

# OPM DISABILITY RETIREMENT LAW

## Vital Information for Federal Employees

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## LEGAL MANUAL

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#### 1 What is disability retirement?

Disability retirement is a right. Any employee who belongs to either the Civil Service Retirement system (CSRS) or the Federal Employees Retirement System (FERS), after meeting certain threshold requirements, can collect a portion of his or her salary if a medical condition prevents him or her from continuing work in a government job. It is not a favor, a handout, or a gift, but a right for which you have already paid through contributions to your retirement fund. Whereas regular retirement gives you the right to stop working and begin collecting if you reach a certain age, disability retirement gives you this right if you develop a disability, even if you haven't yet reached retirement age. Just as the premium payment on your fire insurance policy protects you against the loss of your house due to fire, your monthly paycheck retirement deduction protects you against loss of income due to disease or injury.

#### 2 How sick or injured do I have to be in order to collect disability retirement?

You do NOT have to be totally disabled to collect disability retirement. You are considered disabled if you are unable to render "useful and efficient service." If you are unable to perform satisfactorily a single (just one and any one will do) "critical element" of your current government job on account of an illness or injury, then you cannot render "useful and efficient service" and are eligible for disability retirement. It does not matter that you may be able to perform all of the other elements of that job. If you can't perform that single "critical element," then you are by definition disabled.

To some this sounds too good to be true; particularly to some physicians who are accustomed to thinking of disability in terms of wheelchairs, oxygen tents, and life support machines. They often fail to grasp the fundamental point that Congress has chosen to define disability for government employees in far more liberal terms than disability is defined in other areas of the law. As a consequence of their misunderstanding, many doctors are reluctant to go all out for their patients who do not meet the more traditional definition of disability. One result is that their patients end up being denied a benefit to which they have a legal right. One of my major tasks in representing government employees seeking disability retirement is to educate physicians and others on this critical point so that they can, in turn, really go to bat for their patients.

*Example: Andy suffers from the chronic pain of a slipped disc whenever he is required to sit for even short intervals. Andy's desk job requires long stretches of sitting. Andy has no trouble playing golf or dancing till dawn, but he cannot sit without pain. Because Andy can not render "useful and efficient service," he is disabled from his government job even though he can play golf and dance. If he meets the other requirements, he is entitled to disability retirement.*

#### 3 How long must the disability be likely to last before I am eligible for disability retirement?

Just as the disability need not be total, it also need not last forever. You are entitled to disability retirement if your disabling symptoms are likely to last for at least one year. While no less than one year's duration is sufficient, no more than one year's duration is required.

*Example: Barbara's job description required her to travel by airplane, at least one time each month, to the agency's field office. She developed an uncontrollable phobia of flying and could no longer attend the monthly meetings. Accommodation was not possible, such as by conference telephone call, since effective meetings required her physical presence. Barbara's psychiatrist corroborated her claim with a "reasoned medical opinion," which included a prognosis that her symptoms would not abate for at least one year. Barbara is disabled because she is unable to render "useful and efficient service" for at least one year. She is entitled to disability retirement if she meets the other requirements.*

**4 How long do I have to work for the government in order to be eligible for disability retirement?**

That depends on the retirement system to which you belong. FERS employees are required to be enrolled in their retirement system for a minimum of 18 months to be eligible for disability retirement. CSRS employees must be enrolled a minimum of five years in their retirement system to be eligible.

**5 Will a pre-existing disease or injury prevent me from collecting disability retirement?**

No. You have a right to disability retirement even if you were sick or injured prior to your government employment, so long as you became disabled by the symptoms of your disease or injury after you were employed. In other words, a pre-existing disease or injury will not bar you from collecting, as it might with many types of disability and health insurance. A pre-existing disability, however, will bar you from collecting.

*Example: Charlie entered government service with cerebral palsy, but he was able to perform his job very well for a number of years. Later, his condition worsened so that he lost the ability to perform some of the critical elements of his job. Because he is unable to perform at least one of the critical elements of his job, he is unable to render "useful and efficient service" and is legally disabled. Although he entered government service with cerebral palsy, the condition did not become disabling until later. Thus, if he meets the other requirements, he is entitled to disability retirement.*

**6 Can I be denied disability retirement if I refuse evaluation or treatment which might reasonably ameliorate the medical condition causing the disability?**

That depends on the nature of the medical evaluation or treatment you refuse. You cannot be denied disability retirement for refusing to undergo diagnostic procedures or treatment strategies that are relatively invasive, relatively painful, or may result in further illness. However, in one case an employee's chronic back pain was exacerbated by being overweight. She was denied disability retirement when she refused to accept medical advice to exercise and lose weight.

**7 Do I need to have a job- related disease or injury in order to qualify for disability retirement?**

No. Disability retirement compensates you regardless of either the nature or the cause of the disability. Nor does it matter where the disability was incurred, whether at the desk or on the dance floor. Workers' compensation is a different program that compensates employees for disabilities which are exclusively job-related.

**8 What's the biggest difference between disability retirement and workers' compensation?**

The biggest difference is this: the workers' compensation program, run by the Department of Labor, compensates employees for disabling diseases or injuries that are caused exclusively by or on the job. OPM's disability retirement program, on the other hand, compensates government employees for disability from disease or injury irrespective of how or where they were caused. Thus, if your disease or injury is job-related, you may be eligible for both programs.

**9 If I'm eligible for both disability retirement and workers' compensation, can I collect from both?**

No. Government employees who are eligible for both disability retirement and workers' compensation cannot collect from both, except in very special circumstances. Since there are a multitude of other differences between the two programs, you should definitely seek legal assistance if you are confronted with a choice. Be aware, however, that you will probably not be able to find a lawyer who will represent you in a government workers' compensation case, given the government's shenanigans with legal fees in such cases.

**10 Which diseases and injuries qualify for disability retirement?**

All diseases and all injuries qualify for disability retirement, including phobias, depression, chronic pain, allergies, chemical sensitivities, drug addiction, and alcoholism.

**11 Is there a time limit on applying for disability retirement?**

Yes. You cannot apply for disability retirement after being separated from government service for one year. To meet the time deadline, your application must be filed with OPM within one year of the date you leave your government job. There is an exception, under special circumstances, for persons who are mentally incapacitated.

Employees separated for more than 31 days may file an application for disability retirement with their agency, but are best advised to file directly with OPM. Employees who are near the expiration of the one year time limit should file directly with OPM to preclude the possibility of the agency's delaying the application from reaching OPM until after the time limit.

**12 If I am fired from my government job, am I still eligible for disability retirement?**

Yes. Even if you are fired from your government job (except for treason or for certain other select offenses), you are eligible for disability retirement. In fact, it is not unusual for employees to be fired just because their disability precluded them from coming to work on time or from performing satisfactorily on the job. In those cases, the adverse action itself may enhance your ability to win disability retirement. But such employees, as everyone else, are required to file for disability retirement with OPM within one year of being separated from the government.

**13 Is it possible to be fired as the result of sickness or injury and yet not qualify for disability retirement?**

Yes. You can be fired from your job as the result of a medical condition that precludes you from performing one of the critical elements of your job, and yet you may not be eligible for disability retirement because you do not meet one of the other requirements.

*Example: Dagwood, a CSRS employee with four years tenure in federal service, was completely paralyzed from a skiing accident. The agency can legally fire Dagwood on grounds that he can no longer perform one or more of the critical elements of his job. Unfortunately, Dagwood is ineligible for disability retirement because he does not have the requisite five years tenure required by CSRS.*

**14 If I withdraw all of the money from my retirement fund after separation from government service, am I still eligible for disability retirement?**

Probably, but the answer is not clear-cut. Depending on the circumstances, withdrawal of your retirement fund does not necessarily extinguish your right to disability retirement. However, since the law is somewhat unclear, you certainly should not withdraw your retirement fund at separation if you think there is any chance that you may seek disability retirement within the next year.

**15 Who decides if I have a right to collect disability retirement?**

OPM decides. If it turns you down in a final decision, though, you can then appeal to the Merit Systems Protection Board (MSPB), and the Board will decide. Your agency does not make that decision (unless you happen to work for OPM).

**16 If OPM denies my disability retirement application, will they give me another chance to prove my case to them, without having to appeal to the MSPB?**

Yes, in most cases. If OPM denies your application, they will do so in an initial decision, and you can request that they reconsider that decision. But be aware that in some cases, OPM may randomly toss your case into its new experimental "pilot project," and not give you another opportunity for review. If this happens, the only way to win disability retirement is to appeal to the MSPB and start all over again there. I will discuss this "pilot project" in more detail below.

Most applications that are denied are first issued an initial decision. If this happens to you, you will be given the opportunity for reconsideration. Your reconsideration request must be received by OPM within 30 days of the date on your initial decision letter. You will also have to submit additional documentation or information in response to OPM's initial adverse determination. If you are unable to provide the information within the 30 day time limit, be sure to request reconsideration and an extension of the time limit so you can provide that additional information. If your request for additional time is received within the 30 day time limit, it will almost certainly be approved, although OPM does have the power to deny it.

**17 How valuable is the reconsideration stage in winning disability retirement?**

Until recently, the reconsideration stage was often a wasted effort. In most instances as a consequence of bureaucratic intransigence (or plain laziness), OPM regularly failed to provide the reasons why the application was rejected. This pretty much made the reconsideration stage worthless, since you had to guess at what might change the minds of those at OPM. After constantly pummeling OPM for this failure, I have found that the agency has changed its procedure, and is now regularly providing reasons for their initial denial. This makes an enormous difference and allows you to make a more meaningful response on reconsideration.

If OPM rejects your application again on reconsideration, it issues a final decision, which gives you a right to appeal to the Merit Systems Protection Board. There, an administrative judge will afford you a hearing and decide your entitlement to disability retirement.

**18 What's the key to winning on reconsideration?**

Get yourself a lawyer with solid experience in disability retirement cases. If you lost the first round going it alone, you are even more likely to lose this second and final round. It is inherently more difficult to win a legal matter on appeal (reconsideration is an appeal) than it is to win it the first time around. Asking OPM for reconsideration is the same as accusing it of having made a serious mistake and asking it to correct that mistake. I don't know too many people who take kindly to such requests, let alone people insulated by a huge bureaucracy.

Winning on reconsideration requires first that someone really considers your argument and second that your argument meets that person's standards. You will not meet OPM's standards if you merely point out all of the errors they made. Instead, you will have to demonstrate how those errors prejudiced OPM's decision against you, since errors per se are not grounds for reversal. That's tough to do, especially when OPM bureaucrats often see their mission as trying to find reasons to deny disability retirement rather than to grant it. You need a good deal of experience to be successful against this mind-set.

**19 What are some of the things my lawyer might do to win on reconsideration?**

Since it would be impossible to explain how to win every type of case on reconsideration, let me tell you one way that you certainly won't win. You won't win if OPM is using information about you that you are unaware of. Many applicants keep a meticulous file on their case and believe that it constitutes all of the information in their case. Many are wrong. Sometimes there are medical records that physicians not have shared with patients. Sometimes OPM obtains information from workers' compensation, from supervisors, from official personnel files, from informal agency contacts, or from other sources. You need every bit of that information and you have a right to every bit of it. You even have a right to medical information that OPM may seek to conceal from you under its "prudent physician's rule." That information is critical to you winning your case, and it should be obtained, you should go for it.

Equally important as gathering all of the factual information in your case, is designing a written argument that will make OPM change its initial decision. This requires challenging not only factual assumptions but also their legal conclusions, which are often erroneous. Most disability retirement decisions contain whole paragraphs drawn directly from previous decisions that have been stored over the years in some word processor. This is a cavalier way to adjudicate someone's rights. If you want to win, you have to turn this around.

**20 Does OPM ever deny applicants the right to reconsideration? What do I do if that happens to me?**

Yes. Until recently, any time OPM rejected a disability retirement application, it provided an initial decision from which an applicant could request reconsideration. Reconsideration provides an opportunity to point out to OPM its errors, thereby giving OPM a chance to correct those errors before making a final decision. In a process rife with errors, reconsideration is often critical to affording applicants due process of law.

Recently, OPM implemented a "pilot program" in which some applications are randomly short-circuited and sent directly to a final decision. These cases are foreclosed from the critical due process reconsideration step. If you have the misfortune of having your case randomly assigned to the "pilot program," your sole remedy will be a hearing at the MSPB, and under its rules you must start all over from square one in proving your entire case to a judge.

OPM wants to speed up its processing by sending some applications directly to a final decision, disallowing reconsideration. That would be fine so long as the only applications that are denied reconsideration are those that would be unlikely to benefit from

reconsideration. This would require that OPM develop carefully drawn standards to determine which cases should be short-circuited and which should not. Unfortunately, OPM has no standards whatsoever for depriving applicants of their right to reconsideration. OPM denies this right by selecting cases at random. Random selection may be great for scientific experiments, but not for safeguarding people's rights.

This "pilot project" resulted in a recent disaster when a government lawyer who was disabled by AIDS dementia was erroneously denied disability retirement, and then was denied the right to reconsideration because his case had been randomly selected for the project. OPM's denial was based on several blatant errors, but once this man's case was randomly tossed into OPM's pilot project, his only recourse was an appeal to the Merit Systems Protection Board where he had to start all over again and prove his entire case to the judge. Despite the fact that he was himself an attorney, his dementia, together with the technical nature of MSPB proceedings, required him to retain me.

This particular case had a happy legal ending when OPM's representative recognized that his agency had committed a serious error. He prevailed on OPM to award my client disability retirement, and thereby avoided an MSPB hearing. Unfortunately, my client was not reimbursed for the legal fees that he had to expend to win his case. Although I applaud the efforts of the OPM representative in this case, I fault OPM for making serious errors in its decision and then eliminating the reconsideration process that would have allowed my client to correct those errors.

It is hard to understand how OPM could deny disability benefits to someone disabled by such a devastating illness as AIDS dementia, but it is even harder to understand how it could design a program that would randomly deprive such an obviously disabled person of the traditional right to reconsideration and force him into a costly and time consuming appeal. Hopefully, OPM will abandon the "pilot project" in its current form.

**21 If I retain an attorney and win disability retirement before the MSPB, will I be reimbursed for attorney's fees?**

Maybe, but don't count on it. If you win before the Board, you may be able to win reimbursement for attorney's fees, but only fees related to the hearing and not the fees for the OPM proceeding. Additionally, you will not be automatically awarded attorney's fees just because you beat OPM. Before you can get attorney's fees, you have to show the MSPB that awarding fees is "in the interests of justice." Believe it or not, just winning does not necessarily satisfy the standards of "the interests of justice." In short, it is going to be a long, hard, and very unsure road to winning your attorney's fees. Furthermore, because the legal issues are so technical, it is unlikely that you could win an award of attorney's fees without skilled legal assistance. Because you will need legal representation to petition for the legal fees, this may mean that you will have to pay additional attorney's fees in order to win the prior attorney's fees. If all this sounds to you like it isn't in the interests of justice, that's because it's not.

**22 Can my agency influence whether or not I get disability retirement?**

Yes. While your agency does not have the power to grant or deny disability retirement (unless you work for OPM), it can play a significant role in the process through two important documents: the "Supervisor's Statement" and the "Agency Certification of Reassignment or Accommodation Efforts."

**23 What is the "Supervisor's Statement", and how important is it?**

The "Supervisor's Statement" is a required form which is nearly identical for both FERS and CSRS employees. It requires the supervisor to provide specific information about your performance, attendance, and behavior on the job. It is assumed that these are reliable indicators of whether you are unable to render "useful and efficient service" and thus whether you are considered disabled from your job.

The importance of the "Supervisor's Statement" varies with the nature of the case and with the individuals at OPM who review it. In short, its impact can't be measured. Since it could be important, you want it to be as much in your favor as possible. To that end, you should encourage your supervisor to provide as helpful a response as is possible. However, even if your supervisor did everything possible to be unhelpful, that would not necessarily prevent you from gaining disability retirement.

If you have previously received satisfactory or excellent evaluations in spite of your declining performance, your supervisor may worry about suddenly having to downplay your performance for the purpose of the disability retirement application. However, this has never been a real problem, given the universal understanding that performance evaluations often have little relationship to performance. Anyway, few would challenge a supervisor

who refused to record the diminished performance of a once excellent, but now ailing, subordinate.

**24 What is "accommodation," and how is it related to disability retirement? What about "reassignment?"**

Making some change to allow you to function in your current job is "accommodation." Placing you in another job in which you can function is "reassignment." Government policy dictates that disability retirement be a last resort. (That does not diminish the fact that it is also your right if you meet the legal criteria.) Because it is a last resort, your agency is required to make a reasonable attempt either to allow you to continue working in your present job or to reassign you to another job.

Accommodation may involve modifying the work site, adjusting the work schedule, restructuring the job, etc. To be a valid accommodation, it must allow you to perform all the critical elements of your job, regardless of your medical disability. A valid reassignment must be an offer of another position in your agency at your grade, pay and tenure, within your commuting area. The new job reassignment must be one in which you can perform satisfactorily despite your disabling symptoms.

Only after efforts to accommodate or to reassign have been attempted and have failed, can the agency move your case to OPM for disability retirement consideration.

*Example: Edna became hypersensitive to tobacco smoke, causing her to suffer from disabling symptoms such as nausea, dizziness, and headaches. Her agency tried to accommodate her by moving her to a non-smoking office. When that didn't work, she was placed on a smoke-free floor. Edna still got sick from the trace amounts of tobacco smoke she encountered in the hallways and elevators. Apart from her hypersensitivity to tobacco smoke, Edna was perfectly healthy. Edna was legally disabled. The agency has made greater accommodation efforts than is customary. If she meets the other requirements, Edna would be entitled to disability retirement.*

**25 If I refuse to accept an accommodation or reassignment, will I lose my right to disability retirement?**

Yes. You will lose your right to disability retirement if you turn down a reasonable accommodation or reassignment. If the agency is able to accommodate you in your current job or to reassign you to another job, within the legal strictures explained above, you must accept it or you will lose your right to disability retirement. On the other hand, if you do accept either an accommodation or a reassignment, you will of course lose your opportunity to gain disability retirement (unless it doesn't work out for you, in which case you can try again). In short, the last thing that most people applying for disability retirement want is for the agency to accommodate or reassign them.

But not to worry. In the vast majority of cases, the agency has neither the desire nor the ability to accommodate or reassign an employee. For the most part, accommodation and reassignment of those who are disabled, like accommodation of other handicapped individuals, is treated as a joke by the federal agencies.

One exception: many non-management Postal Service employees fall under a different rule and, under certain circumstances, they can turn down reassignments to a different craft (or those which violate collective bargaining agreements) without jeopardizing their disability retirement rights.

**26 What are the specific questions that OPM will ask me?**

OPM requires that you fill out an "Applicant's Statement." A cursory review of the questions asked demonstrates OPM's interest in deficiencies in performance, attendance, and conduct. To the extent possible, your responses should be directed to those issues. The following is a composite of the four most critical questions asked of both FERS and CSRS employees:

*Describe how you are deficient in your job in respect to performance, attendance, or conduct.*

*Describe your medical condition(s) (i.e., disease or injury) and how it interferes with performance of your duties, attendance, or conduct.*

*Describe any other restrictions on your activities imposed by your medical condition(s) (i.e., disease or injury) which you believe should be considered in determining your ability to perform your job in your agency and in other positions in your agency for which you may otherwise be qualified.*

*What efforts have been made by your agency to change your work area or your job to make it possible for you to perform useful and efficient service in your position or another position?*

The Applicant's Statement is the only government form that provides you with an opportunity to express the severity of your disabling symptoms. As you can see from the few questions on the form, it fails to elicit the information that OPM really needs in order to assess your case. In my practice, I have developed a far more detailed questionnaire that allows my clients to provide OPM with the information that it really needs to make a decision. Unfortunately, there is no guarantee that they will read it. But there is no guarantee that they will read their own form either.

Remember that your responses on the Applicant's Statement may be useful not only to OPM, but also to your physician who will draft the Physician's Statement. Your doctor may have heard your complaints over and over again, but nothing is more effective than having them detailed in writing while your doctor is drafting the Physician's Statement.

Here's an example of the importance of detailing your symptoms to both OPM and your physician. Tests may demonstrate that you have a medical condition known to cause fatigue. However, the fact that you suffer from this particular medical condition means nothing to OPM, and may not in itself remind your doctor of your particular disabling symptoms. Through your answers to these questions, you can make the point that in your particular case, your medical condition causes fatigue, and that your fatigue is so bad that it precludes you from getting anything accomplished at work, because (you might explain further) after being at the office for two hours you can no longer stay awake, and when you are awake, you can't remember from one moment to the next what you just read on the computer screen. This tells everyone much more than just stating that you suffer from fatigue.

**27 Do I have a right to keep the nature of my medical condition confidential from my agency? From OPM?**

Yes and no. You have a right to the strictest confidentiality regarding your medical condition at your agency but not at OPM. Despite that right, in some instances it takes a special effort to keep the matter confidential. Since OPM, rather than your agency, determines your case, the agency only needs to know the nature of your disabling symptoms and how they prevent you from performing. Except in unusual circumstances, the agency should not need to know the diagnosis or cause of those symptoms. In the event that it demands such information, you have a right to provide it through the agency physician, who must treat it as privileged information and maintain your confidentiality.

**28 If I am denied disability retirement, can I ask for it again at a later time?**

Yes. If you are denied disability retirement because you were accommodated or reassigned, and that accommodation or reassignment does not work out, you can request disability retirement again. Also, if your application for disability retirement is rejected by OPM or on appeal by MSPB, there appears to be no prohibition against reapplying, using both old and new evidence, provided that you are still in government service or have been separated for less than one year.

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**29 Will I need a lawyer to win disability retirement?**

Probably. While it is true that a typist whose hand is cut off probably will not need a lawyer to get disability retirement, most cases are not so clear-cut. Remember the case of the government attorney disabled by AIDS dementia that I discussed previously? If someone suffering from such a serious and incurable illness needed a lawyer to win, then most applicants probably need a lawyer. This is particularly true given that most government employees seek disability retirement for illnesses like chronic pain, depression, anxiety, phobias, allergies, chemical sensitivities, and the like -- all of which have a single common denominator: they are subjective. While such symptoms may severely disable the sufferer, they cannot be readily perceived by others, including the physicians who are called upon to diagnose and treat them. Employees with such difficult-to-prove symptoms have a particular need for strong legal advocacy.

30 **Which is more important in getting disability retirement, the nature of my disease or injury, or the symptoms from which I suffer?**

The disabling symptoms matter most, although diagnosis of a fatal or very serious disease can certainly be expected to have some impact on the disability decision. For instance, people with cancer do not automatically qualify for disability retirement unless they are presently suffering from the disabling symptoms of that disease. On the other hand, you don't have to suffer from any particularly serious disease, or even from any diagnosable disease in order to qualify for disability retirement. You only need to make the appropriate showing that you are suffering from disabling symptoms, even if the cause of the symptoms is unknown.

The rules are tough in not allowing a mere diagnosis to serve as a ground for disability retirement. But the rules are also lenient in permitting you to qualify for disability retirement on the basis of disabling symptoms which may appear to be minor or which effect you only on particular occasions. A person whose job requires travel by plane on occasion, but who is unable to fly on account of chronic back pain may well be eligible for disability retirement, even if an asymptomatic cancer patient is not eligible.

31 **How do I prove that I am disabled?**

You don't have to prove it, in the sense of being required to produce objective medical evidence. In certain clear-cut cases (i.e. that of the typist whose hand was cut off), it is easy to prove disability. But such cases are the exceptions. More frequently, disabling symptoms are impossible to prove, and, contrary to popular belief, the law does not require you to do the impossible. Subjective but very disabling symptoms (such as fatigue, chronic pain, phobias, depression, and allergies) are usually impossible to prove, because no objective medical evidence is usually available. Yet they are among the most common disabilities for which government employees seek and obtain a monthly disability annuity. Employees with subjective symptoms, regardless of their medical condition, face the greatest difficulties before OPM.

Sometimes, even when you can provide objective medical evidence to support your claim, OPM may not be interested in looking at it. In one case, I sent a client's x-rays to OPM to demonstrate that he had a slipped disc. OPM refused to accept them, saying that it had no place to store x-rays. You would think that if only to prevent potential fraud, OPM would have demanded such information, not blindly turned it away.

32 **How do I get the government to award me retirement if I can't prove that I have disabling symptoms?**

The law has accommodated the imprecision of medical science by providing alternative methods of proof. Deficiencies in either attendance, performance, or conduct may be used to infer the presence of disabling symptoms. To that end, the "Applicant's Statement" and the "Supervisor's Statement" specifically raise questions about such deficiencies.

However, just because you demonstrate such deficiencies, it does not mean that OPM will use them in your favor to infer that you have a disabling medical condition. Quite the contrary, OPM often, and without good reason, uses evidence of such deficiencies to trash employees for laziness and ineptness, thereby defeating the purpose for which they raised the deficiencies in the first instance.

Apart from the inferences provided by various deficiencies, the law has developed a special presumption concerning the credibility of government employees with long tenure and a good record. The bottom line is that you have a right to be believed even if your symptoms can't be perceived by others. Especially if you have long tenure and a good record, you are entitled to be taken seriously in your claims of disabling symptoms. If your claims are consistent with the nature of your medical condition, you are entitled to disability retirement.

33 **Can I really expect OPM to take seriously my claims of disabling symptoms when those symptoms are subjective?**

Probably not. Such claims are often not taken seriously by OPM. As a result, many government employees disabled by subjective symptoms are wrongfully denied disability retirement. When proof of disability is difficult to provide, OPM often chides employees and routinely makes them out to be malingerers, liars and cheats. This is where an experienced lawyer can have a particularly salutary impact.

34 **What can I do to best assure that OPM takes my claim seriously?**

Apart from the formal steps necessary to get disability retirement, there is one particularly effective informal step that I take in some cases. I flood OPM with evidence of disability by introducing letters and affidavits from family and friends on the home front, and co-workers



and colleagues on the work front, all testifying to my client's credibility and disability. I never worry that the formal process has no place for such letters and affidavits. I go on the assumption that it's hard to ignore someone with a horde of witnesses out there just itching to testify.

- 35 **What types of disability retirement cases have required legal assistance to win?**  
The following are just a few of the many cases of government employees who were initially rejected by OPM, and who, with legal assistance, are today receiving a monthly disability annuity:

- a typist unable to work anywhere in her agency's office building on account of her allergy to cigarette smoke;
- a computer analyst distracted from his work by chronic pain resulting from a childhood injury;
- a manager whose HIV-positive status caused him to be too fatigued to put in a full day's work;
- a secretary whose depression-related crying spells often made her late for work;
- a post office employee suffering from carpal tunnel syndrome and unable, without distracting pain, to perform the repetitive motions involved in sorting mail;
- a security guard with chronic bowel syndrome who could not patrol outside because he needed quick access to toilet facilities;
- a hospital worker with an obsessive fear of germs at the work site;
- an auditor required to travel by plane but unable to sit still in her airplane seat because of a slipped disc; and
- a laboratory technician who developed a hypersensitivity to the fumes from chemicals used in the lab.

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- 36 **Will the amount I collect be related to the degree of my disability?**  
No. The amount you collect has nothing whatsoever to do with the degree to which you are disabled; nor does it have anything to do with how or where you were disabled; nor does it have anything to do with the cost or duration of the treatment you might require.

- 37 **How much will I collect each month on disability retirement?**  
The amount you collect each month depends on the federal government retirement system in which you are enrolled. FERS has a simple formula; CSRS requires some calculations.

FERS Employees: First, the good news. Apart from any potential cost of living increases, you will receive 60 percent of your "average pay" the first year you collect and 40 percent of your "average pay" during every other year you collect. "Average pay" is the average amount you earned each year during your three highest consecutive paid years of federal civilian employment.

Now the bad news: all FERS employees are required to apply for Social Security, even if they believe that they are ineligible. The majority of FERS employees who apply are not eligible for Social Security benefits, so their disability retirement annuities will not be affected.

FERS employees who are eligible for Social Security benefits will have their 60/40 percent of average pay annuities adjusted as follows: during the first year, for each dollar that Social Security gives you, FERS will deduct one dollar from your annuity. (This is known as a "wash," a transaction in which gains and losses are exactly equal.) During the second and all succeeding years, for each dollar Social Security gives you, FERS will deduct sixty cents from your annuity. In this case, there is some benefit from Social Security eligibility, but the value of that benefit is greatly diminished.

CSRS Employees: The good news is that you don't have to apply for Social Security. If you do apply and are eligible, your disability retirement annuity won't be reduced. Another bit of good news is that some CSRS employees will receive disability annuities higher than the 60 percent ceiling paid FERS employees. But there's bad news for CSRS employees, too. Although the law assures you a "guaranteed minimum" disability retirement annuity, that minimum can be far lower than the 40% floor paid to FERS employees.

A CSRS annuity is predicated on "average pay," (defined above) just as is a FERS annuity. CSRS employees with less than 22 years of actual service also need to consider an additional factor, known as "creditable service." You compute your "creditable service" by calculating the number of years until you reach age 60, and adding that number to your number of years of federal civil service.

Apart from adjustments in the annuity resulting from the potential application of COLA (cost of living adjustment) rules, CSRS employees can determine their approximate annuities by applying one of the following three rules:

1. If you have 22 or more years of "creditable service," but less than 22 years of actual service, you will collect 40 percent of "average pay" and you don't have to bother with any other calculations.
2. If you have 22 or more years of actual service, then don't worry about creditable service at all. Your annuity will be computed under the general formula for regular retirement and you will receive more than 40 percent of "average pay."
3. If you have less than 22 years of "creditable service," you will receive less than 40% of "average pay," and to find your approximate monthly disability retirement annuity, use the chart that follows.

<b>Earned Retirement Percentages Based of Years of Service</b>			
<b>Years of Service</b>	<b>Percent of High 3-Year Average Earnings</b>	<b>Years of Service</b>	<b>Percent of High 3-Year Average Earnings</b>
5	7.50%	25	46.25%
6	9.25%	26	48.25%
7	11.00%	27	50.25%
8	12.75%	28	52.25%
9	14.50%	29	54.25%
10	16.25%	30	56.25%
11	18.25%	31	58.25%
12	20.25%	32	60.25%
13	22.25%	33	62.25%
14	24.25%	34	64.25%
15	26.25%	35	66.25%
16	28.25%	36	68.25%
17	30.25%	37	70.25%
18	32.25%	38	72.25%
19	34.25%	39	74.25%
20	36.25%	40	76.25%
21	38.25%	41	78.25%
22	40.25%	42	80.00%
23	42.25%	43	80.00%
24	44.25%		

**38 How long will I be paid that monthly annuity?**

You will be paid that monthly annuity for as long as you remain disabled from your government job, even if you are able to work in another job outside of government and in fact do so. Your monthly annuity will stop only if: (1) you die (unless you provided for a survivor's annuity); (2) you are reemployed by the federal government; (3) you voluntarily give it up; (4) you recover from your disability; or (4) you are "restored to earning capacity."

**39 Can my disability retirement entitle me to additional payment (for nursing services, wheelchairs, etc.)?**

No. There are no additional payments available from disability retirement. However, disability retirement is not a bar to your pursuing any other entitlements that may be available, such as from a private insurance policy, Social Security, or the like. However, you are not permitted to collect workers' compensation (except in unusual cases).

**40 If I've exhausted all of my sick and annual leave, can I go on leave without pay (LWOP) pending approval of my disability retirement?**

Probably, but there is no right to LWOP. It is always left to the discretion of the agency. However, most agencies exercise their discretion in favor of employees seeking disability retirement and allow them to go into a LWOP status for a period of up to one year. Approval of a request for LWOP may require some negotiating. Your physician may have to provide a written response to questions similar to those on the Physician's Statement form used for disability retirement.

**41 If the agency won't grant LWOP, can I quit and still apply for disability retirement?**

Yes. Even if you resign from your job, you can still apply for disability retirement. You must, however, have already filed your application with OPM at the time of your resignation or do so within a period of one year from your separation date.

**42 If I have sick leave left, should I exhaust it before I go on disability retirement? What about annual leave?**

It is probably best to exhaust your sick leave before going onto disability retirement. There are at least two ways to do this. First, you can use up your sick leave once you have been awarded disability retirement, holding your retirement annuity in abeyance until you have exhausted your sick leave. Second, you can use all of your accumulated sick leave in advance, beyond the amount necessary for OPM to approve your application. You can do this by leaving just enough sick leave to get you through the process. The problem here is that no one can guess how much time OPM will take to come to a decision.

The advantage of using up your sick leave, no matter how you do it, is that you will be paid at your full salary for your time on sick leave instead of being paid at the lesser rate of the disability retirement annuity. While the unused sick leave of CSRS employees is credited to time in service and may have potential value for retirement purposes (this is not so for FERS employees), it's still usually much more profitable to exhaust sick leave first, thereby recouping it in the form of dollars.

Annual leave is different. You should exhaust any "use or lose" annual leave before going onto disability retirement. However, there is no special reason (except perhaps for tax purposes) to exhaust any other accrued annual leave, since you will be paid a lump sum for any annual leave remaining in your leave account when you go onto disability retirement.

**43 How long will it take to prepare my application for submission to OPM, and how long thereafter can I expect to wait until OPM approves my application? Also, how long will it be before I get any money?**

That part of the application that you must complete yourself requires several hours' work. However, getting the "Physician's Statement" into just the right shape often takes weeks and sometimes months. Thereafter, the agency's bureaucracy can take an additional six to eight weeks before the application can be transmitted to OPM.

The timing of OPM's approval appears related largely to happenstance and apparently the whim and fancy of those running the show. For instance, OPM has no procedure whatsoever for expediting applications due to financial need. It claims to expedite the applications of the terminally ill on an ad hoc basis, irrespective of financial need, but refuses to expedite the applications of those threatened by financial ruin.

In my experience, case approval time varies from 10 weeks in a tiny minority of potentially news-sensitive cases (e.g. those concerning AIDS), to an average of five or six months. Some applications, however, languish inexplicably for a year or more, and have required complaints to the Inspector General to get the cases processed.

It may take up to several months, after winning, before you receive any money from OPM. By this time, if you've stopped working and are on LWOP, you will be owed a good deal of annuity back-payments. Usually, OPM makes an initial lump sum distribution of part of the back-payments owed. Thereafter, there may be another lump sum distribution of any other back-payments owed, usually together with the first of the regular monthly annuity payments.

**44 What determines the date from which the monthly annuity begins?**

Assuming that you are disabled at the time, your annuity will start from either (1) the day after your government pay ceased; or (2) the day after you were separated from government service. If your government pay ceases and then starts up again, the resumption will cut off your right to collect disability retirement for the period during which your pay had ceased. Therefore, make sure that once your pay has ceased for any considerable time, that you do not receive any further pay from your government job before finally being separated.

*Example: Peter, a government employee, applied for disability retirement and went on LWOP status for nearly a year, pending approval of his application. At his boss' urging he returned to his government job part-time for two weeks. After he won disability retirement, OPM refused to pay him his annuity for the nearly one year he had been out of work. By going back to work for the government, Peter forfeited his retroactive disability annuity for the nearly one year period. He would have been awarded the annuity for that period if he had not worked those two weeks for the government or if he had worked for a non-government employer instead.*

**45 Are disability retirement payments taxable?**

Yes. Disability retirement payments are normally taxable as ordinary income. There are, however, some exceptions. For instance, persons who, in addition to meeting OPM's standard for disability retirement, are totally and permanently disabled for any gainful employment may be eligible for a special tax credit. Similarly, in certain circumstances and in certain states, persons may not have to pay state income tax on their federal annuity. Because the rules are complex and can have significant monetary consequences, you should consult a tax expert.

**46 Are legal fees incurred in petitioning for disability retirement tax deductible?**

Yes. Attorney's fees related to petitioning for disability retirement are usually tax deductible. However, the particular rules under which the deduction may be taken depend on the circumstances so that the tax savings will vary. Thus, you should check with a tax professional.

**47 Can I continue to carry my government life and health insurance?**

Yes. You can continue to carry the same group health insurance that you carried on your last day of employment with the government if: (1) you retire on an immediate annuity, and either (2) you were covered for the five years of government service directly before going onto disability retirement, or (3) if you were covered for less than that five years, you obtained your coverage at the first opportunity you could do so after entering government service. Thereafter, should you for any reason lose your disability retirement, you cannot continue to carry the group policy but are required, if you wish to keep the insurance, to carry the non-group conversion policy then available. An exception: if your disability retirement annuity is later reinstated, you can have the group policy reinstated. Of course, the group policy is always better than the private policy.

As to life insurance, you can continue to carry the same amount of basic life insurance coverage (or less, but not more) than you carried on your last day of federal employment, under rules somewhat similar to those noted above for health insurance.

Special elections and conditions may apply in different circumstances as to both types of insurance, and you should not proceed without careful inquiry. As well, be sure to take the actions within the time limits required to preserve these valuable rights to coverage.

**SUBJECT: Earnings from Other Employment** [▲ TOP](#)**48 Can I work in another job after I retire from my government job on disability?**

Yes. Although you may be unable to render "useful and efficient service" in your government job and are therefore disabled from it, you may be able to perform in a non-government job, and if you can, you are perfectly free to do so.

*Example: Fern, an accountant, suffers from continuing bouts of clinical depression in part as a result of government job duties and long hours. Her symptoms include early morning crying spells, which often make her late for the daily staff meetings which are an integral part of one of the critical elements of her job. After she is awarded disability retirement, Fern finds a new job as an accountant in private business with duties and hours that she*

*can handle. Fern is disabled from her government employment, and if she meets the other requirements, the fact that she can perform the private sector job does not prevent her from receiving disability retirement.*

**49 Is there an earnings limitation in that other job?**

Yes. The law allows you to collect your full disability retirement annuity so long as you are not "restored to earning capacity." You are considered "restored to earning capacity" if in any calendar year your earnings from wages, self-employment, or both (but not passive investments) reaches or exceeds 80% of the current rate of basic pay of the position you occupied immediately before retirement. The rule is very strictly construed and you will be stripped of your annuity even if you exceed the 80% ceiling by even a single penny. If you think that you may fall within the scope of this rule, be very sure to find out precisely how it is applied by OPM. For instance, OPM may include in its definition of income, earnings that IRS may exclude from its definition of income.

If you are "restored to earning capacity," you will lose your entire disability retirement annuity, not just some percentage of it. Loss of your annuity will also mean loss of other benefits, including loss of your group health insurance, which will always be more favorable than the individual conversion policy to which you may thereafter be entitled. Persons over 60 years of age are exempt from this 80% earnings limitation.

**50 If I lose my disability annuity by earning too much, can I ever get it back?**

Yes. Though you will lose your disability retirement annuity if you are "restored to earning capacity," you may reapply. On reapplication, you will have to demonstrate not only that your earnings have diminished for an entire calendar year below the 80% ceiling, but also that you are still disabled from your old government job (and not some other job) by the same disability (and not some other disability) that disabled you before. This can be very tricky. The best advice: make sure that you keep your earnings under the 80% ceiling.

**51 Will OPM check up on me to see if I am still disabled or if I have been restored to earning capacity? If so, how, and how often?**

Yes, they will check up on you, but the experience of most of my clients is that they will not harass you to get you off disability retirement. This policy, by the way, is different from that of the Department of Labor, which has a reputation for unrelentingly harassing employees in an effort to get them off workers' compensation. The disability retirement law requires OPM to check on your medical condition at least once a year and also permits them to check up on you whenever they so desire. The results are uneven and sporadic. Some employees are contacted within a few months of going on disability retirement while others are not contacted for years. Although OPM has the power to send annuitants to government-appointed physicians, it usually requires you to have your own physician answer a series of questions, which may be the same or similar to those previously asked on the "Physician's Statement." As to monitoring for restoration of earning capacity, that is done on an annual basis through a questionnaire, and you may, in addition, be required to provide copies of your tax returns.

**52 Is it true that legally I may be able to earn more while on disability retirement than I did while working in my old government job?**

Yess. By keeping your earnings in your new job just below the 80% ceiling and combining these earnings with your disability annuity, you can, without any penalty, earn more than you formerly did when you were healthy and employed by the government. Nor is there anything illegal or unethical about purposely keeping your earnings below the 80% ceiling and as a consequence, earning more on disability than you earned previously.

**SUBJECT: Getting the Doctor on Your Side** [▲ TOP](#)

**53 How will my doctor react when I ask for help in getting disability retirement?**

Probably not very well. Most will not be happy, for a variety of reasons. Here are some of the reasons often expressed by physicians who are asked by patients to help them get disability retirement:

"These questions OPM asks are ridiculous!"

It's absolutely true that at least some of the five questions that doctors are asked to answer on the "Physician's Statement" are either absurd, unintelligible, or medically irrelevant. In fact, the degree to which the physician should consider each and every question varies with the nature of the case. In general, the more subjective the symptoms, the more carefully each of the questions should be dealt with. Unfortunately, this is a

difficult judgment call for physicians who don't have any direct experience with OPM's disability retirement program. A primary task of the attorney is to encourage and assist the physician in this task.

"I can't possibly charge for all the time its going to take me to answer these questions!"

Not unreasonably, physicians want to get paid for their time and work. Physicians are often unsure as to how to charge patients for the sometimes great amount of time and work required to properly prepare a "Physician's Statement." It does not fall easily under a predetermined diagnostic code on some form, and insurance will often not cover it. The remedy is to assure your physician that you will pay fully for all the time involved that is not otherwise covered.

"No one will ever believe that this patient is disabled!"

Many doctors, just like most of the rest of us, tend to define a disabled person as some sort of basket case. Doctors are concerned that they will be perceived as dishonest in going to bat for a patient who doesn't appear to fit that picture. The physician needs to come to terms with the disability retirement law, and how it differs from other laws such as workers' compensation. Doctors who are not experienced with disability retirement for government employees do not understand that the program does not require total disability, and it even permits you to work at another job while collecting. But quite truthfully, this is the type of lesson best taught by an attorney with sufficient experience to answer the inevitable questions that the physician is going to raise. If necessary, an attorney can assure a physician that the patient is a proper candidate for disability retirement.

"I'm going to end up in court on this one!"

Most physicians dread the thought of being hauled into court as a witness in any sort of legal matter, let alone in what they perceive as some difficult-to-prove "subjective" symptoms case. Not to worry! Disability retirement cases never make it to court, and rarely ever make it to a hearing at the MSPB. One way to dispel the physician's anxiety on this issue may be by providing a copy of this book as part of your campaign to enlist wholehearted cooperation. If that doesn't work, have your doctor phone me.

**54 What if my physician refuses to assist in my disability retirement application?**

Get yourself another physician, at least for the purpose of preparing the Physician's Statement. It's done quite successfully. While certainly it is best to be supported by a physician who has had a longstanding relationship with you, nothing in the law requires that. It is particularly helpful in such circumstances if the reporting physician has available all prior medical records and is able to review the totality of the situation.

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