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**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF J. A.
DOCKET NO. 2017-11
CLAIM OF J. A.

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the proposed Opinion and Recommendation of the Hearing Examiner. We note that neither party filed Exceptions to the proposed Opinion and Recommendation. The Board finds appropriate the History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation with the following modifications:

1. Finding of Fact 11 is amended to read: "A disability retirement¹ is comprised of the member's retirement benefit plus, if the member retired prior to superannuation age, a disability supplement. NT at 37."

2. In Finding of Fact 25, "**October 21, 2016**" in the block quote is amended to "**October 31, 2016.**"

With the above modifications, we hereby adopt the Hearing Examiner's Opinion and Recommendation as our own and, accordingly:

IT IS HEREBY ORDERED that Claimant J. A.'s request to have her monthly disability supplement reinstated is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: Oct. 11, 2019

By: Melva S. Vogler
Melva S. Vogler, Chairman

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF J [REDACTED] A [REDACTED] :
DOCKET NO. 2017-011 :
CLAIM OF J [REDACTED] A [REDACTED] :

RECEIVED

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PSERB
EXECUTIVE OFFICE

OPINION AND RECOMMENDATION

Ruth D. Dunnewold
Hearing Officer

Date of Hearing: February 28, 2019
Hearing Officer: Ruth D. Dunnewold, Esquire
For the Claimant: J [REDACTED] A [REDACTED], *pro se*
For PSERS: Dwight A. Decker, Jr., Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by J. [REDACTED] A. [REDACTED] ("Claimant"). Claimant appealed from a decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS"), dated December 14, 2016 ("ESRC denial letter"), which denied Claimant's request to have her monthly disability supplement reinstated, citing Claimant's continued failure to provide information that PSERS requested.

By letter dated July 17, 2018, the Board's Secretary, Glen R. Grell, appointed Ruth D. Dunnewold to act as Hearing Officer for Claimant's administrative hearing. After being scheduled and continued once at Claimant's request, an administrative hearing on Claimant's appeal occurred in Harrisburg, Pennsylvania, on February 28, 2019, before Hearing Officer Ruth D. Dunnewold. Claimant attended the hearing and chose to proceed *pro se*, while Dwight A. Decker, Jr., Esquire, represented PSERS. At the close of the hearing, PSERS elected to file a post-hearing brief. Thereafter, the hearing transcript was filed on March 15, 2019, and an Order Establishing Briefing Schedule, dated March 19, 2019, was issued.

The Order Establishing Briefing Schedule directed Claimant, as the party with the burden of proof, to file her initial post-hearing brief by close of business on April 17, 2019, PSERS to file its post-hearing brief in response by close of business on May 17, 2019, and Claimant to file her reply brief, if any, by close of business on May 28, 2019. Claimant filed her initial post-hearing brief and PSERS filed its responsive brief in accordance with that schedule, but Claimant did not file a reply brief, so the record was closed when May 28, 2019, the date by which Claimant was to file a reply brief, if any, passed without her doing so. Accordingly, the matter is now before the Board for final disposition.

FINDINGS OF FACT

1. At all relevant times, Claimant was a member of PSERS. Notes of Testimony (“NT”), *passim*.
2. At all relevant times, Claimant’s address has been, and remains, [REDACTED] [REDACTED] (“Claimant’s address”), which is also the address PSERS has on record for Claimant. PSERS Exhibit 2; NT at 7, 26.
3. Superannuation age is a PSERS member’s normal retirement age. NT at 23.
4. At the time of the hearing, Claimant was 50 years old, while her superannuation age is 62. NT at 8, 23.
5. On March 13, 2015, Claimant attended an individual, one-on-one disability counseling session with a PSERS counselor. PSERS Exhibit 1; NT at 6, 7, 25.
6. At that counseling session, the PSERS counselor provided Claimant with a Disability Retirement Counseling Checklist (“Checklist”) and went through each point of the Checklist with her; Claimant signed the Checklist and received a copy of it that same day. PSERS Exhibit 1; NT at 6 – 7, 25.
7. Among other things, the Checklist stated, under the heading “E. After Retirement,” “*Annual Earnings Statement* must be filed with PSERS by April 30 of each year until you reach normal retirement age.” PSERS Exhibit 1; NT at 25 – 26.
8. At the counseling session on March 13, 2015, Claimant completed, signed and filed an *Application for Disability Retirement* (“*Disability Application*”) with PSERS. PSERS Exhibit 2; NT at 7, 26.
9. Claimant signed her *Disability Application* under the following relevant language:

I certify that all statements made on this application are true and correct.

I understand that:

* * *

Each year, effective with my retirement date until I reach normal retirement age, PSERS will send an *Annual Earnings of Disability Annuity* letter to me. The *Annual Earnings Statement* should be completed and returned to PSERS as soon as possible, but no later than the date specified on the statement. If this form is not completed and returned to PSERS by the requested date, my monthly disability retirement benefit will be suspended. Continued failure to return the form will result in the forfeiture of all rights to the disability retirement benefit in excess of any early or normal retirement annuity to which I were entitled.

* * *

PSERS Exhibit 2, p. 6 of 6; NT at 7 – 8, 27 – 28.

10. Claimant's *Disability Application* was approved. PSERS Exhibit 3; NT at 29 – 30.

11. A disability retirement¹ comprises a disability supplement, which is extra money the member receives for not being able to retire at their superannuation age because of a disability; the disability supplement is added to the early retirement and makes the member's check higher than it would be without the disability supplement. NT at 37.

12. Once PSERS grants a disability retirement, there are ongoing requirements set forth in the Retirement Code with which the member must comply, including but not limited to the requirement that the member must submit an *Annual Earnings Statement for Disability Benefits* form up until the member's superannuation age. NT at 23 – 24.

13. In April 2015, Claimant received a letter from PSERS, dated April 3, 2015, advising her, among other things, that PSERS' medical examiners had approved Claimant's disability benefit for one year and that, at the end of each year, Claimant would receive an *Annual Earnings Statement for Disability Benefits* form on which she would be required to report earned income for the calendar year. 24 Pa.C.S. 8508(b); PSERS Exhibit 3; NT at 8, 28.

¹The terms "disability retirement benefit," "disability benefits," "disability retirement" and "disability annuity" were used interchangeably throughout the hearing in this matter, as well as in the exhibits admitted into the record. The terms are, likewise, used interchangeably in this *Opinion and Recommendation*.

14. After receiving PSERS' letter of April 3, 2015, Claimant began receiving disability benefits from PSERS. NT at 8, 30.

15. Claimant was and is familiar with PSERS' disability annuity process, and the importance of it, because her husband receives a PSERS disability annuity. NT at 5, 11, 16.

16. Claimant filled out her husband's *Annual Earnings Statements* in 2013 and 2014 for him, he signed them, and they mailed them. NT at 12, 16.

17. PSERS' routine business practice in 2015 and at all times since 2015 is to keep track of all mail returned to PSERS as undeliverable. NT at 29.

18. By letter dated January 2, 2016, addressed and mailed by first-class mail to Claimant at Claimant's address, PSERS provided Claimant with an *Annual Earnings Statement for Disability Benefits* form for the 2015 tax year, explained that she must complete and return the form to PSERS by April 29, 2016, and added that her failure to timely provide the information would result in the suspension of her disability retirement benefit from PSERS. PSERS Exhibit 4; NT at 30 – 31, 32.

19. PSERS' letter dated January 2, 2016, is an initial/first notice letter that PSERS sends as part of PSERS' routine practice related to disability annuities and the required *Annual Earnings Statement for Disability Benefits* form. NT at 30, 35.

20. PSERS' letter dated January 2, 2016, was not returned to PSERS as undeliverable. NT at 31.

21. By letter dated March 21, 2016, addressed and mailed by first-class mail to Claimant at Claimant's address, PSERS enclosed an additional *Annual Earnings Statement for Disability Benefits* form, informed Claimant that PSERS had not yet received Claimant's *Annual Earnings Statement for Disability Benefits* form, reiterated that she must complete and return the form to PSERS by April 29, 2016, and added that her failure to timely provide the information would result in the suspension of her

disability retirement benefit from PSERS beginning with her May payment. PSERS Exhibit 5; NT at 32.

22. PSERS' letter dated March 21, 2016, was a first follow-up/second notice letter that PSERS sends as part of PSERS' routine practice related to disability annuities and the required *Annual Earnings Statement for Disability Benefits* form. NT at 32, 35.

23. PSERS' letter dated March 21, 2016, was not returned to PSERS as undeliverable. NT at 32.

24. By letter dated April 10, 2016, marked "FINAL NOTICE YOUR MONTHLY BENEFIT WILL BE SUSPENDED," addressed and mailed by first-class mail to Claimant at Claimant's address, PSERS enclosed an additional *Annual Earnings Statement for Disability Benefits* form, informed Claimant that PSERS had not yet received Claimant's *Annual Earnings Statement for Disability Benefits* form, reiterated that she must complete and return the form to PSERS by April 29, 2016, and added that her failure to timely provide the information would result in the loss of her disability retirement benefit from PSERS beginning with her May payment. PSERS Exhibit 6; NT at 33 – 34, 35.

25. PSERS' letter dated April 10, 2016, also included the following statement:

If you fail to return the earnings statement to PSERS on or before **October 21, 2016**, **you will forfeit your disability retirement benefit**. If this should occur, you will no longer be eligible for a disability retirement benefit from PSERS unless you return to public school employment and become a member of PSERS again.

PSERS Exhibit 6 (emphasis in original); NT at 35.

26. PSERS' letter dated April 10, 2016, was a second follow-up/final notice letter that PSERS sends as part of PSERS' routine practice related to disability annuities and the required *Annual Earnings Statement for Disability Benefits* form. NT at 33, 35.

27. PSERS' letter dated April 10, 2016, was not returned to PSERS as undeliverable. NT at 34.

28. Claimant did not return the *Annual Earnings Statement for Disability Benefits* form to PSERS by the stated deadline of April 29, 2016, so as of June 1, 2016, PSERS suspended Claimant's disability supplement for six months. PSERS Exhibit 7; NT at 10, 35, 36, 42.

29. Claimant received no retirement benefits from June 1, 2016 through November 2016. NT at 10, 36.

30. Claimant did not contact PSERS about her missing benefit payments from June to November 2016. NT at 10, 42.

31. By letter dated December 14, 2016, addressed and mailed by first-class mail to Claimant at Claimant's address, PSERS notified Claimant, among other things, that her monthly disability supplement had been terminated, effective June 1, 2016, and PSERS had converted her to a regular (early or normal) retirement using Claimant's original option selection of Option 2. PSERS Exhibit 7; NT at 10, 37.

32. The letter of December 14, 2016 further informed Claimant of her right to appeal to PSERS' Executive Staff Review Committee ("ESRC") by January 20, 2017. PSERS Exhibit 7; NT at 38.

33. After PSERS' letter of December 14, 2016, terminating her disability supplement, Claimant started receiving her early retirement benefit payments again, but they were lower payments because they did not include the amount of the disability supplement. NT at 37.

34. After receiving PSERS' letter of December 14, 2016, Claimant appealed to the ESRC by January 20, 2017. NT at 10 – 11, 37 – 38.

35. On March 27, 2017, Claimant requested of PSERS an *Annual Earnings Statement for Disability Benefits* form, which PSERS sent to her. NT at 40, 41, 42.

36. PSERS received Claimant's *Annual Earnings Statement for Disability Benefits* form for 2015, which Claimant signed on March 31, 2017, on April 10, 2017. PSERS Exhibit 9; NT at 11, 40.

37. By letter dated June 15, 2017, the ESRC denied Claimant's request to have her disability annuity reinstated, citing the following basis for the denial:

By letter dated April 3, 2015, PSERS informed you that your disability retirement was approved for one year and that you must complete and submit an *Annual Earnings Statement for Disability Benefits* ("Statement") for each calendar year. On January 2, 2016, PSERS sent you a *Statement* for earnings in calendar year 2015, which had to be returned to PSERS by April 29, 2016, even if you had no earnings. PSERS sent you a reminder letter dated March 21, 2016, and another dated April 10, 2016, which warned you that if you failed to return the *Statement* to PSERS by October 31, 2016, your disability retirement benefit would be forfeited. Because you did not submit a completed *Statement* for calendar year 2015, you are no longer eligible to receive a disability annuity.

PSERS Exhibit 8; NT at 38.

38. By *Appeal and Request for Administrative Hearing* filed on July 14, 2017, Claimant appealed the ESRC's decision. Official notice of filings of record;² NT at 11.

39. On April 23, 2018, PSERS filed its Answer to Claimant's appeal. Official notice of filings of record.

40. A hearing on Claimant's appeal was held on February 28, 2019, before Hearing Officer Ruth D. Dunnewold. NT at 3 and *passim*.

41. Claimant was present at the hearing, chose to proceed without counsel, and had the opportunity to be heard, pursuant to which she presented her own testimony, but presented no other

²Under the General Rules of Administrative Practice and Procedure ("General Rules"), 1 Pa. Code § 31.1 *et seq.*, at 1 Pa. Code § 35.125(d)(1),

[t]he applications (including attached exhibits), complaints, orders to show cause and answers thereto and similar formal documents upon which hearings are fixed shall, without further action, be considered as parts of the record as pleadings.

Based on this rule, Claimant's *Appeal and Request for Administrative Hearing* filed July 14, 2017 is a part of the record as a pleading.

Also, under the General Rules at 1 Pa. Code § 31.1 *et seq.*, at 1 Pa. Code § 35.173, an administrative agency may take official notice of its own records. *See also Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A.2d 991 (Pa. Cmwlth. 1987) (the doctrine of official notice allows an agency to take official notice of, among other things, reports and records in the agency's files). Therefore, these two rules allow official notice to be taken of Claimant's filing of her *Appeal and Request for Administrative Hearing*.

witnesses or documentary evidence; she also had the opportunity to cross-examine PSERS' witness, made a closing statement for the record, and filed a post-hearing brief in support of her appeal. NT at 3 and *passim*.

CONCLUSIONS OF LAW

1. PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. ("Retirement Code"). *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).
2. Members of PSERS have only those rights recognized by statute and none beyond. *Bittenbender v. State Employees' Retirement Board*,³ 622 A.2d 403 (Pa. Cmwlth. 1992).
3. Claimant bears the burden of establishing the facts necessary to sustain her claim. *See Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *see also Wingert v. State Employees' Ret. Bd.*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991).
4. Claimant was afforded notice and an opportunity to be heard in connection with her appeal. Findings of Fact 31 – 34, 37 – 41.
5. Because Claimant failed for more than six months after PSERS' suspension of her disability annuity supplement to furnish PSERS with a written statement of earned income for 2015, she has forfeited all of her rights to the disability annuity payments in excess of any annuity to which she is otherwise entitled. 24 Pa.C.S. § 8508(b); Findings of Fact 1 – 30, 35 – 36.

³Cases interpreting provision of the State Employees' Retirement Code "are equally applicable in deciding issues arising under similar or identical provisions" of the Retirement Code. *Krill v. Pub. Sch. Employees' Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

DISCUSSION

Preliminary matter

Claimant's post-hearing brief contains many assertions of fact that Claimant did not place in the record via her testimony during the hearing. As such, those assertions were not given under oath, PSERS had no opportunity to object to them or to cross-examine Claimant about them, and they are not a part of the evidentiary record in this matter. In its post-hearing brief, PSERS objected to such assertions of fact, which it referred to as "testimony" despite the fact that the assertions of fact were not made during the hearing. However, because the assertions were not made under oath, in the record, during the hearing, they are non-testimonial assertions of fact and are outside the record.

It is erroneous for the finder of fact in a matter to rely on evidence outside, or *dehors*, the record in making its findings of fact or other determinations. *See, for example, Commonwealth ex rel. Valentine v. Strongel*, 246 Pa.Super. 466, 371 A.2d 931 (1977). For that reason, none of the findings of fact or determinations in this Opinion and Recommendation have relied on the non-testimonial assertions of fact in Claimant's post-hearing brief. Instead, the hearing examiner has disregarded any such non-testimonial assertions of fact set forth in Claimant's post-hearing brief.

Although PSERS asked that the non-testimonial assertions of fact in Claimant's post-hearing brief be stricken, it is unnecessary to strike them. Indeed, Claimant's non-testimonial assertions of fact in her post-hearing brief were legion and as such, it could consume considerable time and energy to review them and suss out which ones were made on the record at the hearing and which were not. Nor is there a jury of laypersons here who might be unable to disregard evidence outside the record. Rather, the hearing examiner simply disregards it, emphasizing that any non-testimonial assertions of fact have not been subjected to cross-examination, so they cannot be, and therefore, were not, considered by the hearing examiner in making a proposed decision. *Strongel, supra*, 371 A.2d at 933. The Board certainly will be capable of disregarding any non-testimonial assertions of fact, as well, when it reviews this matter.

Primary matter

In this case, Claimant appeals from a decision of PSERS' Executive Staff Review Committee ("ESRC"), set forth in a letter dated June 15, 2017, denying Claimant's request to have her disability annuity reinstated. The ESRC's letter cited the following basis for the denial:

By letter dated April 3, 2015, PSERS informed you that your disability retirement was approved for one year and that you must complete and submit an *Annual Earnings Statement for Disability Benefits* ("*Statement*") for each calendar year. On January 2, 2016, PSERS sent you a *Statement* for earnings in calendar year 2015, which had to be returned to PSERS by April 29, 2016, even if you had no earnings. PSERS sent you a reminder letter dated March 21, 2016, and another dated April 10, 2016, which warned you that if you failed to return the *Statement* to PSERS by October 31, 2016, your disability retirement benefit would be forfeited. Because you did not submit a completed *Statement* for calendar year 2015, you are no longer eligible to receive a disability annuity.

PSERS Exhibit 8; NT at 38. This matter arises under section 8508(b) of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 *et seq.* ("Retirement Code"), which provides, in pertinent part, as follows:

§ 8508. Right and duties of annuitants.

* * *

(b) *Periodic earnings statements by disability annuitants.* — It shall be the *duty of an annuitant receiving a disability annuity while still under superannuation age* to furnish a written statement within 30 days of the close of each year of all earned income during that year and information showing whether or not he is able to engage in a gainful occupation and such other information as may be required by the board. *On failure, neglect, or refusal to furnish such information for the period of the preceding year, the board may refuse to make further payments due to disability to such annuitant until he has furnished such information to the satisfaction of the board. Should such refusal continue for six months, all of his rights to the disability annuity payments in excess of any annuity to which he is otherwise entitled shall be forfeited from the date of his last statement to the board. Any moneys received in excess of those to which he was entitled shall be deducted from the present value of the annuity to which he is otherwise entitled.*

* * *

24 Pa.C.S. § 8508(b) (emphasis added).

Based on the ESRC's letter and this section of the Retirement Code, the first issue in this matter is whether Claimant is an annuitant who was receiving a disability annuity while under superannuation age. The Retirement Code defines "annuitant" as "[a]ny member on or after the effective date of retirement until his annuity is terminated." 24 Pa.C.S. § 8102. There is no dispute here that Claimant was an annuitant; the evidence clearly indicates that she began receiving a disability annuity after PSERS' April 3, 2015 letter notifying her that her *Application for Disability Retirement* had been approved. Likewise, there is no dispute that Claimant was under superannuation age while she was receiving the disability annuity; at the time of the hearing, she was 50 years old and her superannuation age is 62. Because Claimant is an annuitant who was receiving a disability annuity while under superannuation age, then, the duty imposed by section 8508(b) applied to her.

The next question is what that duty was, and whether Claimant was aware of it. As described in the remainder of the first sentence of section 8508(b), Claimant's duty, as an annuitant who was receiving a disability annuity while under superannuation age, was to furnish PSERS with a written statement, within 30 days of the close of each year, of all income earned in the preceding year. Moreover, the uncontroverted evidence of record indicates that Claimant was aware of that duty. First of all, on March 13, 2015, she had attended an individual, one-on-one disability counseling session with a PSERS counselor, at which the PSERS counselor provided Claimant with a Checklist that included, under the heading "E. After Retirement," the statement that an "*Annual Earnings Statement* must be filed with PSERS by April 30 of each year until you reach normal retirement age." The PSERS counselor reviewed the Checklist with Claimant, going through each point of the Checklist with her, and Claimant signed the Checklist and received a copy of it that same day. That was Claimant's first notice of her duty under section 8508(b).

Additionally, at the counseling session on March 13, 2015, Claimant completed, signed and filed her *Disability Application* with PSERS. Claimant signed that *Disability Application* under language by

which she acknowledged her understanding of the requirement that, each year, she would have to file with PSERS an *Annual Earnings Statement* no later than the date specified on the *Statement*; that her failure to do so would result in the suspension of her monthly disability retirement benefit; and that her continued failure to return the form would result in her forfeiture of all rights to the disability retirement benefit in excess of any early or normal retirement annuity to which she was entitled. That was Claimant's second notice of her duty under section 8508(b).

Then, in April 2015, Claimant received PSERS' letter advising her, among other things, that her disability benefit had been approved for one year and that, at the end of each year, she would be required to report earned income for the calendar year. That was Claimant's third notice of her duty under section 8508(b).

Furthermore, besides receiving those formal written notices of her duty from PSERS, Claimant was and is familiar with PSERS' disability annuity process, and the importance of it, because her husband receives a PSERS disability annuity. Significantly, she had filled out her husband's *Annual Earnings Statements* in 2013 and 2014 for him, so, as she admitted at the hearing, she was aware, not just of the duty to report her earned income for the preceding calendar year, but of the mechanism for doing so.

Therefore, the record is clear that Claimant was an annuitant who was receiving a disability annuity while under superannuation age, and she was aware of her duty under section 8508(b) to annually report to PSERS her earned income for the preceding calendar year. The next question is whether the circumstances existed that, under the second sentence of section 8508(b), authorized PSERS to refuse to make further payments due to disability to Claimant. The evidence here, which Claimant did not contradict and even admitted, indicates that Claimant did not return the requested documentation for the year 2015 to PSERS by the stated deadline of April 29, 2016. At that point, PSERS was authorized, pursuant to the Retirement Code, to refuse to make further payments on Claimant's disability annuity because she failed to furnish the required information for the period of the preceding year. 24 Pa.C.S. § 8508(b). Therefore,

as of June 1, 2016, PSERS suspended Claimant's disability supplement for six months, in effect refusing to make further payments due to disability to Claimant's "failure, neglect, or refusal to furnish such information for the period of the preceding year."

The second and third sentences of section 8508(b) authorize PSERS to refuse to make further disability annuity payments in these circumstance "until [the annuitant] has furnished such information to the satisfaction of the board," but before the failure or refusal to provide the required documentation has continued for six months. By implication, the six-month period is a grace period, during which the disability annuitant has the chance to cure her failure and avoid the forfeiture that the Retirement Code mandates after the refusal has lasted six months. In this case, the uncontradicted evidence indicates that, because of PSERS' suspension of her disability annuity, Claimant received no retirement benefits from June 1, 2016 through November 2016. That, in itself, served as notice to her that something was wrong. And yet, Claimant did not contact PSERS about her missing benefit payments at all during the entire period from June 2016 to November 2016.

The third sentence of section 8508(b) mandates that, should the disability annuitant fail for six months to provide the written statement of income earned in the preceding year, the disability annuitant shall forfeit all of her rights to the disability annuity payments. Therefore, when that six-month period from June 2016 to November 2016 had run out, and Claimant had not provided the required written statement of income earned in 2015, PSERS had no alternative but to comply with the terms of the Retirement Code as section 8508(b). So at that point, by operation of the statutory language, Claimant forfeited "all of [her] rights to the disability annuity payments in excess of any annuity to which [s]he is otherwise entitled." 24 Pa.C.S. § 8508(b).

Therefore, PSERS sent Claimant the letter dated December 14, 2016, notifying Claimant, among other things, that her monthly disability supplement had been terminated. Eventually, on March 27, 2017, Claimant requested of PSERS an *Annual Earnings Statement for Disability Benefits* form for 2015, which

PSERS sent to her. And then finally, on April 10, 2017, nearly one year after Claimant was actually required to provide it, PSERS received Claimant's *Annual Earnings Statement for Disability Benefits* form for 2015, which Claimant had signed on March 31, 2017. But at that point, that was far beyond the six months permitted by the Retirement Code.

Claimant bears the burden of proof in this proceeding. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29 (Pa. Cmwlth. 1999), *petition for allowance of appeal denied*, 751 A.2d 194 (Pa. 2000); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991). That means she must prove her case by a preponderance of the evidence, *Lansberry v. Pennsylvania Public Utilities Commission*, 578 A. 2d 600 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 602 A. 2d 863 (Pa. 1992), which has been described as evidence of sufficient weight to "tip the scales on the side of the plaintiff." *Se-Ling Hosiery v. Margulies*, 70 A. 2d 854, 856 (Pa. 1960).

Under section 8508(b), to prevail in this appeal, Claimant had to prove one of the following: (1) that she *did* furnish PSERS with a written statement, within the required timeframe, of all income she earned during 2015, the year at issue; or (2) that she failed to provide the written statement of income earned during 2015 within the required timeframe, but that she furnished it late, and her failure to furnish it lasted less than six months. But as outlined in the discussion above, Claimant provided no evidence of either of those two things. She has, therefore, failed to meet her burden.

Apart from her failure to meet her burden of proof, Claimant asserts that she did not receive PSERS' letters and that, because she did not receive them, she was not provided with the necessary forms or the date by which she was required to file them. By making this argument, she seeks to place responsibility for her own failures on PSERS. However, the Retirement Code contains no provision that requires PSERS to provide a disability annuitant with *any* notice or reminder whatsoever about her responsibility under section 8508(b). In the absence of such a specific provision imposing a duty of notification on PSERS, there is no requirement that PSERS specifically communicate to its disability

annuitants the date by which they must submit the written statement of income earned pursuant to section 8508(b). *Trakes v. Public Sch. Employees' Retirement Sys.*, 768 A.2d 357, 367 (Pa. Cmwlth. 2001).

Under the Retirement Code, as interpreted in the *Trakes* decision, PSERS had no obligation even to provide Claimant with the initial written notice, second written notice and final written notice that PSERS sent to Claimant via its letters of January 2, 2016, March 21, 2016 and April 10, 2016, respectively. To the contrary, Claimant's obligation under this provision exists regardless of whether PSERS reminds her of it annually in order to help her comply. *Trakes*. Therefore, it is immaterial whether or not she received PSERS' letters.

Even if Claimant's receipt of PSERS' letters were a determining factor, there Claimant is presumed to have received those letters unless she demonstrates, again by a preponderance of the evidence, that she did not receive them. Under the mailbox rule, an evidentiary rule traditionally utilized by Pennsylvania's courts, testimony that a document was properly addressed and deposited in the mail in accordance with an agency's normal mailing procedures raises a presumption that the letter was received at its destination. *C.f. Harasty v. Public School Employees' Retirement Board*, 945 A.2d 783, 787 (Pa. Cmwlth. 2008), quoting *In re Cameron's Estate*, 130 A.2d 173, 177 (Pa. 1957). PSERS presented evidence to that effect, thereby raising that presumption. As the party with the burden of proof, it was Claimant's responsibility to present evidence to rebut the presumption.

Claimant's primary evidence on this question was her testimony that she did not receive PSERS' letters of January 2, 2016, March 21, 2016 and April 10, 2016. But the mere denial of receipt is not sufficient, by itself, to rebut the presumption of receipt. *Meierdierck v. Miller*, 147 A.2d 406, 408 (Pa. 1959); *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584, 585 (Pa. 1974). Therefore, Claimant's mere assertion that she did not receive those letters from PSERS is not sufficient to overcome the presumption of receipt raised by PSERS' evidence about the manner in which the letter was prepared and mailed. To rebut that presumption, Claimant had to produce additional evidence in support of her

denial of receipt. She did not produce any *competent* evidence to that effect; rather, she merely speculated, and even admitted that her testimony about her mail was “just assumptions.” NT at 18. This is not sufficient to rebut the presumption of receipt. Claimant, therefore, is presumed to have received PSERS’ letters of January 2, 2016, March 21, 2016 and April 10, 2016.

Based upon the above facts, despite the fact that PSERS itself had no duty under the Retirement Code to notify Claimant about *her* duty, under section 8508(b), to file with PSERS an annual written statement of all earned income from the preceding year, PSERS provided Claimant with that information on multiple occasions. First, PSERS did so generally, in Claimant’s disability counseling session with a PSERS counselor; in the Checklist reviewed and provided at that time; in the language, which Claimant acknowledged understanding, of her *Disability Application*; and in the April 2015 letter advising her that her disability benefit had been approved. Second, PSERS did so specifically, in the letters of January 2, 2016, March 21, 2016 and April 10, 2016. No fault can be placed at PSERS’ door for its handling of this matter.

Lastly, Claimant asserts that PSERS’ failure to reinstate her disability retirement benefit is arbitrary and capricious, and contrary to public policy, and she expresses the hope that PSERS will do “what is right in this unique situation.” Claimant’s post-hearing brief, page 3. As to the assertion about PSERS’ action being arbitrary and capricious, Pennsylvania’s courts have accepted the definition of “arbitrary” “as being “based on random . . . selection other than reason.” *Casel v. Scott*, 479 A.2d 619, 620 (Pa. Super. 1984), *quoting In Re Estate of Roos*, 451 A.2d 255, 259 n.2 (Pa. Super. 1982) (other citations omitted). And “capricious” is defined as

Unjustifiable. Capriciousness is the quality of an action or decision that lacks a foundation that makes any sense. Capriciousness is usually one half of a deferential standard of review that would uphold a decision that is not arbitrary and capricious. To an extent, caprice is an emphasis on arbitrariness, yet capriciousness emphasizes the aspect of the decision being both personally rather than officially made and that it is unjustified in its making. Thus, a decision that lacks a reasonable foundation based on at least some form of evidence as applied to an appropriate policy, rule, or legal standard is capricious. An official decision

taken for strictly personal reasons that do not equate to public reasons of an official justification is capricious as an official act.

STEPHEN MICHAEL SHEPPARD, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk Ed. 2012) (LEXIS Dec. 17, 2018).

In this case, the evidence indicates that PSERS followed section 8508(b) of the Retirement Code to the letter. Moreover, the language of section 8508(b) explicitly states that, in these circumstances, the disability annuitant's disability annuity payments "shall be forfeited." 24 Pa.C.S. § 8508(b) (emphasis added). When a statutory provision uses the term "shall," it is generally regarded as imperative. *Nat'l Transit Co. v. Boardman*, 197 A. 239, 241 (Pa. 1938). That is particularly true when failure to follow it would result in an illegality. *Kowell Motor Vehicle Registration Case*, 228 A.2d 50, 52 (Pa. Super. 1967). If PSERS were to fail to enforce the forfeiture aspect of section 8508(b), that failure would constitute a deviation from the requirements of that provision of positive law, which is not permissible, *c.f. Finnegan v. Com., PSERB*, 560 A.2d 848, 850 (Pa. Cmwlth. 1989), and might even be termed illegal. It follows that PSERS' actions were neither arbitrary nor capricious, nor can they be considered a violation of public policy, because they were rational, reasoned, and designed to comply with section 8508(b).

In suggesting that PSERS should fashion a special remedy for her in "this unique situation, Claimant seeks to have PSERS act other than in accordance with the mandate of section 8508(b) of the Retirement Code. But PSERS is a creature of statute which derives its authority from the provisions of the Retirement Code, and it has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 668 A.2d 1139 (Pa. 1995). Consequently, Claimant has only those rights created by the Retirement Code and none beyond that. *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Burriss v. State Employees' Retirement Board*, 745A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa.

Cmwlth. 1992). Thus, the Board has no equity powers by which it may provide Claimant with a right that the Retirement Code does not explicitly provide. *Marinucci v. State Employees' Retirement System*, 863 A.2d 43, 47 (Pa. Cmwlth. 2004). PSERS simply has no power to act in any way other than in accordance with the terms of section 8508(b) of the Retirement Code.

CONCLUSION

Based on all of the above, PSERS clearly went over and above its own statutory responsibilities to give Claimant multiple chances to provide PSERS with the required information. But Claimant never complied with the required deadlines and did not even inquire of PSERS, when her disability annuity was suspended and stopped coming, about what had happened. Therefore, Claimant has failed to prove, by a preponderance of the evidence, that she complied with the requirements of section 8508(b) of the Retirement Code. Under that provision, not only was PSERS completely justified in refusing to reinstate Claimant's disability annuity, but PSERS was mandated to do so. Accordingly, the following recommendation will be made to the Board:

