



This document is scheduled to be published in the Federal Register on 11/09/2016 and available online at <https://federalregister.gov/d/2016-27060>, and on [FDsys.gov](https://FDsys.gov)

## **RAILROAD RETIREMENT BOARD**

### **20 CFR Part 220**

### **RIN 3220-AB68**

#### **Providing Evidence of Disability**

**AGENCY:** Railroad Retirement Board.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to amend our regulations regarding the submission of evidence in disability claims to require you to inform us or submit all evidence known to you that “relates to” your disability claims with exceptions for privileged communications and duplicates. This requirement would include the duty to submit all evidence obtained from any source in its entirety, subject to one of these exceptions. These modifications to our regulations would better describe your duty to submit all evidence that relates to your disability claim and will enable us to have a more complete case record which will allow us to make more accurate determinations of your disability status.

**DATES:** Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by [3220-AB68], by any of the following three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to RIN number 3220-AB68.

Caution: You should be careful to include in your comments only information that you wish to make publicly available as comments are posted without change, with any personal

information provided. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. Internet: E-mail comments to the Secretary to the Board at SecretarytotheBoard@rrb.gov.
2. Fax: Fax comments to (312) 751-7102.
3. Mail: Address your comments to the Secretary to the Board, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611-2092

Comments are available for public viewing on the Federal eRulemaking portal at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Marguerite P. Dadabo, Assistant General Counsel, Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611-2092, (312) 751-4945, TTD (312) 751-4701.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Railroad Retirement Act (Act) gives the Railroad Retirement three member Board (Board) the authority to issue regulations governing the production of evidence used to adjudicate both occupational disability and total and permanent disability claims under the Act.<sup>1</sup>

There has been recent interest by members of Congress in ensuring that Railroad Retirement disability benefits are reserved for only those who are truly disabled under either the standards of the occupational disability or total and permanent disability programs.<sup>2</sup>

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<sup>1</sup> See 45 U.S.C. 231a(a)(2) and (3).

<sup>2</sup> See, e.g., Is the Railroad Retirement Board Doing

Additionally, the Social Security Administration (SSA) has recently published new regulations requiring the comprehensive submission of all evidence known to the claimant that ‘relates to’ the claimant’s disability claims with exceptions for privileged communications and duplicates. Previously, Social Security disability claimants were required to submit evidence that was ‘material’ to the disability determination. The effect of the SSA’s new regulations is to require that claimants submit evidence that is both favorable and unfavorable to their claims.<sup>3</sup>

The analogy between total and permanent disability under the Railroad Retirement Act and the Social Security Act (SS Act) is well-established. See, e.g. Webb v. Railroad Retirement Board, 358 F. 2d 451 (6<sup>th</sup> Cir. 1966); Peppers v. Railroad Retirement Board, 728 F. 2d 404 (7<sup>th</sup> Cir. 1984); Goodwin v. Railroad Retirement Board, 546 F. 2d 1169 (5<sup>th</sup> Cir. 1977).

Additionally, the Railroad Retirement Board’s (RRB) occupational disability program incorporates the records requirements of the total and permanent disability program.<sup>4</sup> The SSA’s regulations specify a broader scope for claimants when providing records in support of his or her disability claim than the RRB’s current regulations. Revising the RRB’s regulations would allow the RRB to similarly obtain more complete case records and adjudicate disability claims more precisely.

## **Proposed Changes**

### *Providing Evidence of Disability*

We propose to revise § 220.45(a) to require you to inform the Board about or submit all evidence known to you that relates to your claimed disability.<sup>5</sup> The RRB’s current regulations

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Enough to Protect Against Fraud? Hearing Before the H. Comm. on Oversight and Government Reform: Subcommittee on Government Operations, 114<sup>th</sup> Cong. (2015), <https://www.congress.gov/congressional-record/2015/5/1/daily-digest>.

<sup>3</sup> Submission of Evidence in Disability Claims, 80 FR 14828, March 20, 2015

<sup>4</sup> See 20 CFR 222.12.

<sup>5</sup> Under the Act, a claimant will be considered to be occupationally disabled if he or she has a current connection to the railroad industry and a permanent physical and mental condition such as to be disabling for work in his or her

require that the “[t]he claimant for a disability annuity is responsible for providing evidence of the claimed disability and the effect of the disability on the ability to do work.” 20 CFR 220.45(a). Additionally, RRB’s regulations require that “[t]he claimant must provide medical evidence showing that he or she has an impairment(s) and how severe it is during the time the claimant claims to be disabled.” 20 CFR 220.45(b).

The RRB’s regulations further state that the Board may ask the claimant to provide evidence about his or her- (1) Age; (2) Education and training; (3) Work experience; (4) Daily activities both before and after the date the claimant says that he or she became disabled; (5) Efforts to work; and (6) Any other evidence showing how the claimant’s impairment(s) affects his or her ability to work.” 20 CFR 220.45(b)(1) through (6).

The proposed rule would amend § 220.45(a) by adding “you must inform the Board about or submit all evidence known to you that relates to the claimed disability. This duty is ongoing and requires you to disclose any additional related evidence about which you become aware. This duty applies at each level of the administrative review process, including the appeals level, if the evidence relates to the period on or before the date of the hearing officer’s decision.”

The proposed rule would also amend § 220.45(b) by **expanding the explanation of the kinds of evidence to be submitted and excluding certain information protected by attorney-client privilege or by the attorney work product doctrine.**

### **Clarity of This Proposed Rule**

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regular occupation. 45 U.S.C. 231a(a)(1)(iv). A claimant will be considered to be totally and permanently disabled if his or her permanent physical or mental condition is such that he or she is unable to engage in any regular employment. 45 U.S.C. 231a(a)(1)(v).

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this proposed rule, we invite your comments on how to make it easier to understand.

For example:

- Are the requirements for the rule clearly stated?
- Have we organized the material to meet your needs?
- What else could we do to make the rule easier to understand?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format make the rule easier to understand?

### **When will we start to use this rule?**

We will not use this proposed rule until we evaluate public comments and publish a final rule in the **Federal Register**. All final rules we issue include an effective date. We will continue to use our current rules until that date. If we publish a final rule, we will include a summary of relevant comments we received, if any, and responses to them. We will also include an explanation of how we will apply the new rule.

### **Regulatory Procedures**

*Executive Order 12866, as Supplemented by Executive Order 13563*

The Board, with the concurrence of the Office of Management and Budget, has determined that this is not a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, no regulatory impact analysis is required.

*Regulatory Flexibility Act*

We certify that this proposed rule would not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

*Paperwork Reduction Act*

This NPRM imposes no reporting or recordkeeping requirements subject to OMB clearance.

**List of Subjects**

*20 CFR Part 220*

Disability benefits, Railroad retirement.

The Railroad Retirement Board proposes to amend title 20, chapter II, subchapter F, part 220 of the Code of Federal Regulations as follows:

**PART 220 DETERMINING DISABILITY**

1. The authority citation for part 220 continues to read as follows:

**AUTHORITY:** 45 U.S.C. 231a(1); 45 U.S.C. 231f.

2. Revise § 220.45 to read as follows:

**§ 220.45 Providing evidence of disability.**

(a) *General.* You are responsible for providing all evidence of the claimed disability and the effect of the disability on your ability to work. You must inform the Board about or submit all evidence known to you that relates to the claimed disability. This duty is ongoing and requires you to disclose any additional related evidence about which you become aware. This duty applies at each level of the administrative review process, including the appeals level, if the

evidence relates to the period on or before the date of the hearings officer's decision. The Board will assist you, when necessary, in obtaining the required evidence. At its discretion, the Board will arrange for an examination by a consultant at the expense of the Board as explained in §§ 220.50 and 220.51.

(b) *Kind of evidence.* (1) You must provide medical evidence proving that you have an impairment(s) and how severe it is during the time you claim to be disabled. The Board will consider only impairment(s) you claim to have or about which the Board receives evidence. Before deciding your disability status, the Board will develop a complete medical history (i.e., evidence from the records of the your medical sources) covering at least the preceding 12 months, unless you say that your disability began less than 12 months before you filed an application. The Board will make every reasonable effort to help you in getting medical reports from your own medical sources when you give the Board permission to request them. Every reasonable effort means that the Board will make an initial request and, after 20 days, one follow-up request to your medical source to obtain the medical evidence necessary to make a determination before the Board evaluates medical evidence obtained from another source on a consultative basis. The medical source will have 10 days from the follow-up request to reply (unless experience indicates that a longer period is advisable in a particular case). In order to expedite processing, the Board may order a consultative exam from a non-treating source while awaiting receipt of medical source evidence. If the Board asks you to do so, you must contact the medical sources to help us get the medical reports.

(2) *Exceptions.* Notwithstanding paragraph (a) of this section, evidence does not include:

(i) Oral or written communications between you and your representative that are subject to the attorney-client privilege, unless you voluntarily disclose the communication to us; or

(ii) Your representative's analysis of your claim, unless he or she voluntarily discloses it to us. Your representative's "analysis of your claim," means information that is subject to the attorney work product doctrine, but it does not include medical evidence, medical source opinions, or any other factual matter that we may consider in determining whether or not you are entitled to benefits (See paragraph (b)(2)(iv) of this section).

(iii) The provisions of paragraph (b)(2)(i) of this section apply to communications between you and your non-attorney representative only if the communications would be subject to the attorney-client privilege, if your non-attorney representative were an attorney. The provisions of paragraph (b)(2)(ii) of this section apply to the analysis of your claim by your non-attorney representative only if the analysis of your claim would be subject to the attorney work product doctrine, if your non-attorney representative were an attorney.

(iv) The attorney-client privilege generally protects confidential communications between an attorney and his or her client that are related to providing or obtaining legal advice. The attorney work product doctrine generally protects an attorney's analysis, theories, mental impressions, and notes. In the context of your disability claim, neither the attorney-client privilege nor the attorney work product doctrine allows you to withhold factual information, medical source opinions, or other medical evidence that we may consider in determining whether or not you are entitled to benefits. For example, if you tell your representative about the medical sources you have seen, your representative cannot refuse to disclose the identity of those medical sources to us based on the attorney-client privilege. As another example, if your representative asks a medical source to complete an opinion form related to your impairment(s), symptoms, or limitations, your representative cannot withhold the completed opinion form from us based on the attorney work product doctrine. The attorney work product doctrine would not protect the

source's opinions on the completed form, regardless of whether or not your representative used the form in his or her analysis of your claim or made handwritten notes on the face of the report.

(c) *Your responsibility.* You must inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled. When you submit evidence received from another source, you must submit that evidence in its entirety, unless you previously submitted the same evidence to us or we instruct you otherwise. The Board may also ask you to provide evidence about :

(1) Your age;

(2) Your education and training;

(3) Your work experience;

(4) Your daily activities both before and after the date you say that you became disabled;

(5) Your efforts to work; and

(6) Any other evidence showing how your impairment(s) affects your ability to work. (In §§ 220.125 through 220.134, we discuss in more detail the evidence the Board needs when it considers vocational factors.)

Dated: November 3, 2016.

By Authority of the Board.

Martha P. Rico,

Secretary to the Board

[FR Doc. 2016-27060 Filed: 11/8/2016 8:45 am; Publication Date: 11/9/2016]