



JOINT LEGISLATIVE AUDIT
& REVIEW COMMISSION
OF THE VIRGINIA GENERAL ASSEMBLY

The VRS Disability Retirement Program

Report Summary and Contents

- **Organization and Structure of the Disability Retirement Program** *Page 3*
 The VRS program provides regular and work-related benefits. The VRS Board of Trustees is responsible for the sound management of the disability retirement program. The program is administered by VRS staff and a board of physicians appointed by the Board of Trustees. An appeals process is the responsibility of VRS agency representatives.
- **Characteristics of the Program** *Page 8*
 The number of VRS disability retirees has grown from 7,900 in 1989 to more than 10,600 in 1994. During this same period, disability retirement benefits paid by VRS grew from \$44 million to \$84.7 million. A typical retiree is over 50 years of age, with at least five years of service credit.
- **Determination of Disability** *Page 13*
 The program is administered in a reasonably sound manner. However, differing statutory interpretations and a frequent lack of objective medical evidence creates the potential for inconsistency or error in the initial determination of disability and any subsequent appeals. Adoption of administrative regulations could help to improve the disability determination process.
- **Income Earned by VRS Disability Retirees** *Page 22*
 A disability retiree can work in a job not covered by VRS. In tax year 1992, VRS disability retirees had more than \$6.4 million in earned income. In that year, about 9.4 percent of all disability retirees had earned income.

Profile: VRS Disability Retirement Program

VRS Director:
William H. Leighty

Number of Disability Retirees (CY 1994):
10,600

Disability Retirement Benefits Paid (CY 1994):
\$84.7 Million

Average Employee Age at Retirement:
50+ years

Average Benefit Paid (CY 1994):
\$7,959

VRS Administrative Costs (FY 1994):
\$383,000

Percentage of Disability Retirees with Earned Income (Tax Year 1992): **9.5 percent**

Total Earned Income of Disability Retirees: (Tax Year 1992): **\$6.4 Million**

Total Benefits Paid 1989 to 1994

Year	Total Benefits Paid (\$Millions)
1989	44
1990	52
1991	59
1992	68
1993	76
1994	84.7

Source: Virginia Retirement System.

VRS Disability Retirement Program

INTRODUCTION

The disability retirement program administered by the Virginia Retirement System (VRS) provides retirement benefits in the event that an individual is physically or mentally unable to perform the duties of his or her current occupation. More than \$84 million in disability retirement benefits were paid to more than 10,600 individuals during calendar year 1994. In a number of ways, the disability retirement program is cumbersome to administer. In particular, it can be difficult to determine if an individual is actually disabled. Much of this difficulty is the result of the definition of disability as stated in the *Code of Virginia*. Within the context of these inherent difficulties, the program is administered in a reasonably sound manner. The large majority of disability retirements appear to be appropriate and warranted by the available evidence.

Appropriate revisions to the *Code of Virginia* could address some of the issues currently affecting administration of the program. The Joint Commission Studying the Management of the Commonwealth's Workforce (the Workforce Commission) is reviewing the structure and design of the disability retirement benefit. This study may result in recommendations for statutory revision. However, regardless of any amendments to the statute, VRS should address certain administrative and operational issues. These include the need for formal administrative regulations for the disability determination process, and the development of additional sources of information to assist in determining the extent of an individual's disability. Addressing these issues would help VRS ensure that the pension trust fund is protected from unnecessary benefit expenses, while at the same time ensuring that appropriate disability applications are approved within a consistent framework.

Study Mandate

The Workforce Commission requested that JLARC, as part of its retirement oversight function, perform an operations and management review of the disability retirement program administered by VRS. The JLARC review was done at the same time that the Workforce Commission's consultant, A. Foster Higgins & Co. (Foster Higgins), reviewed the disability retirement benefit provided by VRS. The focus of the consultant study was on the structure and level of the disability retirement benefit. The focus of the JLARC study, by comparison, was on how the current disability retirement program is administered and implemented by VRS.

Study Approach

This study was designed to examine three broad areas: (1) the general scope and profile of the disability retirement program in terms of number of retirees, amount of benefit payments, and other demographic, financial, and administrative characteristics; (2) the adequacy of VRS policies and procedures for the program; and (3) the extent that individuals receiving VRS disability retirement benefits are also receiving earned income. This study did not evaluate the structure or design of the disability retirement benefit. Rather, given the existing benefit as prescribed by the *Code of Virginia*, this study provides descriptive background information concerning the benefit program and evaluates VRS administrative policies and procedures.

A number of research activities were conducted to examine each of the study areas. These included structured interviews with VRS staff, the Medical Board, VRS agency representatives, and staff from the

OVERSIGHT VRS Report

VRS Oversight Report is published periodically by the Joint Legislative Audit and Review Commission (JLARC) in fulfillment of Section 30-78 *et seq.* of the *Code of Virginia*. This statute requires JLARC to provide the General Assembly with oversight capability concerning the Virginia Retirement System (VRS), and to regularly update the Legislature on oversight findings.

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Attorney General's Office. In addition, JLARC staff analyzed descriptive data provided by VRS for all current disability retirees. JLARC staff also reviewed a random sample of disability application files in order to examine the review and approval process. A total of 100 files for which disability retirement was ultimately approved were examined, as were 30 files of applications for which disability retirement was ultimately denied. JLARC staff also reviewed various documents provided by VRS staff, the Medical Board, and the VRS agency representatives. Finally, JLARC staff worked with staff from VRS and the Department of Taxation to identify the number of VRS disability retirees who reported earned income from various sources. This was done through a computer match of the social security numbers of VRS disability retirees and social security numbers on the Department of Taxation's Information Returns Master File.

Report Organization

This report examines the operation and administration of the VRS disability retirement program. The first section reviews the structure and organization of the program. The second section describes the program according to a number of demographic and financial characteristics. The third section examines issues affecting the determination of disability. The final section presents the results of an analysis by the Department of Taxation requested by JLARC staff concerning the extent to which individuals receiving disability retirement benefits from VRS are also receiving earned income through employment.

ORGANIZATION AND STRUCTURE OF THE PROGRAM

The structure and design of the disability retirement benefit is prescribed by the *Code of Virginia*. As administered by VRS, the program is intended to provide retirement benefits in the event of disability from one's current job. The disability retirement benefit is different in structure and design from the service retirement benefit.

A number of different entities have responsibilities relating to the administration and operation of the program. These include the VRS Board of Trustees, the VRS staff, the Medical Board, VRS agency representatives, and the Attorney General's Office. This section provides a general overview of the structure of the disability retirement benefit, and of the organizational structure that is used to administer the benefit program.

Definition of Disability

Section 51.1-156 of the *Code of Virginia* provides that a member of VRS may retire due to disability if the member is "mentally or physically incapacitated for the further performance of duty" and provided "the incapacity is likely to be permanent." Under the program as administered by VRS, an individual may retire if he or she is unable to perform his or her "present job duties" and if the disability is likely to be permanent.

The extent to which a disability needs to be "total" in order to be eligible for retirement is not entirely clear. Neither the *Code of Virginia* nor the *VRS Handbook for Members* indicate that disability needs to be total. However, the *VRS Disability Retirement Factsheet* does state that total disability is required. In addition, the VRS Medical Board bases its decisions on whether or not an applicant is "totally and permanently disabled."

Given the nature of the statutory definition, it is possible for an individual to receive a retirement benefit from VRS due to the inability to perform his or her current VRS covered job, while at the same time actively working at a job not covered by VRS. There is no statutory or administrative relationship between an individual's eligibility for VRS disability retirement benefits and eligibility for Social Security disability benefits. Work-related disability retirement is authorized only for causes compensable under the Virginia Worker's Compensation Act. However, receipt of an actual worker's compensation award is not required. Disability retirement is not authorized for any condition which existed at the time an individual first became a member of VRS, unless convincing medical evidence supports the fact that the pre-existing condition has worsened substantially.

Structure and Design of the Benefit Program

There are two kinds of disability retirement: regular and work-related. As previously stated, a work-related disability results from a cause compensable under the Virginia Workers' Compensation Act. Work-related disability typically arises from an injury or illness contracted while performing the duties of one's job. Regular disability retirement is not compensable under the Virginia Workers' Compensation Act. Regular disability results from an injury or illness contracted while not performing the duties of one's job. All individuals applying for VRS disability retirement must also apply for disability benefits from the Social Security Administration. Social Security defines disability differently than does VRS, requiring that an individual be unable to perform any and all occupations by which he or she is reasonably suited by reason of age, education, or work experience.

Eligibility Requirements. There are no service requirements for disability retirement. Therefore, an individual is eligible to retire due to disability from the first day of employment. Similarly, there are no age restrictions on disability retirement. Therefore, an individual could retire due to disability even though he or she was already old enough to qualify for normal service retirement.

An individual must apply for disability retirement while still employed in a covered position or within 24 months of being placed on an official leave of absence. An individual may also apply for disability retirement within 90 days after termination of employment, provided that the individual has not already received a refund of the contributions and interest in their VRS account. In the event that an employee is placed in a part-time position, the individual retains eligibility to apply for disability retirement for a 90-day period.

Benefit Calculation. The calculation of the amount of an individual's monthly disability retirement benefit is somewhat complex. The amount of the benefit depends on the interrelationship of a number of factors. These include an individual's age, average final compensation (AFC), vesting status, whether regular or work-related disability is sought, and the status of the individual's application for Social Security disability benefits. Depending on an individual's preference and particular circumstances, the VRS benefit is calculated using either: (1) a formula based on a benefit multiplier applied to AFC and a specified amount of service credit, or (2) a minimum guarantee expressed as a percentage of AFC.

The tax liability of the benefit adds additional complexity to the benefit structure. Regular disability benefits are taxable by both the federal and State government. Work-related disability benefits are taxable if calculated using the VRS benefit formula. However, work related disability benefits are tax-exempt if based on the guaranteed amount.

In the disability benefit formula, average final compensation is defined as an individual's highest three consecutive years (or 36 highest consecutive months) of salary, divided by three. A multiplier of .0165 is applied to AFC for purposes of benefit calculation. That product is multiplied by an individual's total years of service. There are two noteworthy aspects to the VRS formula for calculating disability retirement. First, unlike for service retirement, a single benefit multiplier is applied to the entire amount of AFC. Second, the amount of service credit used in the benefit calculation can greatly exceed the actual period of service earned through employment. If an individual is less than 60 years old, the amount of service credit is increased by the smaller of (1) twice the actual years of service, or (2) the individual's actual earned service

plus the number of years of service credit the individual would have earned had he worked to age 60. This aspect of the formula can potentially produce some interesting results. For example:

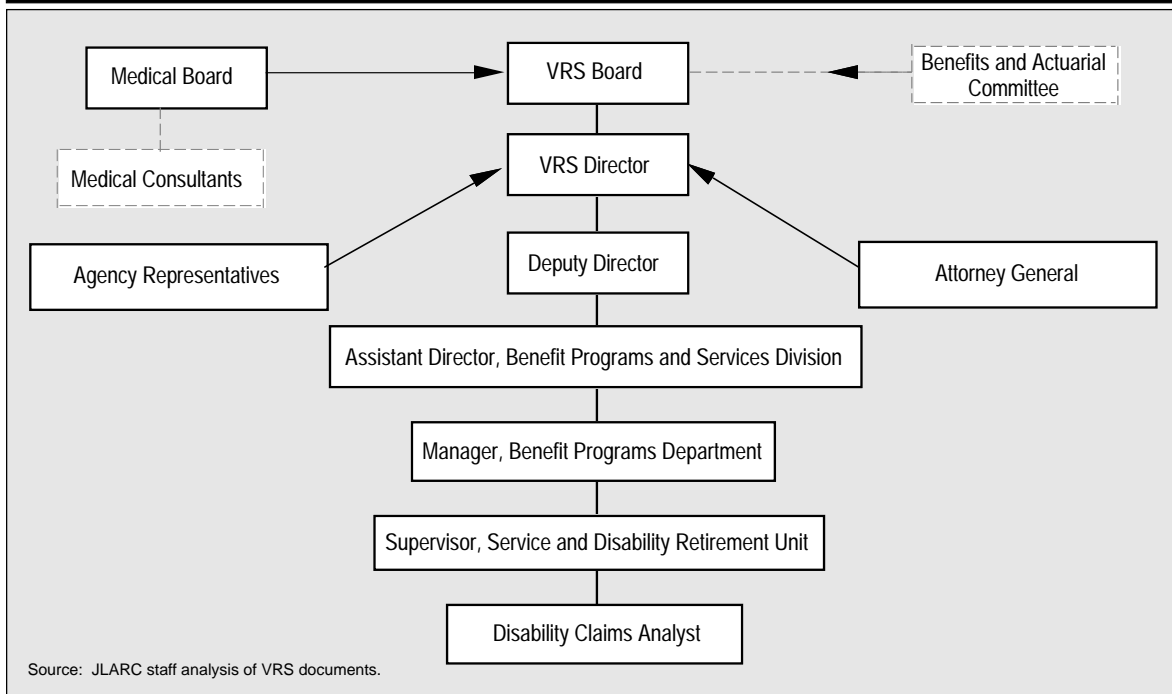
Two hypothetical VRS covered employees have each been working in the same type of job for twenty years and earning the same salary. The only difference is that one is 40 years old and the other is 50 years old. They both become disabled and apply for regular disability and are both denied Social Security disability benefits. Each has an average final compensation of \$20,000. The 40-year old employee's annual benefits are calculated to be \$13,200 while the 50-year old employee's annual benefits are calculated to be \$10,000. The formula gives the 40-year old employee a service credit of 40 years while giving the 50-year old employee a service credit of 30 years.

In addition, depending on particular combinations of age and service credit, a disability retirement benefit can provide greater income replacement than normal service retirement. For example:

An employee who is age 55 and has 30 years of service decides to retire. The individual's average final compensation is \$30,000. Under normal service retirement, the annual benefit is calculated to be \$14,256. If the individual applies for and is granted disability retirement, the annual benefit will be \$17,325.

Staff Authority, Responsibilities, and Procedures

The VRS Board of Trustees (VRS Board) is ultimately responsible for the sound management and administration of the disability retirement program. The VRS Board has appropriately delegated day-to-day administrative responsibility to the VRS Director and staff. The *Code of Virginia* requires that the VRS Board employ a Medical Board to investigate and make recommendations concerning applications for disability retirement. In addition, in response to the requirements of the Virginia Administrative Process Act, VRS retains the services of six attorneys throughout the State who serve as agency representatives at informal fact-finding hearings. The Office of the Attorney General is responsible for defending VRS in court in the event of litigation arising from an application for disability retirement. Figure 1 illustrates the various reporting relationships among the various entities involved with the operation of the disability retirement program. Figure 2 (page 6) illustrates the major elements of the disability retirement application review, approval, and appeal process.

Figure 1: Organization of the VRS Disability Retirement Program

VRS Board of Trustees. *The Code of Virginia* specifies that the retirement system shall be administered by the VRS Board. The VRS Board is authorized to promulgate regulations and procedures, and to make determinations, necessary to carry out the statutory provisions concerning VRS. The VRS Board is also responsible for employing a Medical Board. In 1994, the VRS Board established a benefits and actuarial committee. This three-member committee has within its purview the disability retirement program.

The VRS Board is responsible for periodically revising, based on an actuarial experience investigation, the actuarial assumptions used in computing employer contribution rates. The most recent experience investigation, prepared as of June 30, 1992, found that the actual number of disability retirements was greater than assumed, at most age levels, for all categories of VRS members with the exception of female teachers. Based on the results of this investigation, the VRS actuary recommended that the VRS Board increase the assumed rates of disability retirement so that the assumptions more closely reflect actual experience. Following the actuary's recommendation, the VRS Board approved increases in the assumed rates of disability retirement for VRS members.

VRS Staff. The VRS Director is authorized by the VRS Board to make final determinations of all applications for disability retirement. The final determination is based on the findings and recommendations of the Medical Board and the agency representatives.

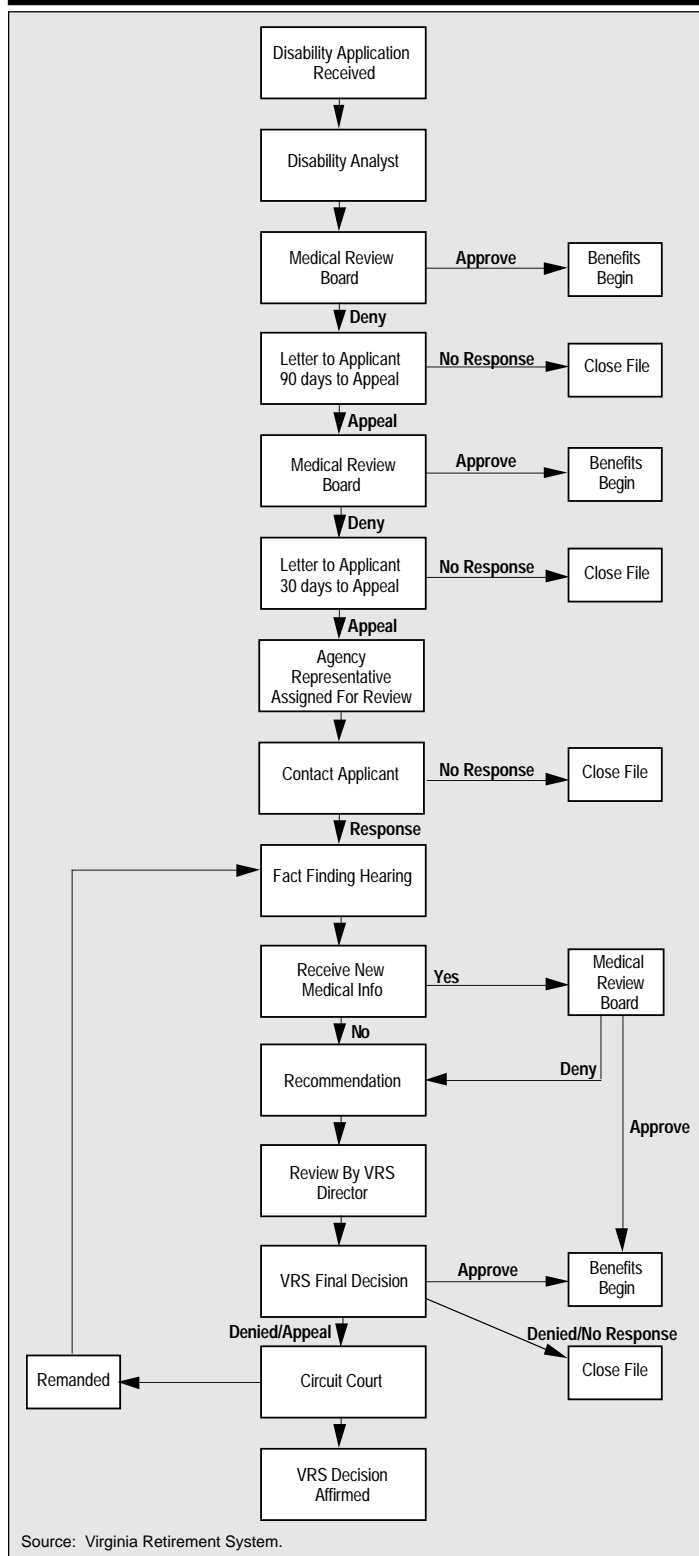
VRS administers the disability retirement program within the Benefit Programs and Services Division. This division, under the supervision of the Assistant Director for Benefit Programs and Services, consists of three departments. These are benefit programs, field services, and publications. The benefit programs department, under the supervision of the benefits manager, contains a service and disability retirement unit. This unit reports to the retirement benefits supervisor, whose position is classified as an "accountant senior."

The service and disability retirement unit includes four disability claims analysts, whose positions are classified as "accountants." The analysts have a number of responsibilities which involve extensive contact and interaction with applicants and often their attorneys. These duties include:

- counseling individuals concerning benefit provisions and explaining eligibility and application requirements;
- ensuring that all necessary information has been submitted by the applicant;
- preparing the application packet for the Medical Board;
- notifying applicants of Medical Board and agency representative determinations;
- explaining appeal procedures to applicants; and
- calculating benefit amounts.

VRS policy and compliance staff also have certain responsibilities concerning the disability retirement program. These staff, who report to the VRS Director,

Figure 2: VRS Disability Retirement Application Review, Approval and Appeal Procedures



serve as the liaison between VRS and the agency representatives concerning cases which have been appealed pursuant to the Administrative Process Act. The policy and compliance staff also serve as the liaison between VRS and the Attorney General's Office concerning disability cases that are the subject of litigation. The position of Special Assistant for Policy Coordination has been vacant since May 1994. A compliance officer, whose position is classified as an "accountant senior," performs the necessary liaison activity with the agency representatives and the Attorney General's Office.

VRS Medical Board. Section 51.1-124.23 of the *Code of Virginia* states that the Medical Board shall consist of "three physicians who are not eligible to participate in the retirement system." The statute also states that the Medical Board shall:

- review all reports of medical examinations required by this chapter;
- investigate all essential health and medical statements and certificates filed in connection with disability retirement; and
- submit to the VRS Board a written report of its conclusions and recommendations on all matters referred to it.

The *Code of Virginia* specifies that members of the Medical Board are appointed for four year terms, and serve at the pleasure of the VRS Board. The current Medical Board consists of a general orthopedic surgeon, an internist with an industrial medicine background, and a cardiologist. Two of the three Medical Board members have served for more than ten years. The third member was appointed in 1988. Due to a technical oversight, the Medical Board members were not formally reappointed in 1992. According to VRS, these reappointments will be made in the near future.

VRS contracts with Richmond Memorial Hospital to provide necessary staff support for the Medical Board. Under the terms of the contract, VRS pays Richmond Memorial Hospital \$45 per application reviewed by the Medical Board. The contract fee is used primarily to pay the salary of the Medical Board Coordinator, while

also defraying the hospital's costs of office space, equipment and supplies used by the Medical Board in performing its duties. A Medical Board Coordinator is not required by the *Code of Virginia*. The position was created in 1979, as part of a restructuring of the Medical Board process, in order to provide staff support for decisionmaking by the Medical Board.

The Medical Board Coordinator, who is a retired internist, prepares for each meeting of the Medical Board by reviewing all of the new disability retirement applications received from VRS. In addition, the Medical Board Coordinator reviews reports from the Medical Board's independent medical consultants. During each Medical Board meeting, the Medical Board Coordinator presents a summary of each case for the Medical Board. The Medical Board then discusses the case and makes a decision. The Medical Board Coordinator is not officially a member of the Medical Board, and therefore has no statutory role in the disability determination process. However, by virtue of his prior review of the applications, the Medical Board Coordinator is very influential in the disability determination process.

The Medical Board meets each week to review disability retirement cases for VRS. As the result of its review of each application, the Medical Board may decide to recommend approval of disability retirement, denial of disability retirement, or examination of the applicant by an independent medical consultant prior to making a recommendation. In addition, for approved disability applications, the Medical Board may request that the retiree be recalled for re-examination in one year. Following each meeting, the Medical Board submits a written report to VRS concerning recommendations made during the meeting.

VRS Agency Representatives. The Virginia Administrative Process Act (VAPA) requires that State agencies follow certain processes in making adjudicatory-type decisions. VRS, through its Medical Board, makes such decisions through the approval and denial of disability retirement applications. Informal fact-finding, which is governed by Section 9-6.14:11 of the *Code of Virginia*, is one of the methods provided by VAPA for resolving cases involving such decisions.

VRS retains the services of six attorneys, located throughout the State, in order to conduct informal hearings concerning denied applications for disability retirement that have been appealed by the applicant. The attorneys, who are reimbursed at the rate of \$95 per hour, are located in Alexandria, Bedford, Goochland, Hanover, Richmond, and Virginia Beach. As of September 30, 1994, there were 38 disability retirement appeals assigned to the VRS agency representatives.

VRS uses the informal fact-finding approach, as opposed to the formal hearing approach, in order to

comply with VAPA. Parties involved in informal fact-finding enjoy certain rights under VAPA:

- to have reasonable notice of the informal conference or proceeding;
- to be present or to have counsel or other qualified individuals present to offer data, arguments or proof;
- to have notice of the contrary facts that are in the possession of the agency;
- to receive a prompt decision; and
- to be informed in writing of the basis for the agency decision.

VRS employs some of the required elements of formal hearings, such as the administering of oaths and cross-examination by the agency representative, and the preparation of an official transcript of the proceedings by a court reporter, as part of its informal fact-finding process. However, the rules of evidence are not strictly applied during informal hearings. As a result, hearsay evidence can be introduced.

The primary difference between the informal fact-finding hearing used by VRS and the formal hearing prescribed by VAPA is that formal hearings must be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court. Through use of the informal fact-finding process, VRS is authorized to select its own agency representatives.

VAPA requires that an agency render a case decision within 90 days from the date of the informal fact-finding proceeding, or from a later date agreed to by the named party and the agency. VRS requires that an agency representatives issue a recommendation in the form of a case decision to VRS within 30 calendar days from the receipt of the transcript of the proceedings from the court reporter. VAPA provides that if an agency does not render a decision within 90 days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within 30 days from agency receipt of the notice, the decision is deemed to be in favor of the named party. If the affected party wishes to further challenge the agency's decision, it may litigate the issue.

Attorney General's Office. In the event that the VRS agency representative upholds the denial of a disability retirement application, the applicant may file suit in circuit court. The Attorney General's Office represents VRS in such litigation. The focus of judicial review in such litigation is on the reasonableness of VRS' decision given the information that it had at the time the decision was made. New medical evidence in support of an individual's application is not supposed to be introduced in circuit court. In the event that an individual attempts to introduce such new evi-

dence, the Attorney General's Office attempts to either prevent its introduction or to have the case remanded back to VRS for further review. As of September 30, 1994, there were 13 disability retirement cases pending in circuit court.

**CHARACTERISTICS OF THE VRS
DISABILITY RETIREMENT PROGRAM**

The VRS disability retirement program has a number of distinguishing demographic and financial characteristics. First, there has been a steady increase in the number of individuals retiring due to disability along with a corresponding increase in disability benefit expenses. Second, many disability retirees do not receive Social Security benefits. To the extent that Social Security benefits are awarded, the amount of VRS disability benefit expenses are reduced. Third, most disability retirees are older than age 50, had at least five years of service at the time of retirement, and have been receiving disability benefits for at least ten years. In addition, it appears that most retirees are disabled as a result of physical, rather than psychiatric, conditions.

In terms of operational and administrative factors, several characteristics are noteworthy. Most disability retirement applications are approved. The large majority of applications are approved by the Medical Board during its initial review. Furthermore, most individuals who are approved for disability retirement continue to receive disability benefits until death. In addition, administrative costs associated with processing applications and making disability determinations have been increasing.

This section provides a summary profile of the VRS disability retirement program. This is done through two approaches. First, demographic and fi-

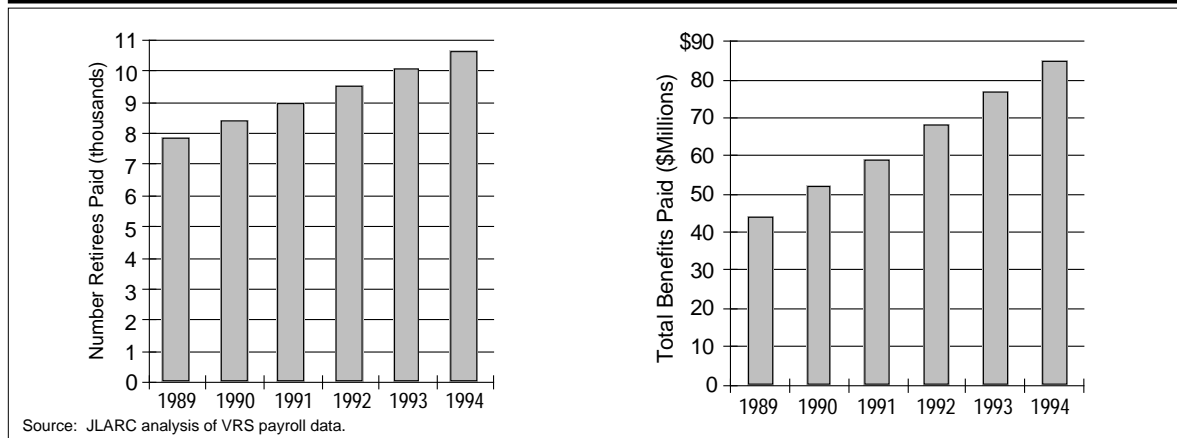
ancial characteristics of the disability retirees and beneficiaries are examined. Second, operational and administrative statistics that provide insight into the disability process itself and the administrative costs of the program are reviewed.

Demographic and Financial Characteristics

Using VRS payroll and case tracking data, several analyses were made to summarize the size of the program and characteristics of the members. These analyses include the number of retirees and beneficiaries paid, the amount of benefits paid, the presence of additional disability benefits from Social Security, the retirees' years of service at retirement, age at retirement, and the number of years that disability retirement benefits have been received, as well as the State agencies and political subdivisions which use the disability retirement program most frequently. In addition, the causes of disability are briefly summarized based on a review of a sample of disability case files.

Increasing Number of Beneficiaries and Benefits Paid. The number of disability retirees and beneficiaries and the amount of benefits paid to them has steadily increased over the past five years. Based on VRS payroll data, nearly 7,900 retirees and beneficiaries were paid in calendar year 1989. During 1994, VRS paid approximately \$84.7 million in benefits to more than 10,600 disability retirees and beneficiaries. In 1989, by comparison, disability retirement benefit payments totaled approximately \$44 million. Figure 3 shows the number of retirees and beneficiaries and the amount of benefits paid in each year since 1989. In 1994, the average annual benefit per retiree or beneficiary was \$7,959. In addition, 90 percent of the disability retirees retired under regular disability provisions while ten percent retired under work-related disability.

Figure 3: Total Number of Disability Retirees and Beneficiaries Paid and Amount of Benefits Paid, 1989 to 1994



Social Security Disability Award. As already stated, the definition of disability for VRS is significantly different from the one used by Social Security. However, VRS disability benefit calculations depend upon the status of an individual's Social Security disability benefit application. The presence of a Social Security benefit will reduce the amount of the VRS benefit. Thus, to the extent that VRS disability retirees receive Social Security benefits, VRS benefit expenses are reduced.

According to data obtained from the VRS disability tracking system, of the 6,111 disability retirees (including beneficiaries) added since the beginning of 1989, 16 percent received a Social Security disability benefit as well as the VRS disability benefit. This low percentage appears to confirm that most of the individuals receiving a disability retirement benefit from VRS are not sufficiently disabled to receive a disability benefit from Social Security.

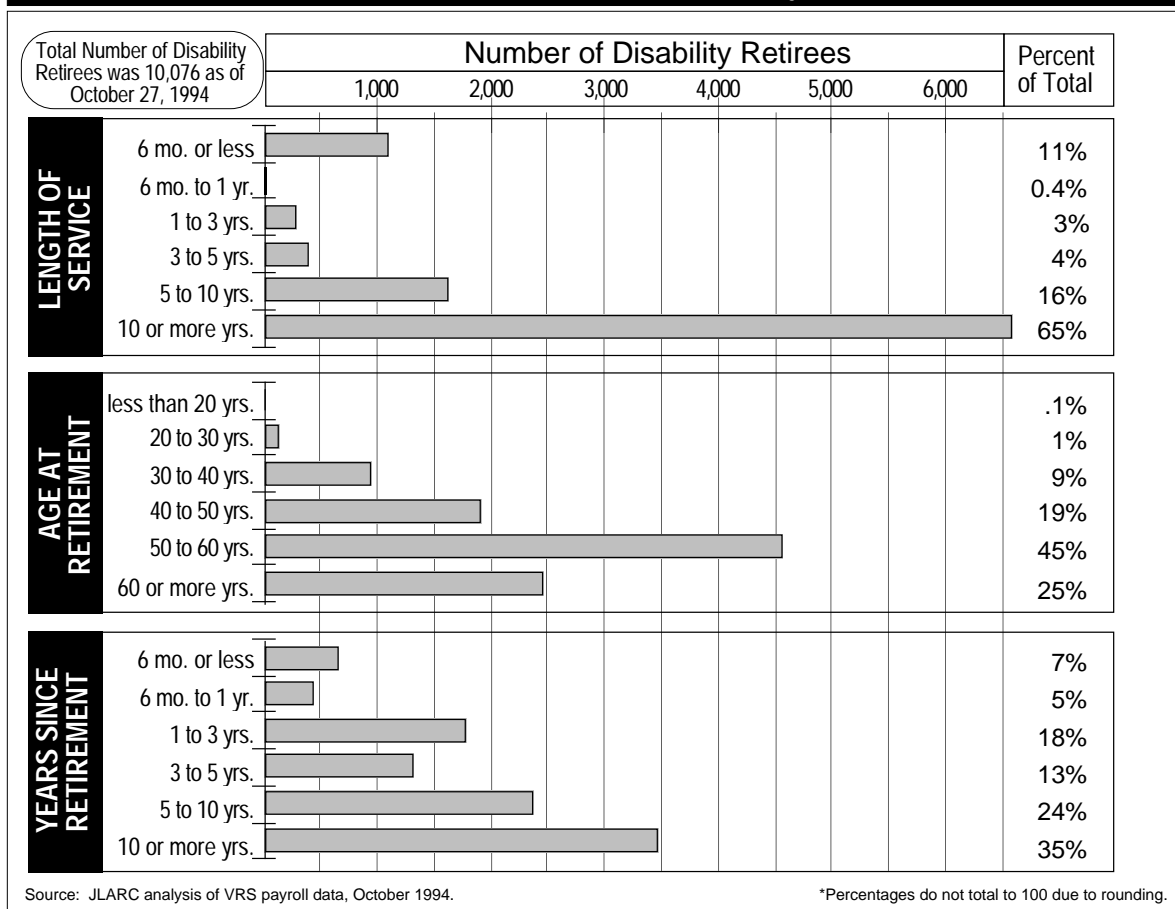
Disability Retiree Length of Service, Age at Retirement, and Years Since Retirement. The length of service at retirement, age at retirement, and amount of time receiving disability benefits vary for retirees.

However, the summary profile of a disability retiree suggests that at the time of disability retirement an individual had worked in a VRS covered position for several years, and was over the age of 50. In addition, the typical disability retiree has been on disability for several years.

While some disability retirees retired within their first six months of employment, more than 65 percent of all disabled retirees served more than ten years in a VRS covered position. Furthermore, more than 70 percent of all disability retirees were at least 50 years old at retirement while 45 percent were between the ages of 50 and 60 at retirement. In addition, nearly 35 percent of all disability retirees have been receiving disability benefits for more than ten years. Figure 4 summarizes the number of disability retirees and their length of service prior to retirement, age at retirement, and years on disability retirement.

VRS Member Employers with Most Prevalent Use of Disability. Among all State agencies and political subdivisions within VRS, the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS) had the greatest num-

Figure 4: Characteristics of Disability Retirees



ber of employees, but not necessarily the greatest percentage of employees, retiring on disability from January 1993 through October 1994. DMHMRSAS had 139 employees retire for regular disability and 43 employees retire for work-related disability during this time. The five employers with the most prevalent use of regular disability retirement and work-related disability retirement are listed in Tables 1 and 2.

Causes of Disability. VRS does not maintain comprehensive data on the causes of disability for the retirees in this program. Therefore, diagnostic information was obtained through a file review based on two random samples: a sample of 100 disability applications approved and a sample of 30 disability applications denied. Since there are a multitude of potentially disabling conditions, the causes of disability were generalized into three broad categories: psychiatric, non-psychiatric, or both. Psychiatric conditions include, but are not limited to, depression, anxiety, chronic fatigue syndrome, and post traumatic stress disorder.

JLARC staff found that non-psychiatric conditions were claimed in 84 percent of the cases in the

application approval sample and in 80 percent of the cases in the sample of denied applications. This data clearly illustrates that the overwhelming majority of disability claims are based on non-psychiatric conditions. However, it does not allow any generalization concerning recent trends in the distribution of psychiatric versus non-psychiatric conditions.

Operational and Administrative Characteristics

VRS payroll data and case tracking data were also used to analyze the operations of VRS disability staff and the VRS Medical Review Board. These analyses include the approval rate of disability applicants, the time required to review applications, the basis for disability benefit terminations, and the number of retirees recalled for re-examination. Case files derived from the random samples were used to identify the stages at which disability applications are approved or denied. In addition, VRS cost accounting data were used to compile information on the administrative costs of the program.

Application Approval Rate. Data concerning the number of applications completed and the number of

Table 1: Top Five Employers with the Most Prevalent Use of Regular Disability Retirement -- January 1, 1993 through October 31, 1994

<u>Employer</u>	<u>Total Active Members</u>	<u>Total Employees Retired under Regular Disability</u>
Department of Mental Health, Mental Retardation, and Substance Abuse Services	9,927	139
Department of Transportation	11,115	130
Department of Corrections	8,920	100
Fairfax County School Board	13,819	47
City of Virginia Beach	4,584	42

Source: JLARC analysis of VRS disability tracking data, October 1994.

Table 2: Top Five Employers with the Most Prevalent Use of Work-Related Disability Retirement -- January 1, 1993 through October 31, 1994

<u>Employer</u>	<u>Total Active Members</u>	<u>Total Employees Retired under Work-Related Disability</u>
Department of Mental Health, Mental Retardation, and Substance Abuse Services	9,927	43
Department of Corrections	8,920	40
City of Virginia Beach	4,584	39
Department of Transportation	11,115	37
Department of State Police	1,640	14

Source: JLARC analysis of VRS disability tracking data, October 1994.

applications denied were obtained from the VRS disability tracking system from January 1992 to October 1994. According to the data, of the 3,126 applications completed since January 1, 1992, a total of 264 were denied. This indicates an approval rate of approximately 92 percent. Table 3 (at right) presents the respective data by year.

Length of Time to Review Disability Applications. The length of time from the submittal of a completed disability application to the initial review by the Medical Board is an indication of the workload and efficiency of the VRS disability staff. According to data obtained from the disability tracking system, 93 percent of applications completed from January 1, 1994 through November 2, 1994 reached the Medical Board for initial review within thirty days. This indicates that the VRS disability claims unit is providing the Medical Board with completed applications for review in an efficient manner. It should be noted that work-related disability cases appear to take slightly longer to process. This is reasonable given that a determination by the Virginia Workers' Compensation Commission needs to be made prior to the VRS Medical Board review of the case. The amount of time required to perform an initial review of applications for regular and work-related disability retirement is summarized in Table 4.

Approval/Denial Stages. There are various stages at which a VRS disability claim can be resolved. However, the stage at which a disability claim is resolved is not captured by VRS in either its disability tracking system or in the disability payroll system. Thus, the reviews of case documentation served as the only method for gathering this information. For purposes of analysis, there were four possible claim resolution stages: (1) first Medical Board review (including initial medical consultations); (2) appeal to the Medical Board; (3) appeal to an agency representative under

Table 3: Disability Retirement Application Approvals and Denials

	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>Total</u>
Applications Completed	1001	1123	1002	3126
Applications Denied	53	77	134	264
Applications Approved	948	1046	868	2862

Source: JLARC analysis of VRS disability tracking system data.

VAPA; and (4) appeal to a circuit court. In a few cases from the sample of applications denied, the stage in which the claim was resolved was either unknown or pending. The data indicates that the large majority of disability cases are resolved in the initial Medical Board review (Table 5, page 12).

Addition and Removal of Disability Retirees. Information concerning the number of additions to the VRS disability retirement payroll since 1992 was available through payroll data provided by VRS. Due to different collection techniques and updates, this data does not correspond to that of the VRS disability tracking system. Information concerning the number of disability retirees removed from the benefit payroll since 1992, as well as the reason for removal, was also available from the payroll data. Thus, combining this data yields a net of 1,947 retirees added to the disability payroll since 1992 (Table 6, page 12).

VRS payroll data also indicates the reasons for the removal of disability retirees from the payroll. The overwhelming majority of removals, almost 93 percent, were attributed to the death of the individual receiving the disability benefit. Less than one percent were re-

Table 4: Length of Time from Completed Application to First Medical Board Review, January 1, 1994 through November 2, 1994

<u>Days</u>	Number of Regular Disability Applications		Number of Work-Related Disability Applications		Total Applications	
	<u>Applications</u>	<u>Percent</u>	<u>Applications</u>	<u>Percent</u>	<u>Applications</u>	<u>Percent</u>
1-30	697	95%	115	82%	812	93%
31-60	13	2%	7	5%	20	2%
61-90	20	3%	13	9%	33	4%
91-120	4	1%	5	4%	9	1%
121-150	0	0%	1	1%	1	0%
151-180	2	0%	0	0%	2	0%
181+	0	0%	0	0%	0	0%
Total	736	100%	141	100%	877	100%

Source: JLARC staff review of VRS disability tracking system data.

moved from the disability payroll because they were deemed “no longer disabled,” and less than one percent were removed because they had returned to VRS covered employment. Therefore, it appears that most individuals who retire under disability will receive a benefit until their death.

Number of Recalls. As part of its review responsibilities, the Medical Board can request an annual re-

call for any individual. This annual recall is usually confined to those individuals with a marginally disabling condition, or a condition that may respond to subsequent treatment or go into remission. Thus, the recall serves as a way to check the permanence of a retiree’s disability. In this way, the annual recall has the potential to remove individuals from the disability payroll who are no longer disabled. Therefore, the utilization and results of the annual recalls are an important issue concerning the VRS disability program.

VRS staff and the Medical Board stated that the number of recalls per year is small relative to the number of disability retirees in the system. However, data inconsistencies between the VRS disability tracking system and the VRS disability payroll system have limited JLARC’s ability to determine an annual recall rate. Based solely on data obtained through the disability retiree tracking system, 93 percent of retirees recalled since 1990 were re-approved for their disability retirement (Table 7, below). Slightly less than three percent of recalled retirees were denied for disability. The results of the remaining recalls were either unknown or pending.

Administrative Costs of Disability Retirement.

Administrative expenses incurred by the disability retirement program have increased significantly over the past few years. There are three types of administrative costs associated with the disability retirement program. The first type of costs are the salary and benefit costs of four VRS disability claims analysts and a part-time secretary for the Medical Board. These five individuals collectively earned more than \$131,000 in fiscal year (FY) 1994. This amount is up from \$70,000 in FY 1990. The increase in personal service costs reflects the fact that VRS hired additional disability claims analysts during this time.

A second type of administrative costs are services provided by VRS agency representatives. These hearing officers are paid at a rate of \$95 per hour. In FY 1994, the agency representative costs were nearly \$58,000. By comparison, the costs for these services were approximately \$18,000 in FY 1990.

The third type of administrative costs are the fees for medical review of each application. These medical reviews include the services performed by the Medi-

Table 5: Stages at Which a Final Disability Determination Was Made

	Sample of Applications <u>Approved</u>	Sample of Applications <u>Denied</u>
First Medical Board Review	92%	53%
Appeal to the Medical Board	7%	23%
Appeal Under VAPA	1%	3%
Circuit Court Appeal	0%	0%
Unknown or Pending	<u>0%</u>	<u>20%</u>
Total Cases Reviewed	100	30

Source: JLARC staff analysis of VRS disability retirement files.

Table 6: Net Retirees Added to the Disability Payroll Since 1992

	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>Total</u>
Retirees Added	1,073	1,148	1,120	3,341
Retirees Removed	<u>529</u>	<u>483</u>	<u>382</u>	<u>1,394</u>
Net Additions to VRS Disability	544	665	738	1,947

Source: JLARC staff analysis of VRS disability payroll data.

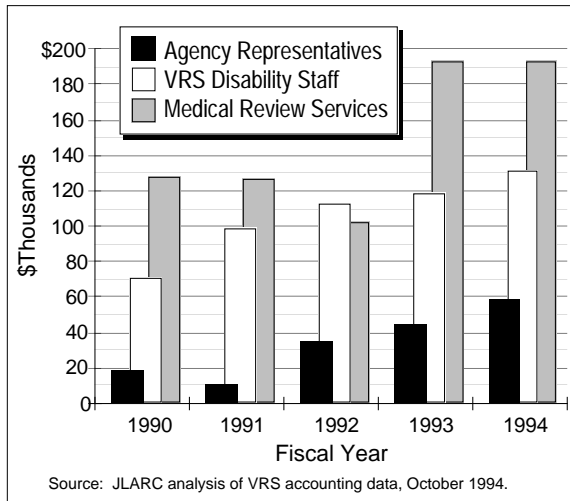
Table 7: Disability Recalls Since 1990

	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>Total</u>
Retirement Re-approved	83	47	48	59	89	326
Retirement Denied	3	3	4	0	0	10
Unknown or Pending	<u>0</u>	<u>0</u>	<u>3</u>	<u>3</u>	<u>7</u>	<u>13</u>
Total	86	50	55	62	96	349

Source: JLARC review of VRS disability tracking system data.

cal Board and independent medical consultants retained by the Medical Board. Each Medical Board member receives a \$215 per diem payment from VRS. Medical consultants submit bills for their services to VRS via the Medical Board. In addition, these fees include those paid pursuant to the contract with Richmond Memorial Hospital. In FY 1990, these costs totaled approximately \$98,000. These services cost \$160,000 in FY 1994. The three types of administrative costs are portrayed in Figure 5.

Figure 5: Administrative Costs of the VRS Disability Program



DETERMINATION OF DISABILITY

There appears to be a lack of consensus on exactly what constitutes disability. The definition of disability contained in the *Code of Virginia* is vague in that several key terms are not defined. The vagueness of the statutory definition, along with the fact that VRS has not developed regulations interpreting the statute, creates the potential for inconsistency in the review and determination of disability retirement applications. This problem is particularly significant when an individual seeks disability retirement due to certain conditions involving psychiatric disorders, emotional distress, or claims of general bodily pain. While such cases appear to constitute a small minority of all disability retirement applications, the Medical Board, some VRS staff, and some agency representatives believe that the prevalence of such cases may be increasing. While some inconsistency may be unavoidable within an adjudicatory process, VRS should address several issues affecting the administration of the disability application review and approval process.

Medical Board Is Experiencing Some Difficulty in Making Disability Determinations

The members of the Medical Board and the Medical Board Coordinator each have, on average, 45 years of medical experience. This extensive medical experience, coupled with their relatively long tenures on the Medical Board, provide these physicians with a unique perspective on issues affecting the disability retirement program. While acknowledging that 90 percent of the disability retirees deserve the pension benefits they are receiving, the Medical Board sees several factors creating difficulties for the disability program. Due to the combined effect of these factors, members of the Medical Board express concern that they are recommending disability retirement for many applicants who are not totally and permanently disabled. Furthermore, the Medical Board estimates that ten percent of the individuals currently receiving disability retirement benefits are not totally and permanently disabled.

Difficult to Obtain Competent, Disinterested Medical Consultants. According to the Medical Board, medical evidence should prove that a disability exists to “an informed, but disinterested observer.” As part of the application review process, the Medical Board is authorized to send applicants to an independent physician for examination. The Medical Board reports that it is difficult to find such physicians for two reasons.

First, some disability applicants can be emotional, unpleasant, and sometimes dangerous individuals intent on receiving a disability benefit. Such individuals, in many cases, are not interested in returning to work. They are only interested in documenting that they have a disability so that they can begin to receive pension benefits. As a result, many physicians do not want to examine such patients. Second, many physicians do not want to make a determination that is contrary to that made by another physician in their community. They fear that doing so might result in fewer referrals and jeopardize their own practice. As a result, the Medical Board often has to send applicants to physicians located as far as 100 miles from their homes.

The Medical Board states that it places more emphasis on the findings of its independent medical consultant than it does on the report of the applicant’s attending physician. To the extent that the Medical Board is unable to locate competent, disinterested physicians in the various specialties, its capability to make accurate and valid disability determinations is reduced. Table 8 (page 14) shows the number of independent medical consultants currently available for use by the Medical Board.

Objective Medical Evidence Required, But Often Difficult to Obtain. It is the responsibility of each applicant for disability retirement to see that their attending physician submits complete, factual medical

Table 8: Independent Medical Consultants Used by VRS Medical Board

Specialty	Total Number	Northern Virginia	Valley	Tidewater	Central Virginia	Southside	Southwest
Orthopedics	13	1		1	7	1	3
Psychiatry	7			2	3		2
Internal Medicine	6		1	1	3		1
Cardiology	5	1		1	2		1
Pulmonary	5	1		1	1	1	1
Neurosurgical	4			1	2		1
Hand Surgical	3			1	1		1
Neurology	3				1	1	1
Rheumatology	3				3		
Psychology	2				2		
Surgical	2				2		
Dermatology	1				1		
Ophthalmology	1	1					
Oral Surgery	1						1
Otolaryngology	1						1

Source: Virginia Retirement System Medical Board.

evidence in support of the application. A medical opinion or diagnosis alone does not satisfy this requirement. According to the *Disability Retirement Factsheet* prepared by VRS and provided to all applicants, some types of information that should be submitted with the physician's report are:

- history and findings of visits to physician;
- hospital records;
- physical and diagnostic findings;
- clinical study reports;
- therapy and response;
- laboratory and special study reports;
- report of X-rays as read by the examining doctor;
- EKG tracing and all other diagnostic cardiac studies;
- diagnostic and treatment responses; and
- physician's evaluation of medical history as it affects ability to perform assigned duties.

Despite the requirement that factual medical evidence be submitted, the Medical Board recognizes that there are a number of conditions for which it is often very difficult to obtain objective medical evidence. Some of these conditions include depression, chronic fatigue syndrome, post-traumatic stress disorder, and fibromyalgia. According to the Medical Board, claims of total and permanent disability due to such conditions do not lend themselves to verification by means of objective medical evidence obtained through an examination. The Medical Board believes that such claims, which are very difficult to resolve, are increasing.

A rehabilitation counselor employed by a State agency claimed disability from both

physical (injury to the dominant hand and wrist) and emotional (post-traumatic stress disorder) conditions. The supporting medical evidence submitted with the application pertained only to the physical condition. The Medical Board denied the application, noting that the applicant submitted a four and one-half page handwritten statement of her complaints. The applicant appealed and was referred to a medical consultant for examination. The consultant's report, which noted that the applicant had been performing tasks similar to those required in her job during service as a legal intern since the onset of her disability, concluded she was not totally and permanently disabled. The Medical Board affirmed its previous denial.

The applicant then appealed pursuant to the Administrative Process Act. At the hearing, the applicant submitted extensive new evidence in support of her claim of post-traumatic stress disorder. Upon review of this new evidence, which consisted largely of notes from a social worker, the Medical Board requested that the applicant be sent for an independent psychiatric examination. Since the administrative hearing is still officially in progress, the applicant may choose to decline a psychiatric examination. In that event, the agency representative will issue a recommendation without the benefit of such an examination. This case is still pending.

* * *

A law enforcement officer employed by a State agency applied for disability retirement due to anxiety, hypertension, and depression. The supporting medical evidence submitted with the application pertained only to hypertension. The Medical Board denied the application. Upon appeal, the applicant submitted new medical evidence pertaining to anxiety and depression. The applicant was referred to a medical consultant for examination and was subsequently approved for disability retirement.

Medical Board Attributes Many Problems to the Medical Profession. The Medical Board has a rather negative opinion of current medical practice as it pertains to disability determinations. In a February 1993 letter to VRS, the Medical Board Coordinator expressed two basic beliefs. First, over the past two decades there has been a tendency to turn any of life's problems into a medical condition that requires treatment. Second, the medical community, particularly physicians with less experience than that of the Medical Board members, are over-diagnosing and finding disability where none would have been identified twenty years ago. The Medical Board Coordinator stated:

The enormous proliferation of physicians, counselors, psychologists, social workers, chiropractors, physical therapists, recreation therapists, speech therapists, hearing therapists, and others has produced a group only ready to document and dignify with a diagnosis conditions that once would have been dealt with by the individual in a simpler manner and in many cases resolved through a change in life circumstances.

We are then left with a large number of people in our society who are afflicted with chronic complaints -- low back pain, depression, fatigue, etc. who are now told they are sick and receive care. Physicians find it very difficult to minimize and reassure these people, with many colleagues standing by ready to confirm the patient's complaint and endorse his desire for disability. Over the years this "background effect" is enervating to the community as co-workers are seen to gain disability for little but chronic complaints and each individual is gradually encouraged to think of himself as equally impaired.

Medical Board Does Not Include a Psychiatrist. While the Medical Board has seven psychiatric consultants at its disposal, there is no psychiatrist on the

Medical Board itself. As previously stated, JLARC staff found that 16 percent of the retirements in a random sample of disability applications were granted due some type of psychiatric condition. While that percentage is still relatively small, the Medical Board believes that disability applications resulting from psychiatric-related conditions are becoming more prevalent. That opinion is shared by some VRS agency representatives and by some members of the VRS staff. Therefore, it may be beneficial to the interests of VRS to have psychiatric expertise on the Medical Board.

In order to achieve psychiatric representation on the Medical Board, an increase in the number of Board members, or the removal of any of the current Board members, is not necessarily required. Rather, VRS could retain the services of a psychiatrist to review applications for psychiatric-related disability with the members of the Medical Board. A psychiatrist retained by VRS in that manner would, in effect, have a support role somewhat analogous to that of the Medical Board Coordinator.

Recommendation (1). *The Virginia Retirement System Board of Trustees should consider appointing a psychiatrist to the Medical Board.*

Medical Board Performance Has Improved Over Time. While the Medical Board is currently encountering some difficulties in the review of disability applications, its overall operation is significantly better than it was in the late 1970s and early 1980s. During that time, documentation concerning the basis for Medical Board decisions was poor. Today, in contrast, VRS receives a report from the Medical Board concerning the basis of the determination for each application.

As previously mentioned, the Medical Board process was significantly revised in 1979. According to VRS management, the Medical Board that existed prior to 1979 rarely met as a board. Most of the disability determinations were apparently made on a unilateral basis by the then chairman of the Medical Board. Documentation concerning the basis for Medical Board decisions was essentially non-existent. In order to improve the functioning of the disability determination process, a new Medical Board was appointed and staff support was arranged through the contract with Richmond Memorial Hospital.

Other Issues Affecting Disability Determinations

The Medical Board believes that the current statutory definition of disability is based on a disability threshold that is too low. This definition lends itself to a number of practices that are probably not in the best interests of VRS. These include disability retirees who may be able to actively work in other occupations, and

employers using the disability retirement program as a means of removing specific individuals from further employment. The Medical Board believes that the disability retirement program should have more stringent criteria for establishing total and permanent disability. VRS management has identified other issues, relating to light-duty work provisions and federal regulations, which may affect disability determinations and overall program administration.

Some Retirees May Be Able to Work in Some Other Capacity. As previously stated, an individual can retire on disability if they are unable to perform the duties of their current position. An example of a more stringent definition, such as the type of definition used by Social Security, results in a finding of disability only if an individual is unable, considering age, education, and work experience, to engage in any other kind of substantial and gainful work activity.

According to the Medical Board, the definition used by VRS can potentially result in questionable disability determinations. For example, if an individual is able to perform nine out of ten of the official duties of his position, as stated on the official position description document, but is unable to perform the tenth duty, that individual can be found to be totally and permanently disabled. In other cases, the facts may suggest the possibility of performing some different type of work other than the individual's current job.

A recreation supervisor employed by a State agency applied for disability retirement due to degenerative arthritis of the knee. The application was approved by the Medical Board. However, the individual's application for Social Security disability benefits was denied. According to the Social Security Administration, this individual was capable of performing less demanding work. Social Security based its determination on reports from the applicant's physician which indicated a satisfactory recovery from knee joint replacement surgery, good movement in the knee and only occasional discomfort.

* * *

A coal mine inspector employed by a State agency applied for disability due to a serious loss of hearing in the left ear. In reviewing the application, the Medical Board noted that the applicant had reasonably good hearing in the right ear. Nevertheless, the Medical Board approved disability retirement on the grounds that the hearing problem affected his ability to locate sources of sounds which was essential to performing his duties as a coal mine inspector.

The Medical Board believes that, if an individual is approved for disability retirement despite the fact that he or she can still perform certain types of work activities, there is a substantial likelihood that the retiree will find employment in a new occupation. The Medical Board further believes that such an individual could be performing duties in the new occupation which are similar to those which he is ostensibly unable to perform. In other words, individuals who are intent on retiring early can potentially use this statutory definition to their advantage, retire early, and then begin a new career.

JLARC staff determined, based on analysis performed by the Department of Taxation, that nine percent of individuals who received disability retirement benefits in 1992 also received earned income during that year. The results of that analysis, which will be discussed in greater detail later in this report, provide support to the proposition that a number of disabled retirees are actively working in some capacity. However, earned income by itself may not indicate that an individual is no longer disabled.

Employer Accommodation of Light Duty. The statutory definition of disability does not take into consideration the possibility that an individual may be only partially disabled. Such an individual may be able to effectively perform modified duties even with a partially disabling condition. VRS encourages employers and employees to make arrangements for light, modified duty assignments where appropriate. However, an employer is not required to provide light duty assignments to an employee. Because VRS is merely the plan administrator and not the employer, its influence in establishing light-duty accommodations is limited.

A highway foreman was approved for work-related disability retirement due to chronic degenerative arthritis of the knee. Workers Compensation benefits were approved, but Social Security benefits were denied. The effective date of retirement was May 1, 1985.

During the application review process, the agency expressed interest in providing the applicant with a light-duty assignment as a toll collector. At the employer's request, the Medical Board reviewed the applicant's record to determine if such an assignment was feasible. The Medical Board stated that, aside from some moderate discomfort, the applicant would be able to perform the duties of a toll collector. It is not clear from VRS records whether the light duty assignment was formally offered, or whether it was offered but the individual declined the

offer. Nevertheless, the individual is still on the VRS disability retirement payroll.

In the event of disability, if an individual is placed in a full-time, light-duty job, VRS disability benefits must cease if the position is covered under VRS. If an individual is able to perform the light-duty job for one year or more, and subsequently applies for disability retirement due the original disabling condition, the application must contain a description of the current light-duty job. In such a situation, the applicant must prove his or her inability to perform the light-duty job. This may be a more difficult test than proving disability from a full-duty position.

Workers compensation benefits will stop in the event an individual refuses a light-duty position with the employer, or if the individual fails to comply with rehabilitation requirements. In that situation, the VRS work-related disability benefit will continue to be offset by the workers compensation benefit amount until the maximum of 500 weeks has been exhausted.

Compliance with the Americans with Disabilities Act. The Americans with Disabilities Act (ADA) gives disabled employees the right to ask their employers to make reasonable accommodations in a number of areas, including the creation of light or modified duty assignments. However, the employee is not obligated to seek light duty and the employer is not mandated to provide it. Nevertheless, according to VRS management, the current disability retirement program may be serving as a disincentive for employers and employees to attempt to reach reasonable accommodations with each other. The availability of a disability retirement benefit from VRS, and the opportunity to continue working in another occupation, may serve as a disincentive for certain employees to stay on the job. Conversely, if an employer prefers to no longer keep the services of a particular employee, the availability of the VRS benefit may act as an incentive for the employer to deny an employee's request for light duty.

Use of Disability Retirement Program to Discharge Employees. The Medical Board believes that the disability retirement program is used on occasion by some employers as a means of removing employees without having to resort to termination procedures. According to the Medical Board, it has received applications which the employee apparently did not personally complete but was compelled to sign. Such employers are sometimes, but not always, successful in their attempts to use the disability retirement program for such purposes.

An information officer employed by a State agency was approved for disability retirement in 1976 as a result of depressive neu-

rosis. The attending physician recognized that the employer wanted to use disability retirement as a means of terminating this long-term employee, rather than continue to employ him for a few more years until he reached normal retirement age. The attending physician stated that there was a clash of personalities within the applicant's department, and the supervisor wanted him out. This individual is still on the disability retirement payroll.

* * *

A first grade teacher employed by a Tidewater city school board applied for disability retirement due to stress, high blood pressure, diabetes, and chest pain. The Medical Board believed that the claim might have some merit. In order to be certain, the application was referred to a medical consultant. The medical consultant determined, during his examination of the applicant, that her school principal wanted to terminate her. Nevertheless, based on the results of a thorough physical examination, the consultant found no basis for total and permanent disability. The application was subsequently denied.

According to the Medical Board, it has encountered situations in which applications have been received from individuals working for the same employer. Although these individuals claim disability due to the same condition, one employee continued to work with the condition for years, while the other applied for disability almost immediately upon receiving the diagnosis. The Medical Board suspects that, in such situations, the former employee has been accommodated by his employer while the latter has not. While that is a possibility, such situations also demonstrate that individuals have varying tolerances for pain and discomfort.

Administrative Regulations Could Provide Guidance for Disability Determinations

Disability determinations are often difficult for the Medical Board to make. This difficulty in ascertaining the extent of an individual's disability continues during the appeal process. An individual who is denied disability retirement by the Medical Board may appeal the decision pursuant to the provisions of VAPA. Since legal representation is not required, there is no disincentive for an applicant to file such an appeal. Therefore, many denied applications are appealed under VAPA. These appeals, which constitute an important part of the disability determination process, are heard by one of VRS' six agency representatives.

The disability determination made by the Medical Board is based on a review of medical evidence. Therefore, approval for disability retirement is a medical decision of the Medical Board. On appeal, denials by the Medical Board are often overturned by an agency representative. However, the decision by the agency representative is based on a review of medical and non-medical information. It is extremely rare for VRS management to overrule the decision of an agency representative.

According to VRS, the administrative appeal is intended to be a non-adversarial proceeding that is designed to ensure due process for all applicants. Such a process is both necessary and desirable. However, the process by which disability determinations are made during the appeal process could be improved. In particular, there are no VRS regulations which, for example, interpret the statutory definition of disability, specify the burden of proof, specify the standard of review on appeal, or which specify the role of the agency representatives. Such regulations could establish specific parameters for disability determinations, and would help promote consistency in decisionmaking. However, any regulations could also represent a reduction in the extensive decisionmaking flexibility that currently exists within the VRS disability determination process.

Characteristics of the Informal Hearing Process. The informal hearing is the first time in the application review and approval process that the individual is able to personally appear to state his case and support his claim. At the informal hearing, the applicant is often represented by an attorney. In addition, the applicant may also have witnesses in support of his application, such as doctors, family members, friends, and co-workers. The Medical Board Coordinator believes agency representatives are overwhelmed by the appearance of applicants, who are often on crutches or in neck braces, and by the presentations of their attorneys. However, some agency representatives express confidence in the process:

I get to see the applicant and be around him for two hours. I get a feel for the applicant and judge his appearance and credibility. I hear the arguments of the applicant and the witnesses.

Another agency representative expresses a similar view:

The Medical Board is so overwhelmed. They never get to see the applicant. I may approve disability based on witness statements and other evidence that the Medical Board does not see.

Interpretation of the Statutory Definition of Disability. The agency representatives are all consci-

entious, take their responsibilities seriously, and strive to be objective in their decisionmaking. However, some recognize inherent difficulties associated with interpreting the statutory definition of disability. According to one agency representative:

Nowhere in the disability retirement statute does the term total disability appear. I use the substantially disabled criteria in my decisionmaking. Due to the lack of formal disability criteria, I draw precedent from Social Security, Workers Compensation or any other case law that I feel is appropriate.

Each agency representative is flying by the seat of his pants. If there was ever something that would be ripe for a lawsuit over denial of benefits, it would be a make-it-up-as-you-go-along approach. How do applicants know that agency representatives are all playing by the same set of rules?

Another agency representative notes that the problem of interpreting the statutory definition is compounded by inconsistencies on the part of VRS in describing eligibility requirements.

Information that VRS provides to its members in the *Disability Retirement Factsheet* indicates that an individual must be totally disabled in order to receive disability retirement benefits. That is wrong. An individual does not have to be totally disabled. The *Code of Virginia* does not state that disability must be total.

Another agency representative also recognizes problems associated with the statutory definition of disability:

There are cases where there is no objective medical evidence but where the person is clearly disabled, and should be entitled to benefits. But, in order to protect the pension trust fund for other State employees, you do not want VRS to be giving money away. Statutory revision by the General Assembly may be required to resolve this philosophical issue.

Standard of Review on Appeal. The informal hearing is intended to provide an individual whose application has been denied by the Medical Board an opportunity to appeal. However, there appears to be some uncertainty concerning whether the Medical Board's prior denial is presumed to be correct. If the Medical Board's determination is presumed to be correct, that could establish parameters for the agency representative's decisionmaking process. While some agency representatives believe that they are clearly

formal decisionmakers, and that the Medical Board's decision carries no presumption of correctness, at least one agency representative is uncertain. According to the agency representative:

What weight should I place on the Medical Board's determination? Is the Medical Board the decisionmaker or am I? If the Medical Board is the decisionmaker, then I should follow an abuse of discretion standard. Under an abuse of discretion standard I can determine the individual to be disabled only if I can prove that the Medical Board ignored medical evidence, that it had in its possession at the time the application was denied, which supported the claim of disability. However, under a preponderance of evidence standard, I can take the Medical Board's denial into consideration but make my own decision based on my own review of the evidence.

Consideration of Medical Evidence. The Medical Board and each agency representative review all of the medical evidence contained in an applicant's claim file. However, the agency representatives appear to place greater emphasis on the findings of an applicant's treating physician than does the Medical Board. According to one agency representative, a medical consultant hired by the Medical Board meets the applicant just once, perhaps for as little as fifteen minutes. Therefore, the findings of the medical consultant have to be considered in comparison with the findings of the attending physician, who has typically seen the applicant more frequently. Another agency representative has a similar opinion:

When I look at the letter from the independent medical examination, I bear in mind that I am looking at the evaluating physician rather than the treating physician. The treating physician sees the applicant more than once. However, I must take into consideration the possibility that the treating physician is feathering his own nest.

As previously stated, the disability retirement program can be difficult to administer. The lack of regulations and criteria for the disability retirement program can make the disability determination process particularly difficult for an agency representative.

A psychiatric aide employed by a State agency applied for disability retirement as a result of lupus. The application was denied by the Medical Board due to insufficient medical evidence. The Medical Board's consultant found no objective evidence of any reason for the disability.

On appeal, the applicant submitted new medical evidence of her disability. The agency representative noted that the applicant's, cheeks were overly red - supporting her claim of rash like symptoms. In addition, the applicant sat almost rigidly still without making any unnecessary movements whatsoever. Furthermore, the agency representative felt confident that the applicant was quite severely depressed.

However, the agency representative noted the applicant's extensive medication and wondered if she was not overmedicated. In addition, the agency representative observed that, following the hearing, the applicant handled going up a staircase well and did not seem to be in undue discomfort.

The agency representative decided that the applicant was totally and permanently disabled. According to the agency representative, the key factors in the decision were physician's records contained in the file.

Role of VRS Agency Representatives. VRS does not view the role of its agency representatives to include representing the interests of the retirement system at the informal hearing. Rather, the agency representative is supposed to serve as an independent fact-finder. This view is shared by several of the agency representatives. However, one agency representative expresses some uncertainty as to his actual role.

Sometimes I wonder exactly what my role is. We are labeled VRS agency representatives, but is our function supposed to be adversarial? The informal hearing is an opportunity for the applicant to unilaterally present his case. The agency representative is allowed to ask questions, and I do ask a lot of questions. However, no one from VRS or the Medical Board is present at the hearing to object to any of the evidence. The Administrative Process Act specifically states that the normal rules of evidence are to be relaxed. As a result, hearsay abounds. VRS must decide if it wants the informal hearing to be adversarial. If it does, it will need additional representation at the informal hearings.

Another agency representative, while recognizing that he is to serve as a neutral fact finder, believes that the fact finding process would benefit from greater representation of VRS interests.

The interests of the State and the retirement system are not represented at the informal

hearing. When you are a lawyer, and only one side is in court, you never feel certain that you have heard the truth. I have a strong feeling many times that I have not heard the whole story. As the fact finder, I would like someone who has had the opportunity to investigate the facts to come in and cross-examine the applicant's witnesses. If that were done, particularly on cases that are especially difficult to resolve, I would feel more comfortable with my decision.

Depending on the facts and circumstances of a particular appeal, VRS might benefit from additional sources of representation at informal hearings. There are no provisions of VAPA that would prohibit VRS from having additional representation at an informal hearing. Possible sources of additional representation could be existing VRS disability retirement staff, or a member of the Medical Board.

VRS Has Begun to Improve Some Aspects of Appeal Process. Since 1993, VRS has made some initial improvements in its approach to the administrative appeals process. First, in August 1993 VRS sponsored a training session for the agency representatives. At that session, a physician made a presentation concerning chronic fatigue syndrome. Also at the training session, the agency representatives were provided a disability hearing manual prepared by VRS staff. The manual contains sections on hearing procedures, administrative appeal procedures, Virginia administrative law, disease and injury case decisions issued by the Virginia Industrial Commission, and selected disability cases decided by the United States Fourth Circuit Court of Appeals. However, no additional training sessions have been held since August 1993. Second, VRS has developed a disability case docket which monitors the status of administrative appeals and any subsequent disability litigation.

Recommendation (2). The Virginia Retirement System Board of Trustees should consider the development of regulations for the administration of the disability retirement program. Any regulations should be developed following the rule making requirements of the Administrative Process Act. The Virginia Retirement System should work with representatives of the medical and legal professions in reviewing the need for regulations, and in developing any regulations.

Some Aspects of VRS Program Administration Require Modification

Much of the actual day-to-day disability retirement program administration performed by VRS consists of explaining benefit provisions to applicants, compiling applications and supporting documents for

transmittal to the Medical Board, communicating with applicants concerning the status of their applications, calculating retirement benefits, and implementing the disability determinations of the Medical Board and the agency representatives by adding approved applicants to the disability retirement payroll. As previously stated, although VRS has final authority to approve or deny disability applications, in practice those decisions are made by the Medical Board and the agency representatives. The VRS Director rarely, if ever, acts contrary to the recommendation of the Medical Board or the agency representatives.

While the extent of VRS decisionmaking concerning disability applications is limited in practice, VRS still has final authority concerning the policies and procedures by which the program is administered. While the program as a whole appears to be administered in a reasonable manner, there are some areas which could be improved through new approaches. These relate to the type of information that VRS has at its disposal for targeting the recall and re-examination of individuals receiving disability retirement benefits.

Section 51.1-159 of the *Code of Virginia* authorizes the VRS Board to recall and re-examine, on an annual basis, individuals receiving disability retirement benefits provided that person has not reached normal retirement age. The purpose of the re-examination is to determine if the individual continues to be totally and permanently disabled. If the person refuses to be re-examined, his disability retirement benefit stops until he complies. If he does not comply within six months, all rights to any further disability benefits cease.

Targeting of Recalls. As previously indicated, VRS recalls relatively few individuals. Furthermore, almost all of the recalled retirees are found to still be totally and permanently disabled. According to VRS, it once attempted to establish a systematic recall process so that a greater number of retirees would be re-examined. However, VRS lacked a sufficient number of staff to effectively administer such a process.

Some of the recalls that are currently performed are the result of a decision by the Medical Board. Others are the results of targeted decisions by VRS staff. VRS staff maintain a manual record of those cases which the Medical Board has selected for annual recall. At the designated time, VRS sends the recalled file to the Medical Board for review. There is no specific percentage of cases that are to be recalled in any given year. According to the Medical Board, it targets the following types of retirees for recall:

- individuals disabled, presumably on less than permanent basis, due to treatable injuries or illnesses;
- relatively young individuals in their 30's or 40's; and

- individuals who, according to citizen complaints, are actively working or engaged in other activities which do not suggest disability.

VRS targets the following types of retirees for recall:

- individuals who are, as the result of citizen complaints, suspected to no longer be disabled; and
- individuals who were granted disability by an agency representative following initial denial by the Medical Board.

A potentially larger group of retirees not systematically targeted for recall are those individuals approved for disability retirement due to one of a number of difficult to verify conditions. Such conditions, as previously noted, include chronic fatigue syndrome, post-traumatic stress disorder, depression, fibromyalgia, and a variety of other conditions involving claims of general bodily aches, pains, and discomfort. The Medical Board may be targeting some individuals with these conditions for recall, if they consider the illness to be treatable. However, a systematic recall program for such cases is not in place.

In order to implement a systematic recall program of this nature, VRS and the Medical Board need access to data which identifies the disabling condition of each retiree. The Medical Board has for several years provided this data to VRS as part of its regular reporting. However, VRS has not entered this data onto its computer database. Therefore, VRS is unable to state the prevalence of various disabling conditions among its disability retiree population. Consequently, it can not identify retirees with specific disabling conditions.

The Medical Board believes that the availability and analysis of such diagnostic data is important for the proper administration of the program. It believes that evaluation of the prevalence of various conditions of disability, correlated with type of employment, age, sex, and geographic location, "might well give us, over time, a better appreciation of trends and of risks to the system." VRS recently provided the Medical Board Coordinator with a personal computer to support the Medical Board's own analysis of diagnostic data. The Medical Board is just beginning to analyze this data.

Recommendation (3). *The Virginia Retirement System and the Medical Board should use the results of their analysis of diagnostic data to enhance the current process used to select disability retirees for recall and re-examination. The Virginia Retirement System may wish to consider the systematic recall of retirees having the following types of disabling conditions: depression, chronic-fatigue syndrome, post-traumatic stress syndrome, and fibromyalgia. The Virginia Retirement System and the Medical Board should also use the results of this analysis to help identify potential risks to the disability retirement program.*

Development of Non-Medical Information for Recalls. Regardless of the number of individuals recalled in any given year, a key factor affecting the ultimate outcome of the recall is the type of information available for review. Currently, recalls are affected by the same basic disability determination problems, such as a frequent lack of objective medical evidence, that affect many initial applications.

An administrative secretary employed by a Northern Virginia locality suffered a work-related injury to her wrist. The applicant had her wrist examined by several physicians who all stated that there was indeed some problem with her wrist. However, the physicians also stated that, if she were to remove her wrist from the splint and exercise it, that the wrist should improve. The individual did not comply with that recommendation. The Medical Board approved the individual for disability retirement in April 1992, on the condition that she be recalled in April 1993. On recall, the Medical Board found that she was still disabled, but made that finding conditional on yet another recall.

The individual was recalled in September 1994 and referred to a medical consultant. The consultant found no reason for any of the claimed immobility in the wrist. The Medical Board has not yet made a determination, but the Medical Board Coordinator told JLARC staff that continued disability will be denied. The Medical Board Coordinator expects the applicant to appeal and file suit if necessary. According to the Medical Board Coordinator, one of the problems with this case is that the treating physician is making a living off the case while the individual continues to receive disability benefits.

One possible method of obtaining additional, non-medical information for use in recalls is to monitor the activities of selected retirees whom the Medical Board believes may no longer be totally and permanently disabled. This idea was proposed by the Medical Board to VRS in January 1994. According to the Medical Board Coordinator:

It would seem prudent to consider the establishment of a more routine investigative service to look into the status of certain disability recipients. We do our best to exclude unjustified awards of disability, but in such a large undertaking it would be unusual if we were not mistaken now and then. I be-

lieve the use of a visiting nurse with a background in industrial medicine would be helpful to look in on certain recipients now and again to make some expression of our concern and also to get some idea of ongoing activity etc. Many, probably most, recipients would not need a visit but certain dubious claims could be followed up in this manner. Requests for reports from treating doctors are presently solicited, but we need another view of the situation and this would be a way of obtaining it.

A slightly different approach from that suggested by the Medical Board, although having the same objective, would be for VRS to retain the services of a company providing claims investigation and surveillance services. The use of such services is prevalent in the insurance industry for purposes of fraud detection and prevention. The selective use of such services furnished by a reputable, experienced company would provide VRS with a means of effectively re-examining those individuals who might not be receptive to an in-home visit.

Regardless of whether a visiting nurse or an investigative service is used, VRS would need to address a number of issues. First, VRS members would need to be informed in advance that an investigative function is component of the program. Second, explicit criteria would be needed concerning the types of individuals who would be selected for investigation. Third, VRS would need a policy identifying the actions that would be taken in the event information is obtained which indicates the individual is no longer totally and permanently disabled. Other potential issues that would require attention would involve privacy and public relations.

Recommendation (4). *The Virginia Retirement System Board of Trustees should examine the advantages, disadvantages, and feasibility of establishing an investigative component as part of the disability retirement program.*

Disability Compliance Staffing. Two positions within VRS, the Special Assistant for Policy, and the Compliance Officer, are responsible for certain aspects of the disability retirement program. Primarily, these responsibilities involve communication and liaison with the Medical Board, agency representatives, and the Attorney General's Office. The Special Assistant for Policy Position has been vacant since May 1994. The duties of the Compliance Officer position are split between investments and disability benefits. The Compliance Officer was originally intended to spend 80 percent of her time on investment matters and just 20

percent of her time on the disability retirement program. The Compliance Officer told JLARC staff that she actually spends 80 percent of her time on disability retirement.

In the event that VRS develops formal regulations for the disability retirement program, the need for compliance staffing will probably increase. In addition, the Special Assistant for Policy coordinated VRS training sessions for the agency representatives. However, there was no training of agency representatives in 1994. For these reasons, VRS should ensure that its level of compliance staffing is adequate.

Recommendation (5). *The Virginia Retirement System Board of Trustees should review its compliance requirements and the responsibilities of its Special Assistant for Policy and its Compliance Officer to ensure that the level of compliance staffing is adequate.*

INCOME EARNED BY VRS DISABILITY RETIREES

A retiree may supplement VRS disability retirement benefits with earned income, provided that the income is earned through the performance of duties which are different from those of the individual's VRS covered position. If a retiree earns income through the performance of duties which are the same as, or similar to, those of his VRS-covered position, the actual extent of continued disability may become an issue. Furthermore, to the extent that disability retirees are earning income through employment in occupations different from those of their VRS-covered positions, the appropriateness of the statutory definition of disability may come into question.

Based on an analysis performed by the Virginia Department of Taxation, nine percent of all VRS disability retirees had earned income during tax year 1992. More than \$6.4 million in earned income was received by VRS disability retirees in 1992, which represented approximately 85 percent of the retirement benefits that were paid to those individuals. The percentage of retirees with earned income varied by employee group. For example, the percentage of retired State Police officers with earned income was particularly high.

The analysis prepared by the Department of Taxation represents a conservative estimate of income earned by disability retirees. This is primarily due to the fact that the analysis did not include income that may have been earned through sole proprietorships. This section presents the results of the Department of Taxation's analysis. In addition, qualifications and limitations concerning the proper interpretation of the analysis are discussed.

Extent of Total Earned Income by Disability Retirees Has Been Consistent

Overall, the rate at which VRS disability retirees received earned income was relatively stable from 1990 to 1992. The percentage of retirees having earned income, and the amount of earned income relative to the amount of disability benefits received, remained fairly constant during this time period. The percentage of disability retirees with earned income in each year was as follows:

- Tax Year 1990 - 9.5 percent,
- Tax Year 1991 - 10.3 percent, and
- Tax Year 1992 - 9.5 percent.

Similarly, the amount of income earned by these retirees remained a relatively stable percentage of the amount of disability benefits that they received. From 1990 to 1992, earned income constituted the following percentage of disability benefits paid:

- Tax Year 1990 - 89.9 percent,
- Tax Year 1991 - 84.3 percent, and
- Tax Year 1992 - 84.7 percent.

Extent of Earned Income Varies by Employee Group. The analysis performed by the Department of Taxation examined retirees from four employee groups: State employees (in which judges were included),

teachers, State Police officers, and political subdivision employees. The percentage of retired State employees and teachers who received earned income was fairly close to the overall percentage from 1990 to 1992. However, the percentage for retired State Police officers and retired political subdivision employees was significantly higher. Table 9 summarizes the results of the earned income analysis by retiree group.

Earned income by State Police officers who received disability retirement benefits is particularly noteworthy. Nearly half of these disability retirees had earned income in 1992. In addition, the amount of earned income received by retired State Police officers in 1992 was 142 percent, or nearly \$200,000 greater, than the amount of disability benefits paid to these individuals. By comparison, the amount of income earned by teachers on disability retirement equaled only 58 percent of the benefits paid.

Interpretation of Earned Income Analysis

There are several limitations on the manner in which the Department of Taxation’s findings can be interpreted. These limitations pertain to the amount of earned income, and to the significance that the amount

Table 9: Income Earned by Individuals Receiving VRS Disability Retirement Benefits

Retiree Group	Tax Year		
	1990	1991	1992
State Employees and Judges			
Percent Reporting Earned Income	8.1%	8.6%	8.7%
Mean Earned Income	\$6,715	\$6,645	\$7,220
Median Earned Income	\$3,993	\$4,155	\$4,628
Earned Income as Percentage of Disability Benefits	94.6%	89.0%	85.8%
Teachers			
Percent Reporting Earned Income	9.2%	10.7%	8.9%
Mean Earned Income	\$6,332	\$5,918	\$7,314
Median Earned Income	\$2,670	\$1,833	\$2,884
Earned Income as Percentage of Disability Benefits	58.4%	50.8%	58.3%
State Police			
Percent Reporting Earned Income	49.3%	45.5%	49.4%
Mean Earned Income	\$16,530	\$16,843	\$16,359
Median Earned Income	\$9,002	\$13,416	\$12,000
Earned Income as Percentage of Disability Benefits	138.4%	142.9%	142.5%
Political Subdivisions			
Percent Reporting Earned Income	14.9%	15.8%	15.4%
Mean Earned Income	\$8,226	\$9,096	\$9,202
Median Earned Income	\$4,188	\$4,920	\$5,839
Earned Income as Percentage of Disability Benefits	104.5%	101.8%	94.7%

Source: Virginia Department of Taxation, and JLARC staff analysis of data provided by Virginia Department of Taxation.

of earned income has concerning the extent of a retiree's disability. While JLARC staff believe that the amount of earned income is a conservative estimate, the amount may in fact be overstated. Furthermore, even if the estimate is conservative, it does not necessarily indicate that these retirees should no longer receive disability benefits.

Amount of Earned Income. According to the Department of Taxation, there is no guarantee that the earned income information on which its analysis was based is complete. The analysis was based on data provided by the Internal Revenue Service (IRS) covering the following types of income and federal information returns:

- employee compensation as reported on form W-2;
- non-employee compensation and other miscellaneous income as reported on form 1099-Misc; and
- partnership and S corporation distributions as reported on form K-1.

There are several reasons why the earned income data may be understated or overstated. For example, a disability retiree may be working as a sole proprietor in transactions for which no federal information return is required. To the extent disability retirees are working as sole proprietors, the amount of earned income identified by the Department of Taxation is understated. Income from such transactions may be included on the IRS Schedule C - Profit or Loss from Business. The Department of Taxation was not able to include that data in its analysis due to the difficulty in attributing earned income to the retiree in the event of a jointly-filed tax return. However, given sufficient time, an estimate of the amount of sole proprietorship income earned by VRS disability retirees may be feasible.

According to the Department of Taxation, the possibility that the amount of earned income is overstated cannot be ruled out. For example, data entry errors by IRS staff may have resulted in an incorrect income or social security number data on the computer tape provided to the Department of Taxation. There are several other limitations concerning the interpretation of the earned income data. For example, income earned in one year may have been for services performed in a prior year. In addition, income received from partnership and corporate distributions may have been for services performed by employees of the retiree.

Relationship Between Earned Income and Disability Status. As previously indicated, the fact that an individual has received earned income while also receiving disability retirement benefits does not necessarily mean the person is no longer disabled from performing the duties of his or her VRS-covered position. Some of these retirees may in fact no longer be disabled. However, that is a determination to be made by VRS based on a review of all appropriate information, not just the amount of earned income. Nevertheless, it does appear that a significant percentage of retirees are actively working while at the same time receiving disability benefits from VRS.

Recommendation (6). *The Joint Commission Studying the Management of the Commonwealth's Workforce may wish to require the Virginia Retirement System Board of Trustees and the Department of Taxation to continue the analysis of earned income on the part of individuals receiving disability retirement benefits from the Virginia Retirement System. The focus of such an analysis should be disability retirees who received earned income while working as sole proprietors.*

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