrease. The statute places a limit on the maximum amount of benefits, equal to the greater of: (1) five thousand dollars; or (2) a specified percentage of the member's average annual salary, not to exceed sixty percent, based on the number of years of the member's active service.

Authority of the Board of Trustees of PFDPF to Reduce a Grant of Partial Disability Benefits if There Is a Change in the Member's Earning Capacity or Level of Disability

For ease of discussion, this opinion now addresses the eighth question. That question is whether the Board has the authority to reduce a grant of partial disability benefits if there is a change in the member's earning capacity, level of disability, or both.

R.C. 742.22, discussed above, provides that any disability benefits awarded to a PFDPF member terminate on the first day following restoration to active duty as a member of a police or fire department. This provision applies to partial disability benefits as well as to permanent and total disability benefits. Thus, if a PFDPF member who receives partial disability benefits is restored to full-time active service as a member of a police or fire department, the member ceases to receive disability benefits. In effect, the restoration to active duty establishes that the member's disability no longer exists and that the member's earning capacity is no longer impaired. Under the provisions set forth above, it is clear that, when the Board awards partial disability benefits to a person who is disabled as the result of the performance of his duties and who has completed less than twenty-five years of active service, the Board has authority to increase or decrease the benefits "whenever the impairment of the member's earning capacity warrants an increase or decrease." R.C. 742.37(C)(3). Any change pursuant to this provision must be based upon the impairment of the member's earning capacity. *See State ex rel. Brunson v. Bedner*, 28 Ohio App. 2d at 64, 274 N.E.2d at 566 (under R.C. 742.37(C)(3), members of the Board of Trustees of PFDPF "are given wide discretionary authority to make awards for disabilities, and to increase or decrease such awards dependent upon the member's earning capacity"). A change in the level of disability would not justify a change in benefits without a corresponding change in the member's earning capacity.

A similar conclusion is reached with respect to members who receive partial disability benefits pursuant to R.C. 742.37(C)(5), when disability results from causes other than the performance of official duties. There is express authority for the Board to increase or decrease the benefits, within the limits established by statute, "whenever the impairment in the member's earning capacity warrants an increase or decrease." R.C. 742.37(C)(5). Again, the standard for any change is not the level of disability but is, instead, the impairment in the member's earning capacity.

A different conclusion is reached with respect to a member who has completed twenty-five or more years of active service and who is partially disabled as the result of the performance of his official duties. For such a member, the statute provides for benefits in the amount of a particular percentage of average annual salary. R.C. 742.37(C)(3). The amount of benefits for such an individual is not dependent upon the earning capacity or level of disability of the member and cannot be reduced if there is a change in the member's earning capacity or level of disability. The only statutory basis for changing the level of disability benefits awarded to such an individual is termination upon restoration to active duty, as provided in R.C. 742.22. *See also* R.C. 742.37(C). All recipients of partial disability benefits from PFDPF are, however, subject to the periods of forfeiture established for employment under other public retirement systems. *See* R.C. 145.38; R.C. 3307.381; R.C. 3309.341.

R.C. 742.46 states that the granting of a benefit or pension to any person under R.C. 742.01-.49 vests a right in such person to obtain and receive the amount of the benefit or pension "subject to" R.C. 742.01-.49. Any benefit granted pursuant to R.C. 742.37(C)(5) or to a member with less than twenty-five years of experience pursuant to R.C. 742.37(C)(3) is "subject to" being increased or decreased as warranted by changes in earning capacity. *See State*

ex rel. Brunson v. Bedner; see also *State ex rel. Boehnlein v. Poland*, 1 Ohio St. 2d 179, 205 N.E.2d 906 (1965).

A PFDPF Member Who Receives Partial Disability Benefits Is Permitted to Accept Employment in a Non-Police or Fire Position, But His Benefits May Be Subject to Change on the Basis of Earning Capacity

The fourth question is whether a PFDPF member may continue to receive a partial disability benefit if the member becomes reemployed in a non-police or fire position. R.C. 742.37 and related provisions do not state expressly whether a member may continue to receive partial disability benefits if the member becomes reemployed in a non-police or fire position. Since the statutes do not prohibit a member from being reemployed in a non-police or fire position and continuing to receive partial disability benefits, it appears that such a situation is permitted, provided that other statutory requirements are met. See, e.g., *Kinsey v. Board of Trustees of PFDPF*, 49 Ohio St. 3d at 226, 551 N.E.2d at 992 ("partial disability, as used for purposes of [PFDPF], implies that a person may be able to perform other gainful employment notwithstanding an inability to return to a former position as a fire fighter"); see also Op. No. 90-002, at 2-9 ("[c]learly, a person incapacitated for duty and eligible for a disability retirement with respect to one position might be capable of performing other work").

R.C. 145.38, which governs the benefits available to a retirant of a public retirement system who is subsequently employed under PERS, includes as an "other system retirant" a member or former member of PFDPF who is receiving a disability benefit. R.C. 145.38 expressly states that such a retirant "may be employed by a public employer." R.C. 145.38(B)(1). R.C. 145.38 contains provisions governing contributions to PERS by the retirant and the employer and states that, if the disability benefit is terminated, the other system retirant will become a member of PERS. R.C. 145.38(B)(1), (E). The statutory scheme thus recognizes that an individual who receives disability benefits from PFDPF may seek other work, and also recognizes that termination of the disability benefits may be possible. Accord R.C. 3307.381 (STRS); R.C. 3309.341 (SERS). Employment under another public retirement system is, of course, subject to the periods of forfeiture established by applicable law. See R.C. 145.38; R.C. 3307.381; R.C. 3309.341.

As discussed above, in all instances except those involving a member with twenty-five years of service receiving benefits under R.C. 742.37(C)(3), the Board is authorized to consider the earning capacity of a recipient of partial disability benefits and to modify the amount of benefits on the basis of earning capacity. Pursuant to this statutory authority, the Board may reduce to zero the partial disability benefits awarded to a member if that member's earning capacity in a non-police or fire position warrants such reduction. See *State ex rel. Brunson v. Bedner* (for purposes of R.C. Chapter 742, "earning capacity" is not limited solely to earning capacity as a police officer or firefighter but relates to capacity to earn compensation in other positions); accord *State ex rel. Boehnlein v. Poland*. The fact that an individual is actually employed in a particular job would clearly be relevant to a determination of that individual's earning capacity. See, e.g., *State ex rel. Brunson v. Bedner* (upholding determination of PFDPF to award partial disability benefits in an amount that, when added to the recipient's current earnings, totaled the sum he had earned as a police officer at the time of his separation from duty); Op. No. 90-002. Accordingly, a member who has a substantial increase in earning capacity might be found to be ineligible for a continued partial disability benefit. It follows that the Board of Trustees of PFDPF is authorized to cease to provide a partial disability benefit to a member, other than a member with twenty-five or more years of service who receives a benefit pursuant to R.C. 742.37(C)(3), if the member's reemployment in a non-police or fire

position, when considered with any other relevant factors, establishes that the member does not suffer from an impaired earning capacity.

Again, however, a different result is reached for a member who has completed twenty-five or more years of service. R.C. 742.37(C)(3) establishes the formula for determining the partial disability benefits for such an individual. The statute does not provide for varying or terminating those benefits on the basis of earning capacity. A literal reading of R.C. 742.37(C)(3) leads to the conclusion that, like an award of permanent and total disability benefits, an award of partial disability benefits to a member who has completed twenty-five or more years of service is not subject to change on the basis that the member has become reemployed in a non-police or fire position.

A PFDPF Member Who Receives Partial Disability Benefits Is Permitted to Accept Employment in a Law Enforcement or Firefighting Position That Is Not Under PFDPF, But His Benefits May Be Subject to Change on the Basis of Earning Capacity

The fifth question is whether a PFDPF member may continue to receive a partial disability benefit if the member is reemployed in a law enforcement or firefighting position that is covered by another retirement system and is not included within the definitions of member of a police department or fire department under R.C. 742.01(A) and (B). *See* note 2, *supra*. It is clear that an individual may not continue to receive a partial disability benefit from PFDPF if the individual is reemployed as a member of a police department or fire department as defined in R.C. 742.01(A) and (B), since R.C. 742.22, discussed above, provides that disability benefits terminate on the first day following restoration to active duty. As noted above, however, the definitions contained in R.C. 742.01(A) and (B) do not include part-time employees as members of a police or fire department. Thus, an individual who works on a part-time basis is not a member of a police or fire department for purposes of R.C. 742.01(A) and (B) and is not prevented by R.C. 742.22 from continuing to receive disability benefits.

As discussed above, statutes governing certain public retirement systems other than PFDPF indicate that recipients of PFDPF disability benefits may, subject to certain periods of forfeiture, be employed under those other retirement systems. *See* R.C. 145.38 (PERS); R.C. 3307.381 (STRS); R.C. 3309.341 (SERS). No statutory provision prohibits a recipient of PFDPF disability benefits from holding a law enforcement or firefighting position that is not covered by PFDPF. It follows that there is no direct prohibition against employment in the type of position here at issue -- that is, employment in a law enforcement or firefighting position that is covered by a retirement system other than PFDPF and is not included within the definitions set forth in R.C. 742.01(A) and (B).

Eligibility for a partial disability allowance is based upon a disability that both: (1) prevents the member from performing the member's official duties as a member of a police or fire department; and (2) impairs the member's earning capacity. If the member is reemployed in a law enforcement or firefighting position, such reemployment may raise questions as to whether the member is truly disabled from performing duties as a member of a police or fire department as defined under R.C. 742.01(A) and (B). *See generally, e.g.,* Op. No. 90-002, at 2-9 ("[i]f a retirant [of the State Highway Patrol] is capable of assuming a position with substantially the same duties as the position from which he retired, logic would indicate that the retirant is probably 'capable of performing his duties.' This determination is, however, a question of fact...").

R.C. 742.37 does not, however, provide for disability benefits to be modified or terminated on the basis of a change in disability. Instead, partial disability benefits (other than those awarded pursuant to R.C. 742.37(C)(3) to an individual with twenty-five years or more of active service) are subject to modification based upon changes in the recipient's earning capacity. If a member's earning capacity increases, the Board of Trustees of PFDPF may decrease the member's partial disability benefits. If a member no longer has impaired earning capacity, the Board may cease to provide partial disability benefits. Employment in a law enforcement or firefighting position that is not covered by PFDPF may raise questions concerning actual impairment of earning capacity.

Limitations on Earnings of Recipients of PFDPF Partial Disability Benefits

The sixth question is whether there is a limit on the amount of earnings a reemployed partial disability retiree may receive, and whether the Board is authorized to require the retiree to substantiate post-retirement income. R.C. 742.37 does not specify a limit on amounts that a reemployed recipient of partial disability benefits may earn. The statute does, however, indicate that the standard for setting partial disability benefits (for members other than those with twenty-five years of service receiving benefits under R.C. 742.37(C)(3)) is the level of impairment of earning capacity.

It is clear that there is a relationship between actual earnings and earning capacity, and it is relevant for the Board to consider actual earnings in determining an individual's earning capacity under R.C. 742.37(C)(3) or (5). To change the level of partial disability benefits, however, the Board must determine not what earnings the member had, but rather whether the level of impairment of the member's earning capacity warrants a change in benefits. The statutes do not mandate a direct relationship between actual earnings and changes in partial disability benefits. In making changes in partial disability benefits the Board is, accordingly, free to consider actual earnings and any other factors it deems relevant.

The purpose underlying the provision of partial disability benefits to police officers and firefighters under R.C. 742.37 and the preceding statutory scheme has been to meet the needs of those individuals. See *State ex rel. Boehnlein v. Poland*, 1 Ohio St. 2d at 184, 205 N.E.2d at 910 ("the original and continuing concept upon which the granting of disability benefits was based has been one of need, to be determined in the discretion of the board of trustees"); *State ex rel. Brunson v. Bedner*. The ability of the Board to increase and decrease partial disability payments on the basis of changes in earning capacity serves this purpose. The Board has discretion to increase or decrease benefits as it deems appropriate to carry out its statutory responsibilities.

R.C. 742.37 and related statutes do not specify that a recipient of partial disability benefits must substantiate post-retirement income. It might be argued that the Board's general authority to manage the fund and disburse benefits, and to adopt rules for that purpose, provides the Board, by necessary implication, with authority to require a recipient of disability benefits to substantiate post-retirement income, particularly in instances in which the Board is authorized to increase or decrease benefits when warranted by the impairment of earning capacity. See R.C. 742.37(C)(3), (5). See generally *State ex rel. Boehnlein v. Poland*; *State ex rel. Lemperle v. McIntosh*.

Under the existing statutory scheme, however, it does not appear that the authority to require a recipient of disability benefits to substantiate post-retirement income may be established by necessary implication. Instead, where the General Assembly has intended that a public retirement system be authorized to establish such a requirement, it has expressly so stated. In

1982, the General Assembly amended the statutes of various public retirement systems in Ohio to authorize those systems to require the submission of information relating to actual income of a disability recipient. Former R.C. 145.39, now R.C. 145.362, was amended to authorize the Board of Trustees of PERS to adopt rules requiring each recipient of disability benefits "to file with the board an annual statement of earnings and current medical information on his condition," and similar amendments were made to statutes governing STRS (R.C. 3307.44) and SERS (R.C. 3309.41). See 1981-1982 Ohio Laws, Part I, 236, 238, 242, 245 (Am. Sub. S.B. 74, eff. Feb. 23, 1982). No corresponding amendments were made to the provisions governing PFDPF. The General Assembly's action in adopting these amendments indicates that, absent such language, a public retirement board lacks authority to require recipients of disability benefits to submit periodic statements of post-retirement income or otherwise substantiate their post-retirement income. In accordance with this evident legislative intent, it must, therefore, be concluded that existing statutes do not authorize the Board of Trustees of PFDPF to require a partial disability retiree to substantiate post-retirement income.

Prima Facie Evidence

The seventh question is whether the fact that an individual did not receive income during a given period is prima facie evidence that his earning capacity is impaired. The term "prima facie evidence" means "[s]uch evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient." *Black's Law Dictionary* 1190 (6th ed. 1990). Once a trier of fact is faced with conflicting evidence, however, the trier of fact must weigh the prima facie evidence with all other probative evidence presented. *Black's Law Dictionary* 1190 (6th ed. 1990); accord *State ex rel. Holcomb v. Walton*, 66 Ohio App. 3d 751, 754, 586 N.E.2d 176, 178 (Butler County) ("*prima facie* evidence is that which is sufficient to carry the case to the trier of fact and, if unrebutted, to support a conclusion in favor of the plaintiff"), *motion to certify overruled*, 56 Ohio St. 3d 702, 564 N.E.2d 703 (1990); *State ex rel. Herbert v. Whims*, 68 Ohio App. 39, 44, 38 N.E.2d 596, 599 (Franklin County) ("[t]he words '*prima facie*' as used in statutes merely mean a fact presumed to be true unless disproved by some evidence to the contrary, but they always imply that the proper party shall have the opportunity of offering proof in rebuttal of the *prima facie* facts"), *appeal dismissed*, 139 Ohio St. 137, 38 N.E.2d 600 (1941).

It is within the power of the legislature to prescribe rules of evidence and methods of proof and to provide that certain facts are prima facie (or presumptive) evidence of other facts, if there is a natural and rational evidentiary relationship between the facts proved and those presumed. *State ex rel. Herbert v. Whims*, 68 Ohio App. at 46, 38 N.E.2d at 600. In some instances, statutes provide that certain information constitutes prima facie evidence of particular facts. See *State ex rel. Holcomb v. Walton*; *State ex rel. Herbert v. Whims*; see also *City of Cleveland v. Keah*, 157 Ohio St. 331, 105 N.E.2d 402 (1952) (municipal ordinance making it prima facie unlawful to exceed a certain speed limit). In the matter here under consideration, the statute does not specify that a lack of income during a given period is prima facie evidence of impairment of earning capacity. Rather, the statute merely requires a finding of impaired earning capacity (together with a disability preventing the performance of the official duties) for an initial grant of partial disability benefits, and authorizes the Board to increase or decrease partial disability benefits whenever the impairment of earning capacity warrants an increase or decrease. R.C. 742.37(C)(3), (5). The Board is not instructed to consider the absence of income as prima facie evidence of impaired earning capacity. The Board has discretion to adopt rules and establish procedures for making determinations relating to impaired earning capacity. R.C. 742.37. The Board may consider all relevant evidence and give any evidence such weight as it deems appropriate, within the proper exercise of its discretion.

Evidence that an individual received no income during a given period may be used to support the conclusion that the individual's earning capacity is impaired. There may, however, be other reasons for such lack of income -- as, for example, total lack of effort to earn income or layoff by the only employer in the area. A determination as to how to receive and evaluate evidence supporting different possible conclusions regarding the impairment of earning capacity is within the discretion of the Board. It cannot be stated, as a matter of law under existing statutes, that the fact that an individual did not receive income during a given period must be considered prima facie evidence that the individual's earning capacity is impaired.

Conclusion

The analysis contained in this opinion is a legal analysis based on the language of the relevant statutes. The analysis considers the statutory language in its historical perspective and as it relates to other provisions of the Revised Code, but does not attempt to interpret it in a manner that promotes any particular result. It might be argued that the PFDPF could be operated more fairly and efficiently if the answers to some of these questions were different. But it is the function of the General Assembly to consider the wisdom of various statutes, and it is within the power of the General Assembly to change statutes as it deems appropriate. The opinion-rendering function of the Attorney General relates to the existing provisions of law, and does not encompass the power to make legislative changes.

It is, therefore, my opinion, and you are advised, as follows:

1. R.C. 742.22 requires the Board of Trustees of the Police and Firemen's Disability and Pension Fund (PFDPF) to terminate a grant of partial or permanent and total disability benefits on the first day following restoration of the recipient PFDPF member to active duty as a member of a police or fire department.
2. Existing statutes do not permit a PFDPF member to receive permanent and total disability benefits under R.C. 742.37(C)(2) while the individual is employed as a member of a police or fire department, but they do not prohibit a PFDPF member from being employed in another position for which the member receives compensation while the member receives permanent and total disability benefits under R.C. 742.37(C)(2).
3. Existing statutes do not permit the Board of Trustees of PFDPF to revoke a grant of permanent and total disability benefits made under R.C. 742.37(C)(2) if an individual becomes employed in a position for which he receives compensation, other than a position as a member of a police or fire department.
4. Existing statutes do not permit the Board of Trustees of PFDPF to reduce a grant of permanent and total disability benefits to a grant of partial disability benefits under R.C. 742.37 if there is a change in the level of disability.
5. Existing statutes permit the Board of Trustees of PFDPF to reduce a grant of partial disability benefits awarded under R.C. 742.37(C)(3) to a member who has completed less than twenty-five years of active service, or a grant of partial disability benefits awarded under R.C. 742.37(C)(5), if there is a change in the member's earning capacity warranting such a reduction.

6. Apart from R.C. 742.22, which requires the Board of Trustees of PFDPF to terminate the disability benefits of a PFDPF member who is restored to active duty as a member of a police or fire department, existing statutes do not permit the Board to reduce a grant of partial disability benefits awarded under R.C. 742.37(C)(3) to a member who has completed twenty-five or more years of active service if there is a change in the member's earning capacity or level of disability.
7. Apart from the periods of forfeiture established under R.C. 145.38, R.C. 3307.381, and R.C. 3309.341, relating to employment under other public retirement systems, existing statutes do not directly prohibit a PFDPF member from receiving a partial disability benefit while the member is employed in a non-police or fire position, or in a police or fire position that is not covered by PFDPF, provided that other statutory requirements are met.
8. Existing statutes permit the Board of Trustees of PFDPF to cease to provide a partial disability benefit to a member, other than a member with twenty-five years or more of service who receives a benefit pursuant to R.C. 742.37(C)(3), if the member's employment in a non-police or fire position, or in a police or fire position that is not covered by PFDPF, when considered with any other relevant factors, establishes that the member does not suffer from an impaired earning capacity.
9. Existing statutes do not establish a limit on the amount of earnings that a reemployed recipient of partial disability benefits can receive while the individual continues to receive partial disability benefits.
10. Existing statutes do not authorize the Board of Trustees of PFDPF to require a recipient of partial disability benefits to substantiate post-retirement income.
11. Existing statutes do not require the fact that a recipient of PFDPF disability benefits did not receive income during a given period to be considered as prima facie evidence that the individual's earning capacity is impaired.