



State of Alaska
ombudsman

INVESTIGATIVE REPORT

Ombudsman Complaint A2010-0281

Finding of Record and Closure

Public Report per AS 24.55.200

December 23, 2011

This investigative report has been redacted to remove information made confidential by Alaska Statute and to remove information that would identify the complainant.

SUMMARY OF THE COMPLAINT

A former public employee, who was vested in the Public Employees' Retirement System (PERS), contacted the ombudsman and complained that the Division of Retirement and Benefits (DRB) had abruptly stopped paying his disability benefits. He said that he and his family were likely to lose their home due to the termination of benefits.

Documentation from DRB showed that the employee had been found eligible for non-occupational disability; however, the statute providing for non-occupational disability, AS 39.35.400, requires DRB to discontinue benefits after a year unless the former employee has obtained disability benefits under the Social Security Act.¹ In this case, DRB found the employee eligible for non-occupational disability approximately eight months after his last date of employment. He therefore received a retroactive lump-sum payment, and then four months of benefit payments. Then DRB discontinued his benefits, as he was in the process of appealing a denial of Social Security disability benefits. Approximately six months after DRB stopped the benefits, the employee was still waiting for a hearing with the Social Security Administration. At that point, he cashed out his PERS contributions to address immediate financial problems, thus foreclosing any possibility of eventually receiving non-occupational disability or normal retirement benefits.

¹ Employees who have not worked sufficient quarters for an employer who pays into Social Security must show that they would be eligible if not for the lack of quarters with a covered employer. See AS 39.35.400(e).

The result in this case was mandated by statute, but the ombudsman believes that the statute is having unintended consequences inconsistent with the overall intent of the PERS disability provisions.

The complaint allegation, restated in terms consistent with AS 24.55.150 is:

Unreasonable: The statute that provides for PERS non-occupational disability fails to provide stable ongoing benefits for disabled former employees, and thus fails to carry out a basic purpose of the program.

The ombudsman found this allegation *justified*, for the reasons discussed in this report

Assistant Ombudsman Beth Leibowitz provided notice of the investigation to Division of Retirement and Benefits Director Pat Shier via e-mail on November 18, 2010. Ms. Leibowitz investigated this complaint and forwarded her investigative results to the ombudsman. The ombudsman provided a confidential preliminary report to the director of DRB on September 23, 2011, and DRB responded on November 8, 2011 (response received by the Office of the Ombudsman on November 21, 2011). DRB disagreed with both the proposed finding and recommendation. DRB's response is incorporated into this final report.

The complainant

The Complainant worked for a governmental agency for over 15 years. He was fully vested in Tier II of PERS. In April 2008, the Complainant applied for occupational disability benefits, citing a shoulder injury that occurred in 2007; he also mentioned a heart attack and diabetes.² In autumn of 2008, the employer terminated the Complainant's employment after he spent several months on leave, because he was permanently unable to return to his full job duties. (The employer stated that it did not have a permanent light-duty position to offer the Complainant.)

DRB obtained records from the Complainant's medical providers, including the "independent medical examination" (IME) done for the workers' compensation claim. In June 2009, DRB sent two letters to the Complainant. The first, dated June 1, 2009, denied his claim for occupational disability, but explained that he would receive non-occupational disability benefits. The second letter, dated June 9, 2009, awarded non-occupational disability benefits.

The Complainant did not appeal the denial of occupational disability benefits, although his right to an appeal was clearly stated in DRB's letter of June 1, 2009. It is unclear why he declined to do so. The ombudsman investigator suspected that he may not have understood that the benefits paid to him were not the occupational disability benefits for which he had applied.

DRB records indicate that DRB employees had several telephone calls with the Complainant, especially in the fall of 2009, in which DRB employees told him that his benefits depended on a decision from Social Security. Despite these phone calls, during his interview with Assistant Ombudsman Leibowitz in March 2010, the Complainant stated that he had been receiving "occupational disability" and that he did not understand why the payments had stopped. It is impossible to determine whether the Complainant's interview with the ombudsman investigator reflected genuine lack of understanding, or denial of unwelcome information. Given that the

² The Complainant also filed for Workers' Compensation. The employer controverted benefits and the case was before the Workers' Compensation Board when the ombudsman investigated this complaint.

Complainant struggles with English as a second language, the possibility of misunderstanding is somewhat more likely than it would be otherwise.

The June 2009 award of non-occupational disability had an effective date of November 1, 2008. DRB therefore paid the Complainant one month of benefits immediately, and then a lump sum representing seven months of benefits. The delay in the lump sum payment was because DRB required confirmation that the Complainant had applied to the Division of Vocational Rehabilitation for services, as required by statute.

The June 2009 award letter explained that DRB would stop paying non-occupational disability benefits at the end of October 2009, unless the Complainant had succeeded in obtaining Social Security disability benefits by then.

The Complainant applied for Social Security disability (SSDI and/or SSI). The Disability Determination Service ruled against him, and the Social Security Administration (SSA) sent him a denial notice in December 2009 (after DRB had stopped paying benefits). Although the Complainant apparently applied for Social Security in 2009, he may have also applied in 2008. DRB phone contact notes indicate that the Complainant said that he had filed a previous application for Social Security in 2008, which had already been denied as of June 2009. The December 2009 decision from SSA apparently was from a second application for benefits. It is unclear why the Complainant apparently did not appeal the earlier denial.

The Complainant appealed the 2009 denial. As roughly two-thirds of appellants win their disability claims after a hearing,³ there is a significant chance that the Complainant will eventually be found eligible for Social Security disability, which would also have restored his PERS non-occupational disability. However, the Complainant could, as of 2009, expect to wait one to two years for a hearing by an SSA administrative law judge. According to the Social Security Administration's Web site, <http://ssa-custhelp.ssa.gov/app/answers>, the national average processing time for a disability appeal was 491 days in federal fiscal year 2009 (October 2008 through September 2009). According to a newspaper article published by the Juneau Empire in May 2010, the processing time for Alaska cases averaged 642 days. See Stephen Ohlemacher, "Spike in disability claims clogs overloaded system," *Juneau Empire* (May 10, 2010).

When the Complainant contacted the ombudsman, he stated that his family was about to lose their home. The Complainant then cashed out his PERS contributions, a net refund of approximately \$50,000. At that time, the Complainant was within two years of qualifying for early retirement benefits. His decision appears to be a reaction of short-term desperation that is almost certainly a long-term economic disadvantage to him and his family.

Occupational and non-occupational disability statutes

Both the occupational and non-occupational disability statutes provide for an annual review to demonstrate continuing disability, but the nature of the review differs. For recipients of occupational disability, AS 39.35.410(b) and (g) provide:

- (b) The occupational disability benefits accrue beginning the first day of the month following termination of employment as a result of the disability and are payable the last

³ See Office of the Inspector General, Social Security Administration, Audit Report A-01-08-18011, "Disability Claims Processing Times" (December 2008), pp. 3-6. (Obtained from <http://www.ssa.gov/oig/ADOBEPDF/A-01-08-18011.pdf>).

day of the month. If a final determination granting the benefit is not made in time to pay the benefit when due, a retroactive payment shall be made to cover the period of deferment. The last payment shall be for the first month in which the disabled employee

- (1) dies;
- (2) recovers from disability;
- (3) fails to meet the requirements under (g) of this section or under AS 39.35.415;
or
- (4) reaches normal retirement age.

• • •

(g) *A disabled employee receiving an occupational disability benefit shall undergo a medical examination as often as the administrator considers advisable but not more frequently than once each year.* The administrator shall determine the place of the examination and engage the physician or physicians. If, in the judgment of the administrator, the examination indicates that the retired employee is no longer incapacitated because of a total and apparently permanent occupational disability, the administrator may not issue further disability benefits to the employee. [*Italics added*]

The non-occupational disability statute, AS 39.35.400, contained a similar annual medical examination requirement until 1976, when the legislature substituted eligibility for Social Security disability for the medical examination. *See* Ch 123 SLA 1976. AS 39.35.400 now provides, in relevant part:

39.35.400. Non-occupational disability benefits.

(a) An employee is eligible for a non-occupational disability benefit if the employee's employment is terminated because of a total and apparently permanent non-occupational disability, as defined in AS 39.35.680, before the employee's normal retirement date and after five or more years of credited service. A member is not entitled to a non-occupational disability benefit under this section unless the member files an application for the benefit with the administrator within 90 days after the member terminated employment. The board may waive a filing deadline if there are extraordinary circumstances that resulted in the inability to meet the deadline. The board may delegate the authority to waive a filing deadline under this subsection to the administrator.

(b) The non-occupational disability benefits accrue beginning the first day of the month following termination of employment as a result of the disability and are payable the last day of the month. If a final determination granting the benefit is not made in time to pay the benefit when due, a retroactive payment shall be made to cover the period of deferment. The last payment shall be for the first month in which the disabled employee

- (1) dies;
- (2) recovers from disability;

(3) fails to meet the requirements under (e) of this section or under AS 39.35.415; or

(4) reaches normal retirement age.

• • •

(e) A disabled employee receiving a non-occupational disability benefit shall provide the administrator, one year after appointment to disability benefits and once each year thereafter until disability benefits cease, proof of continuing eligibility to receive disability payments under the Social Security Act. If the disabled employee is otherwise ineligible for a social security payment, the employee shall provide the administrator with sufficient medical evidence once each year to demonstrate that disability payments under the Social Security Act would be payable had the employee been otherwise eligible. If the disabled employee fails to provide the administrator with evidence of continuing eligibility for disability payments under the Social Security Act or other medical evidence required by the administrator within 30 days following each anniversary date, the disability benefits from the plan shall cease. If that information is subsequently provided to the administrator, benefit payments will resume beginning for the month following that in which the information is provided. When disability payments under the Social Security Act cease, it is the responsibility of the disabled employee to notify the administrator immediately. [Italics added]

DRB has interpreted AS 39.35.400 as meaning that DRB should pay 12 months of non-occupational disability benefits and then stop until the recipient obtains an award of Social Security disability.⁴ If the Social Security award is eventually found to be retroactive, then DRB makes a lump sum payment along with restarting prospective monthly benefits.

ANALYSIS

The presumed purpose of providing disability benefits as a monthly stipend is to provide a stable safety net for a disabled employee and his or her dependents. The element of stability is undercut by prolonged delays in benefits. A lump sum a year or two later is the same amount of money, but delay renders it less useful if the former employee has lost his home in the meantime. By linking continued non-occupational disability benefits to the Social Security system, the statute creates a financial donut hole for disabled employees – although DRB has determined that they are in fact disabled, they are likely to be cut off for an unpredictable period while working their way through the Social Security system.

In the Complainant's case, he applied for PERS occupational disability in spring of 2008, was discharged from employment in October 2008, and received approval of non-occupational disability in June 2009. He waited a little over seven months from his last date of employment to the decision awarding him non-occupational disability. He received a lump sum payment in July 2009, and began receiving monthly payments through October 2009, at which point he had

⁴ If the employee is not eligible for Social Security because of not having worked for an employer that pays into Social Security, then the statute would require that the employee provide medical records to DRB instead. This provision did not apply to the Complainant.

received the equivalent of 12 months of benefits. The Complainant had five months between DRB's decision in June 2009, which expressly informed him that he was receiving *non-occupational* disability and that his continued PERS benefits were thus contingent on obtaining Social Security, and the termination of his benefits. Five months is often not enough time to obtain an initial decision from the Disability Determination Service, let alone to complete an appeal in the Social Security disability system. This more or less guaranteed that the Complainant would be left in financial jeopardy at the end of 2009.

The ombudsman could not readily determine the typical processing time for a Social Security disability claim in 1976, but it appears that the delays in the SSA process lengthened within the last decade. According to the Social Security Administration's Office of the Inspector General, average processing time doubled between 2000 and 2008.⁵

The Complainant's circumstances do not appear to be unique. In a review of PERS appeal decisions issued by the Office of Administrative Hearings, the ombudsman investigator found a reference to a similar situation, and requested additional information from DRB. (See *In re S.S.*, OAH case no. 05-0707-PER; Div. R&B case nos. 100-103).⁶ The employee in that case, S.S., applied for non-occupational disability in August 2001, and became unemployed by January 1, 2002. DRB decided she qualified for non-occupational disability in March 2003, and she received a lump sum payment for one year of benefits. However, she then waited another two-and-a-half years, until November 2005, before she began receiving stable, predictable disability benefits. That was because she had a Social Security disability appeal pending from February 2002 until October 2005, when she was finally awarded Social Security disability.

AS 39.35.400, as passed in 1976, was probably intended as a cost-saving measure for the state. The work of annually reviewing beneficiaries' medical conditions was handed over to Social Security. This would be efficient, if the Social Security Administration's time frames approximated the annual review contemplated by the statute and performed by DRB prior to 1976. The problem is that, given current trends, a successful Social Security disability award can easily take longer than a year. This means that an employee that DRB *has already found to be disabled* will be cut off from benefits for an unpredictable period. For example, when DRB concluded that S.S. qualified for non-occupational disability, her Social Security appeal had already been pending for over a year. When DRB issued its decision, S.S. had already been out of work for over 12 months, so she received a year's worth of retroactive non-occupational disability benefits as a lump sum. She was then left to cope for another two and a half years, waiting on Social Security.

In the Complainant's case, he lost his job in October 2008. In June 2009, DRB concluded that his medical records demonstrated non-occupational disability, but by November 2009, he was on his own again. Even if the Social Security Administration eventually concurs with DRB's initial decision that the Complainant is in fact disabled, it is too late for him to receive PERS disability

⁵ See Office of the Inspector General, Social Security Administration, Audit Report A-12-08-18071, "Aged Claims at the Hearing Level" (September 2009), pp. 1-5. (Obtained from <http://www.ssa.gov>.)

⁶ **Ombudsman note:** The issue before the OAH was S.S.'s appeal of the denial of *occupational* disability benefits. Her loss of non-occupational disability benefits and eventual reinstatement after obtaining Social Security disability were noted in the OAH decision as background information. Non-occupational disability was not an issue before the OAH in *In re. S.S.*, OAH case no. 05-0707-PER.

benefits: he was unable to afford the wait time. This outcome does not represent a stable safety net for disabled employees.

In the response to the preliminary ombudsman report, DRB suggested that the 1976 amendment to AS 39.35.400 was not just intended to shift the labor of evaluating continued disability, but was also intended to raise the bar to qualify for benefits after one year. DRB pointed out that AS 39.35.680(24) defines “non-occupational disability” as “a physical or mental condition that, in the judgment of the administrator, presumably permanently prevents an employee from satisfactorily performing the *employee’s usual duties for an employer or the duties of another position or job that an employer makes available and for which the employee is qualified by training or education*, not including a condition resulting from a cause that the board in its regulations has excluded.” (Emphasis added.) In that definition, an “employer” is a PERS employer. That is the standard for eligibility for the first year of PERS non-occupational disability; however, DRB believes that the standard for Social Security disability – and continuing PERS benefits – is more stringent, because the Social Security Administration considers the employee’s ability to do *any* work, not just work for a PERS employer. DRB may well be correct that the 1976 legislation was intended to make it harder to qualify for continuing benefits, but even if that is so, the effects of delay within the Social Security process still create an unintended consequence. The Complainant’s case, and that of S.S., demonstrate the potential for a legitimate beneficiary⁷ to be cut off, for months or years, from the protection that should be provided by disability benefits. Regardless of whether the Social Security evaluation is actually more restrictive than the initial decision by DRB, the problem here is delay, not the quality of the eventual decision.

FINDING

The allegation considered by the ombudsman was as follows:

Unreasonable: The statute that provides for PERS non-occupational disability fails to provide stable ongoing benefits for disabled former employees, and thus fails to carry out a basic purpose of the program.

The Ombudsman Act, AS 24.55.010 – AS 24.55.340, provides that the ombudsman may investigate acts of administrative agencies that the ombudsman has reason to believe are “unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law.” See AS 24.55.150(a)(2). The Office of the Ombudsman has, in Ombudsman policy and procedure, defined “unreasonable” as including instances where “the agency adopted and followed a procedure in managing a program that was inconsistent with, or failed to achieve, the purposes of the program.”

In this case, DRB is following statute, but it appears that unintended consequences of that statute are defeating the goals of the PERS disability provisions. In this case, the problem goes beyond DRB’s procedure, and DRB is not at fault, but the results in this case undermine the idea that a disabled employee will be protected by receiving a predictable stipend while unable to work. The

⁷ The ombudsman notes that the Complainant may or may not eventually be shown to meet Social Security disability standards; however, even if he prevails on an appeal and demonstrates the legitimacy of his claim, he cannot be made whole by DRB. In the case of S.S., the history of that case indicated that she did eventually prove to be an appropriate beneficiary, but only after prolonged delay.

stability and predictability can end at the 12-month mark. Even if the former employee is eventually reinstated with non-occupational disability after waiting out the Social Security appeals process, a later payment is not truly equivalent to steady monthly assistance.

The ombudsman therefore found the above allegation justified.

RECOMMENDATION

The Ombudsman Act (AS 24.55) contemplates that the ombudsman “may investigate to find an appropriate remedy.” In this case, DRB cannot simply change its policy. The remedy is legislative change.

Recommendation: DRB should seek amendment of AS 39.35.400 to either separate PERS non-occupational disability from the Social Security Administration’s determinations, or to otherwise mitigate the effects of tying continued PERS benefits to the Social Security disability determinations.

The ombudsman notes that occupational disability benefits (AS 39.35.410) are not tied to Social Security awards, nor is the initial determination of non-occupational disability by DRB. The ombudsman believes that there are mechanisms for checking on the validity of continued benefits that do not subject the PERS system to the delays experienced within the federal Social Security Administration.

Agency Response to Proposed Finding and Recommendation

DRB Director Jim Puckett responded to the ombudsman’s preliminary report on November 18, 2011. On behalf of DRB, the director disagreed with the ombudsman’s proposed finding and recommendation. He argued that the restriction on eligibility provided by AS 39.35.400 is consistent with the program’s purpose, as indicated by a general legislative trend toward restricting the scope of non-occupational disability benefits:

Alaska Statute 39.35.680 (24) defines non-occupational disability as "a physical or mental condition that, in the judgment of the administrator, presumably permanently prevents an employee from satisfactorily performing the employee's usual duties for an employer or the duties of another position or job that an employer makes available and for which the employee is qualified by training or education, not including a condition resulting from a cause that the board in its regulations has excluded."

...

To be eligible for disability benefits, a member only has to establish that they are unable to perform the duties of their job or another job for a PERS employer. The intent of the statute was to offer a replacement income for members who are permanently disabled from performing their duties but could possibly find another position. The legislature passed the continuing eligibility requirements in 1976 with the understanding that only members who were disabled under the Social Security standards would continue to receive benefits until they were eligible for a normal retirement benefit. In other words it changed payment of benefits to those

disabled from performing a PERS position to being unable to do any gainful employment. Legislative history clearly shows that the legislature intended to tighten continuing eligibility requirements, such as requiring members who were first hired on or after July 1, 1986, to apply to the Division of Vocational Rehabilitation within 30 days of their appointment to a PERS disability benefit. If a member does not apply and follow the requirements of the vocational rehabilitation statute, their benefit will be stopped after 30 days. This is further reinforced with the inception of SB 141 where members who are hired on or after July 1, 2006 only have the opportunity to apply for PERS Occupational Disability.

Second, the director argued that situations like the complainant's are almost nonexistent. He wrote:

The number of individuals who have had their benefits stopped because of a lack of a social security award is as follows:

2005	26 appointments	0 benefits stopped
2006	22 appointments	0 benefits stopped
2007	32 appointments	1 benefit stopped
2008	28 appointments	1 benefit stopped
2009	19 appointments	1 benefit stopped
2010	18 appointments	3 benefits stopped *
<u>2011</u>	<u>15 appointments</u>	<u>0 benefits stopped</u>
Total	160 appointments	6 benefits stopped

*Two of the three neglected to apply and are in the process of applying now.

[Ombudsman note: The above chart omitted the complainant's case. DRB indicated that the complainant should have been listed as one of the appointments in 2008. This means that actually two beneficiaries appointed to non-occupational disability in 2008 subsequently lost benefits. According to DRB, none of the beneficiaries whose benefits were stopped have had benefits reinstated. DRB is unaware whether any of these beneficiaries appealed the denial of Social Security disability benefits, and, if so, whether any appeals are still pending.]

Third, the director wrote that the Social Security Administration has reduced the wait time for appeals, so the problem of federal delay is now greatly lessened:

The Ombudsman's complaint states the length of time it takes to get a Social Security Disability Award doubled between 2002 and 2008. Social Security has made efforts to reduce this time. For example, there is now a list of 129 diagnosed diseases that will automatically qualify for Social Security disability. The Juneau Social Security Office reported that the initial application takes about 90-100 days. If they are denied it takes 6-8 months for a hearing.

The DRB response concluded as follows:

PERS disability benefits are 100% employer funded benefits; the member's contribution balance is not used for funding disability benefits. These are expensive benefits for the PERS employers to provide. Any changes in the requirements would require the legislature to amend the statutes.

The Division does not believe the Ombudsman's report correctly states the intention of the PERS disability benefits and the continuing eligibility requirements. The Ombudsman also makes an assumption that [the Complainant] would have eventually been appointed to Social Security Disability.

The proposed decision should be modified or eliminated altogether based on the information provided in this memo. The Division will not propose any changes to the statutory requirement that PERS members must be approved for a Social Security Disability Award within one year of being appointed to a non-occupational disability benefit.

Ombudsman's Comments on Agency Response

The ombudsman agrees with DRB's general position that restricting eligibility is consistent with the purposes of the program. However, a restriction that properly serves the purposes of a disability benefit program needs to be neither over nor under inclusive. The fact that eligibility is restricted does not explain the utility of having a time period in which someone who has already been found to be disabled loses monthly benefits while waiting for the additional determination by Social Security. The current method protects DRB from making continued payments to unqualified applicants. However, the protection is at the expense of some of the PERS beneficiaries, i.e. genuinely disabled employees who are eventually able to prove their disability. If the Social Security Administration eventually determines that the former employee is indeed disabled, DRB may pay disability benefits retroactively, but retroactive payment is not equivalent to a steady monthly benefit for purposes of protecting the former employee.

DRB has demonstrated that the number of affected disabled employees is small -- seven employees over the last seven years (2005-2011), including the complainant in this case. Out of these seven employees, two apparently failed to even start the Social Security application process before they were cut off from PERS disability, and are apparently still waiting for an initial decision from the Social Security Administration. Among the other five employees affected in 2005-2011, DRB indicated that none have so far prevailed in a Social Security disability appeal and had benefits reinstated. DRB had no data indicating if these employees have appealed and lost, simply did not appeal the initial denial of Social Security disability, or have pending appeals with the Social Security Administration's Office of Disability Adjudication and Review (ODAR). Two of the seven employees, including the complainant, cashed out their PERS and thus destroyed their eligibility for PERS disability regardless of the outcome with Social Security.

The ombudsman is relieved that cases like the Complainant's are uncommon. However, that does not change the ombudsman's finding. The ombudsman respects DRB's position that the current statute protects DRB from paying for more than a year on unmerited claims, but the ombudsman believes that the current methodology is over-inclusive, because it will occasionally throw out the disabled along with the not-so-disabled.

The ombudsman acknowledges that the problem illustrated in this report may be lessened if the Social Security Administration maintains its reduction in processing time for disability appeals. As indicated by the 2005-2011 (to date) history provided by DRB, situations like the complainant's are, fortunately, relatively rare, and should become rarer if the Social Security Administration is able to maintain its improvement. The current data from the Social Security Administration indicates that a year is, on average, just enough time for an Alaska applicant to receive an initial determination⁸ and appeal if necessary.

The Social Security Administration provides online information on average processing time for appeals pending in the ODAR. For federal FY 2011 (09/25/2010 through 09/23/2011), the Anchorage office of ODAR had an average processing time of 373 days.⁹ That average dropped to 241 days for the first month of FY 2012 (10/01/2011 through 10/28/2011).¹⁰ That would be approximately eight months. However, a second table provided by the Social Security Administration listed the Anchorage ODAR's processing time as averaging seven months for October 2011.¹¹ Of course, an average means that half of the appeals take longer.

Aside from statutory change, DRB may be able to prevent some cases like the Complainant's by careful counseling of PERS disability applicants. The Complainant initially applied for occupational disability in spring of 2008, over a year before DRB approved non-occupational disability. Occupational disability is not tied to a Social Security disability award, but DRB had an opportunity to counsel the Complainant about the advantages of applying for Social Security sooner rather than later. When the Complainant later received notice in 2009 that he was receiving non-occupational disability, with a retroactive effective date, he did not have a year to apply for Social Security disability – he had five months. His first year of non-occupational disability ran out in November 2009. Even with the current improvements in the Social Security Administration, five months is barely enough time for an initial determination and certainly not enough time to complete an appeal. The short period between the notice of appointment to non-occupational disability and the cutoff date makes it more likely that a beneficiary will have a gap in benefits, unless they have already begun the Social Security application process.

DRB made an effort to provide the Complainant with relevant information in 2008, but DRB may be able to improve the delivery of the information about Social Security's role in PERS disability. Judging by correspondence sent to the Complainant when he first applied for PERS occupational disability in 2008, DRB currently provides applicants with written information regarding the need to apply for Social Security disability; however, the explanation is not clear regarding the value of applying for Social Security disability even prior to approval of PERS disability. In the Complainant's case, DRB sent him a letter in spring of 2008, acknowledging his application for disability benefits. After a section discussing the additional information that would be required if his application for disability benefits was approved, the letter stated:

⁸ The Social Security Administration's initial decision is issued by the Disability Determination Service (DDS), and typically takes three months, more or less.

⁹ http://www.ssa.gov/appeals/DataSets/Archive/05_FY2011/05_September_Average_Processing_Time_Report.html
For FY 2011, the Seattle ODAR office averaged 391 days processing time.

¹⁰ http://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.pdf (checked December 8, 2011).

¹¹ http://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html. The Web site describes this data: "A presentation of the average time (in months) from the hearing request date until a hearing is held for claims pending in the Office of Disability Adjudication and Review's hearing offices. Allows users to estimate the amount of time they may have to wait for a hearing to be held."

If your disability application is approved, you will be required to show proof of continuing eligibility by providing Social Security Award of Disability within one year of your appointment to disability. If you are not eligible for Social Security Disability because you have not contributed to Social Security, you will be required to have a *Physician's Statement of Continuing Eligibility* completed by your treating physician and to provide copies of recent medical records to support your continued disability.

Since you were first hired into PERS on or after July 1, 1986, you will be required to apply to the Division of Vocational Rehabilitation within 30 days of your appointment.

The above warning refers to the date of "appointment," but does not clearly explain that the date of appointment may be months before the date of approval, and that the one-year deadline may start running before DRB makes a decision on the disability application.

DRB can address this problem by proactive counseling for disability benefit applicants, as well as by providing a clearer written explanation of the relevant deadlines. As soon as an employee submits a disability benefits application – whether for occupational or non-occupational disability – DRB staff could counsel the employee to begin the Social Security disability application process. The ombudsman notes that this counseling may already occur. DRB's records of contact with the Complainant do not indicate whether DRB staff counseled the Complainant to begin applying for Social Security disability while his PERS occupational disability application was still pending.¹²

If DRB is unwilling to propose a statutory change to the non-occupational disability benefit, then the ombudsman suggests DRB implement a policy emphasizing the need for early counseling of PERS disability applicants (both occupational and non-occupational) regarding this pitfall in benefits eligibility.

Suggestion: DRB procedures should provide for express counseling of disability applicants regarding the timing of a Social Security disability application, with counseling provided as soon as a PERS disability application is pending.

CONCLUSION

The ombudsman closed this complaint as ***justified*** and ***not rectified***. However, the ombudsman notes that, as of 2011, changing circumstances in the Social Security Administration may reduce that agency's appeal processing time, and thus reduce the effect of Social Security delay on PERS beneficiaries.

¹² Even careful counseling might not have benefitted this particular complainant. DRB phone contact notes indicate that the Complainant said that he had actually applied for Social Security disability in 2008 and had been denied. DRB files did not contain a copy of any 2008 documentation from Social Security. He apparently reapplied in 2009.