

**Statement of Martin J. Dickman
Inspector General, U.S. Railroad Retirement Board**

**Before the
U.S. House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Government Operations**



**Systemic Deficiencies within the Railroad Retirement Board's
Occupational Disability Program**

May 1, 2015

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee, I am Martin J. Dickman, Inspector General of the U.S. Railroad Retirement Board (RRB). I truly appreciate the Subcommittee's time and continued interest in the issues raised by my February 10, 2014 seven-day letter. (A copy of this letter is attached and respectfully submitted as part of this testimony). My office has long voiced concerns regarding the RRB's occupational disability program; however, starting in 2007, while investigating massive occupational disability fraud at the Long Island Rail Road (LIRR) we discovered a number of serious systemic deficiencies. The program's weaknesses are pervasive and require both procedural and legislative changes to assure that the RRB is paying only truly deserving beneficiaries.

It was after significant deliberation and considerable work and review by my office that I felt compelled to issue a seven-day letter. The agency has now had more than a year to address the issues raised, but unfortunately their initial reaction was one of defensiveness and inaction. I acknowledge that lately we have seen some movement within the agency to address these issues, but they offer little more than a veneer of program improvement. The RRB's occupational disability program offers a benefit for our nation's railroad workers and their families, but unless there is a radical transformation in agency culture and fundamental legislative and procedural changes, the occupational disability program will remain vulnerable to fraud and abuse.

According to the agency's *2014 Annual Report*, as of September 30, 2013, the RRB is paying approximately 60,500 occupational disability annuities with an average dollar value of \$2,638 per month.¹ This calculates to an annual occupational disability expenditure of approximately \$1.9 billion. The most striking agency statistic, however, is the RRB's national occupational disability approval rate of 98%.² According to the Government Accountability Office (GAO) in their 2009 review of the RRB's occupational disability program "a nearly 100-percent approval rate in a federal disability program is troubling, and could indicate lax internal controls in RRB's decision-making process, weaknesses in program design, or both."³

My testimony today will focus on the foundational flaws that continue to leave the RRB's occupational disability program susceptible to fraud and abuse, including an agency culture that focuses on paying benefits quickly, thereby increasing the likelihood of erroneous payments. I will also present several key recommendations that address weaknesses in the occupational disability program and will serve as a deterrent to those who may wish to defraud or abuse this program. This testimony is based on information my office has obtained through a wide-breadth of investigations and audits.

¹ Railroad Retirement Board, *2014 Annual Report* (Chicago, 2014).

² This approval rate excludes applications processed pursuant to Board Orders 13-33 and 13-55. These Board Orders are discussed on pages 4 and 5.

³ GAO, *Railroad Retirement Board: Review of Commuter Railroad Occupational Disability Claims Reveals Potential Program Vulnerabilities*, GAO-09-821R (Washington, D.C., September 9, 2009).

Background

The RRB is an independent agency in the executive branch of the Federal government. The RRB administers comprehensive disability, retirement-survivor, and unemployment-sickness insurance benefit programs for the nation's railroad workers and their families. These programs are codified under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA), respectively.⁴ During fiscal year 2014, the RRB paid approximately \$12 billion, net of recoveries and offsetting collections, in railroad retirement and survivor payments (including disability annuity payments) to about 562,000 beneficiaries. The RRB also paid approximately \$86 million, net of recoveries and offsetting collections, in unemployment-sickness insurance benefits to roughly 26,000 beneficiaries.⁵

The RRA was enacted in the 1930s to establish a Federally-administered railroad retirement system (including total and permanent disability annuities). Occupational disability annuities were added through the 1946 amendments.

A railroad employee is considered to be occupationally disabled if a physical and/or mental impairment permanently disqualifies them from performing his or her *regular railroad occupation* (even though the employee may be able to perform other kinds of work).⁶ Total and permanent disability annuitants are adjudicated as being disabled from performing any substantial gainful activity.

There are several ways for the RRB to adjudicate an occupational disability application, with the independent case evaluation (ICE) process being the mechanism most commonly used and the most susceptible to fraud and abuse. In fact, RRB disability claims examiners use the ICE process in nearly 80% of the occupational disability application reviews. The ICE process is utilized to collect and review disability applications and related occupational/medical documentation to determine benefit eligibility. This process also includes a determination of basic requirements for an occupational disability including years of service, medical inability to perform their *regular railroad occupation*, and a *current connection* with the railroad industry.

Long Island Rail Road Prosecution

In 2007, the OIG initiated a joint investigation with the Federal Bureau of Investigation that unraveled a complex occupational disability fraud scheme perpetrated by a number of LIRR retirees, doctors, and disability facilitators. This investigation revealed that three doctors used their medical practices to run “disability mills.” These doctors charged a premium of approximately \$800 to \$1,000 in exchange for grossly exaggerated medical documentation designed to fraudulently qualify their client for an RRB occupational disability. In fact, the doctors also helped the retirees pre-plan their disabilities so they

⁴ 45 U.S.C. § 231 and 45 U.S.C. § 351-369.

⁵ Railroad Retirement Board, *Performance and Accountability Report* (Chicago, Illinois, November 7, 2014).

⁶ 45 U.S.C. § 231a(a)2.

would coincide with their anticipated retirement dates. Some of the retirees also used disability facilitators to increase the likelihood of being approved. These facilitators assisted and coached their clients on how to complete the RRB disability application in order to gain approval. One of the facilitators convicted in this scheme is a former RRB employee.

This case was referred to and prosecuted by the U.S. Attorney's Office for the Southern District of New York. All 33 people charged in connection with the LIRR disability fraud scheme have either pled guilty (28 individuals) or been convicted at trial (5 individuals). Federal sentences imposed by the court totaled 544 months of prison, 594 months of probation, 456 months of supervised release, 57 months of home confinement, 300 hours of community service, and approximately \$614 million in restitution, forfeiture, and fines. We estimate that more than 700 individuals may have been involved in this fraud scheme and the investigation remains ongoing.

The RRB's Response to Occupational Disability Fraud and Systemic Weaknesses

I remain dismayed by the reaction and response from agency leadership to our occupational disability fraud prosecutions, audits, and numerous related program alerts and memoranda. Even several years after the LIRR prosecution, there still remains no unified, cohesive response that would enable the RRB to detect or prevent fraud and abuse against its occupational disability program. In fact, the agency's response to our successful occupational disability fraud prosecution and the associated exposure of systemic weaknesses shows an agency culture willing to protect those associated with a high likelihood of defrauding the system by not only allowing them to reapply for benefits, but also preventing the collection of fraudulent payments.

The following table illustrates this point by briefly evaluating the agency's response as evident in their associated Board Orders.

Board Order	Date	Purpose	Brief Description	Result
08-63	10/20/2008	To increase oversight of LIRR occupational disability applications.	Five point plan aimed at increasing program integrity. Plan included centralizing LIRR adjudication to two RRB disability claims examiners and an increased use of contract consultative medical exams.	Approximately 96% LIRR occupational disability approval rate including the approval of 7 individuals who subsequently plead guilty to defrauding the program.
12-29	05/21/2012	LIRR voluntary disclosure and disposition program.	Offered LIRR disability annuitants the opportunity to cancel their annuities under either an early agreement or a standard agreement. The early agreement did not require any repayment of previous benefits unless the annuitant reapplied for disability benefits. The standard agreement required a 50% repayment. Both agreements required 100% repayment if the annuitant applied for future disability benefits.	45 individuals participated in this program.
13-33	06/27/2013	Terminated disability benefits for LIRR annuitants associated with Dr. Peter Ajemian. Allowed terminated annuitants to file "new" applications.	See discussion below.	Approximately 89% re-approval rate. As of 04/02/2015, 542 out of 570 terminated annuitants have reapplied for disability benefits. RRB did not review previous applications for indications of fraud.
13-55	09/30/2013	Terminated disability benefits for LIRR annuitants associated with Dr. Peter Lesniewski. Allowed terminated annuitants to file "new" applications.	See discussion below.	Approximately 96% re-approval rate. As of 04/02/2015, 169 out of 174 LIRR terminated annuitants have reapplied for disability benefits. RRB did not review previous applications for indications of fraud.
15-02	11/06/2014	Supersedes 08-63	Three Member Board adopted changes to the processing of disability annuities under the RRA.	Has not been implemented; however, these changes fail to address core program deficiencies.

Board Orders have Been Ineffective at Dealing with Fraud and Abuse

Board Orders 13-33 and 13-55 established the RRB's policy regarding the termination of occupational disability annuities that were originally awarded based upon medical evidence from the doctors found guilty in connection with the LIRR prosecution. These orders, however, also prevented the recovery of previous improper payments made to the annuitants.

In order to preserve future prosecutorial action, my office originally asked the RRB to not take any administrative recovery action regarding disability annuities previously paid to annuitants associated with Dr. Ajemian (the case against Dr. Lesniewski was still pending at that time). RRB's General Counsel agreed that no recovery would be initiated at that time for previously paid annuities. My office subsequently requested that the agency remove any reference to previously paid annuities from termination notices. The agency never responded to this request and the RRB's actual termination letters stated "[a]nnuity payments made to you prior to the termination...will not be reopened or recovered." (Emphasis added.) We estimate that through the use of this language, the RRB declined to pursue as much as \$275 million in improper payments.

LIRR annuitants re-approved through Board Orders 08-63, 13-33, and 13-55 are the very same individuals the Chairman characterized in his February 18, 2014, response to my seven-day letter as exploiting the occupational disability program. It is illogical that the RRB would potentially recover improper payments from individuals who have actually taken ownership of their actions by volunteering to terminate their annuities, under the voluntary disclosure and disposition program set forth in Board Order 12-29, while individuals who failed to take any responsibility for their actions were not only permitted to re-apply but were for the most part made whole once their applications were reapproved (with an average re-approval rate of approximately 91%) through the RRB's deficient adjudication process.

Occupational Disability Program Improvements Hampered by RRB Agency Culture

The RRB is an independent agency in the executive branch of the Federal government. The RRA mandates a three member Board that is appointed, with the advice and consent of the Senate, by the President of the United States. One member is appointed upon the recommendation of rail employers; another member is appointed upon the recommendation of rail labor; and the third, who is the Chairman, is appointed to represent the public's interest. Each member serves a five year term. In my experience, this structure is problematic because it allows rail labor and management to exercise control over a Federal agency and has resulted in a culture that is focused on paying benefits quickly, not accurately. Further, this structure has hampered the agency's response to the identified weaknesses in the occupational disability program.

Decision Making at the RRB

Historically, changes in RRB programs are typically initiated and agreed to by private-sector parties, in negotiations between rail management and labor, and then Congress examines the possible modifications.⁷ This practice differs from the RRA which states that the Board shall work in *cooperation* with labor and management to determine occupational disability standards.⁸ The importance of agency leadership is made clear in Standards for Internal Control in the Federal Government, which describes the control environment as the foundation for the internal control system.⁹ The oversight body and management should establish and maintain an environment throughout the entity that sets a positive attitude toward internal control. A key principle in the system of internal controls is management's commitment to integrity and ethical values. Paramount to this principle is the tone at the top or how management demonstrates the importance of integrity and ethical values through their directives, attitudes, and behavior. Management's behaviors reflect the integrity and ethical values expected throughout the entity, and can either be a driver to strong internal controls or a barrier.

My office has identified several troubling practices in which rail labor and management assert control over the RRB. For example, the RRB's disability regulation, 20 CFR § 220.10(a), states, in pertinent part, that "[i]n accordance with section 2(a)(2) of the Railroad Retirement Act this subpart was developed with the cooperation of employers and employees." While input from rail labor and management is important, they should not be allowed to dictate the actions of a Federal agency. Rail labor and management control over the RRB's rules and regulations have undermined the integrity of the occupational disability program. It is readily acknowledged that decisions affecting the occupational disability program are negotiated between rail labor and management, which has resulted in a culture where payments are made without the due care needed to protect a Federal agency.

For example, agency regulations provide that:

the Board *shall* select two physicians, one from recommendations made by representatives of employers and one from recommendations made by representatives of employees. These individuals *shall* comprise the Occupational Disability Advisory Committee (Committee). This Committee *shall* periodically review, as necessary, this subpart and the [Disability Claims] Manual and make recommendations to the

⁷ Congressional Research Service, *Railroad Retirement: Legislation in the 107th Congress*, Order Code RS20797 (Washington, D.C., Updated January 22, 2002).

⁸ 45 U.S.C. § 231a(a)(2).

⁹ GAO, *Standards for Internal Control in the Federal Government*, GAO-17-704G (Washington, D.C., September 10, 2014). While these Standards are effective beginning with fiscal year 2016, information on internal control of agency leadership is consistent with the standards in place until that time.

Board with respect to amendments to this subpart or the [Disability Claims] Manual. The Board *shall* confer with the Committee before it amends either this subpart or the [Disability Claims] Manual.¹⁰ (Emphasis added.)

Since Federal statute requires a three-member Board to represent varying interests, I've previously recommended that 20 CFR § 220.10(b) be amended to require a third Occupational Disability Advisory Committee physician/member who represents the Chairman and his constituents—the public. This recommendation has remained unanswered since July 2014.

According to the agency, the last deliverable submitted by the Occupational Disability Advisory Committee was in 2008, and it wasn't until October 2014 that the Board sought nominations (one each from recommendations by representatives of employers and employees) to fill this committee.

The issuance of Board Order 15-02 further illustrates the power that rail labor and management exercises over the decisions of the RRB. It states “the three-Member Board adopted changes to the processing of disability annuities under the Railroad Retirement Act as detailed in the memoranda dated September 4, 2014 and September 9, 2014, issued respectively by Labor Member Barrows and Management Member Anthony.”¹¹ Thus, decisions on changes to the processing of RRB annuities were negotiated and decided by two Members, without input and discussion by the Chairman, to protect the public interest.

Another example is the three member Board's December 3, 2013 letter to the Association of American Railroads and the Brotherhood of Railroad Signalmen, which sought input regarding the RRB's job duty verification process. The letter states, in pertinent part, “[w]e would appreciate your [rail labor and management] cooperation in this matter and will provide whatever assistance is needed. It might be helpful if rail labor and the industry first discuss potential methods of review and contact the RRB after preliminary agreements are established.” I note that in January 2013, my office issued Audit Report 13-02, *Audit of Job Duty Verification Procedures for Long Island Rail Road Occupational Disability Applicants*, which identified several weaknesses in the RRB's job duty verification procedure and made five targeted recommendations to the agency. To date, the RRB has not yet responded to these commonsense recommendations.

Recent Agency Response in Light of Congressional Pressure

While the above examples are disheartening, I note that in response to significant Congressional pressure and oversight by the Office of Management and Budget and my office, the RRB has recently taken some preliminary steps to

¹⁰ 20 CFR § 220.10(b).

¹¹ Railroad Retirement Board, *Board Order 15-02* (Chicago, Illinois, November 6, 2014).

acknowledge and address program integrity in its occupational disability program. For instance, the fiscal year 2016 President's Budget includes \$3.3 million in mandatory funding for RRB's program integrity activities. In its briefing book for the fiscal year 2016 budget hearings, the RRB explained that these funds would be used to assign 29 full time equivalent staff to perform activities such as oversight of fraud prevention initiatives, quality assurance reviews, special studies, support enhanced emphasis on initial eligibility and continuing entitlements to benefits, and eliminate a growing backlog of possible improper payments referrals. It would also allocate funds to conduct fraud training for employees, confirm medical exams for all initial disability applications, in some cases using specialists, and additional communication with beneficiaries. Further, in reaction to a previous OIG Alert, the RRB included a legislative proposal to amend the RRA and RUIA to include felony charges for individuals committing fraud against the agency. Currently, 45 U.S.C. § 231I (RRA) and 45 U.S.C. § 359 (RUIA) contain misdemeanor penalties.

Additionally, in 2014, the RRB contracted with an outside consultant (at an expense of more than \$275,000) for a benefit payment fraud prevention/detection assessment and advisory examination. Work is still ongoing under this contract. Further, in communication with various Congressional committees, the RRB has indicated additional program integrity activities it is undertaking such as seeking input from rail labor and industry on an update to the job descriptions currently in use, increasing fraud awareness training, and reviewing best practices in place at the Social Security Administration.

While my office continues to believe that the aforementioned agency actions do not adequately address the core problems within the occupational disability program, due, in part, to their lack of necessary specificity, timeframes, and cohesiveness to be fully successful, I remain committed to continuing oversight of their program integrity initiatives to assure taxpayer funds are protected. I commit to reporting to Congress on the results of this work. However, without fundamental legislative and procedural change to the occupational disability adjudication process, including key qualification definitions, I believe the occupational disability program is at continued risk of fraud and abuse, regardless of the above described agency actions.

Ways to Reduce Occupational Disability Fraud and Abuse

Program integrity could be greatly enhanced through effective implementation of existing regulations in conjunction with targeted legislative changes.

Implementation of Existing Regulations Could Improve Program Integrity

Our investigative and audit work has revealed a fundamental breakdown in the RRB's adjudication of disability applications. Both RRB disability claims examiners and field office staff should be the first line of defense in identifying potential fraudulent disability

applicants and assuring that cases are properly adjudicated to preclude improper payments. Unfortunately, we found that RRB disability claims examiners looked for anything “to hang their hat on” in order to award benefits, which is facilitated by an organizational culture that encourages approval of applications and an adjudication process that lacks basic controls, such as information verification. For example, we identified the following weaknesses in the adjudication process that in some cases are in direct contrast to the regulations overseeing the occupational disability program.

Failure to verify self-reported job information.

Disability claims examiners frequently do not verify self-reported job information provided by applicants. RRB regulations state that “in determining the job demands of the employee’s regular railroad occupation, the Board will not only consider the employee’s own description of his or her regular railroad occupation, but **shall** also consider the employer’s description of the physical requirements and environmental factors relating to the employee’s regular railroad occupation, as provided by the employer on the appropriate form....”¹² (Emphasis added.) Contrary to its regulations, the RRB forms used to collect job information from the railroad employers, do not require the railroads to provide this information or even to return the form. As a result, obtaining the job information from the employer is not done in most cases. In April 2015, the RRB reported that in 2014, 85.8% of the time they adjudicated claims without a job information form returned by the employer. That percentage remains basically unchanged at 85.6% for 2015, to date. Without key information regarding an applicant’s job requirements, it would be very difficult to determine if a medical condition would prevent a railroad employee from completing that work, the foundation of a disability determination.

As previously mentioned, my office’s January 2013 audit pertaining to this issue identified several weaknesses in the implementation of this regulation. At that time, we made five recommendations to the Office of Programs. To date, the RRB has not yet responded to these commonsense recommendations.

Work related records not requested.

Records, such as fitness for duty exams and payroll records, are not requested from railroad employers. Such records may expose a history of overtime leading up to their retirement, which not only indicates the individual was able to work extended hours but also bolsters the income that future private annuity payments may be based on. Depending upon when an application is submitted, gathering this type information would provide disability claims examiners with invaluable information regarding the applicant’s general health condition immediately preceding their disability application. Even though the RRB’s *Disability Claims Manual* states that “[m]any employers can furnish valuable medical evidence

¹² 20 CFR § 220.13(b)(2)(iv)(E).

through their medical departments or affiliated hospital association” this information is not requested on a regular basis.¹³

Failure to question the application based on observations of employee and treating physician.

Our office saw instances where, according to the treating physician’s statement, the applicant appears to be non-ambulatory and unable to perform even basic life functions; however, that same applicant personally drove themselves to the RRB’s district office and hand-delivered their application. This type of activity level was in direct contradiction to the treating physician’s medical assessment and restrictions. In addition, applicants also listed severe physical limitations on their applications despite their ability to physically appear at the district office. This type of contradictory evidence was hardly, if ever, collected by the field office staff or questioned by claims examiners.

Failure to confirm annuitant is obtaining treatment.

RRB regulations require the annuitant to follow treatment prescribed by their physician if the treatment can restore their ability to work. The regulations also allow for the annuity to be denied or stopped if the annuitant does not follow the treatment plan without good reason, as defined.¹⁴ However, in its *Disability Claims Manual*, RRB directs its disability claims examiners that, while there are conditions that can be controlled by prescribed treatment to a level considered not a disability, whether or not an employee is availing themselves of medical treatment to correct or control the condition has no bearing on an annuity decision.¹⁵

These procedural failures contribute to the staggering 98% approval rate for occupational disability annuities, which if unaddressed, leave the program vulnerable to fraud and abuse.

The Railroad Retirement Act is in Need of Meaningful Legislative Change

My office has issued numerous recommendations aimed at increasing program integrity within the RRB’s occupational disability program, and the RRB has also proposed their own changes to the system. I have, however, come to the conclusion that the RRA is in need of meaningful legislative change as described below. (A more extensive list of legislative proposals is attached and respectfully submitted as part of this testimony).

¹³ Disability Claims Manual Part 4.3.4 C.

¹⁴ 20 CFR 220.115.

¹⁵ Disability Claims Manual Part 3.2.3 A.

Re-define *Regular Railroad Occupation* and *Current Connection*

Current RRB regulations permit an employee to be adjudicated as occupationally disabled from an occupation which they held the most during the last 15 years. This means that an employee may be adjudicated as being occupationally disabled from an occupation they may not have held for years.

Additionally, railroad employees must maintain a *current connection* to the railroad industry to be eligible for an occupational disability. An employee who worked for a railroad in at least 12 months in the 30 months immediately preceding the month their occupational disability is to begin meets the *current connection* requirement. If the railroad employee does not meet the 12 month requirement, they may still meet the *current connection* requirement if they have not held regular employment outside the railroad industry. Railroad employees can maintain their *current connection* even if they retire, voluntarily leave railroad employment, are self-employed in an unincorporated business, or work for select U.S. Government agencies. While a commonsense approach to *current connection* should bar those who have left the railroad industry from applying for occupational disability benefits, it actually allows railroad employees, under certain situations, to apply for and be granted an occupational disability long after they leave the rail industry.

For example, the RRB's *Disability Claims Manual* provides the following:

An employee works in the CSX railroad as a conductor from 1968 through July 1984. He then works as a locomotive engineer from August 1984 through July 1990. In August 1990, he then starts his own business. In January 2006, this employee files a disability application with the RRB. It is determined that the work done for this business is self-employment and allows the employee to keep his current connection. Based on the information provided, the employee's regular railroad occupation would be a locomotive engineer.¹⁶

In this example, the employee had not worked in the rail industry for 16 years (owning his own business in the interim), yet he still retains his *current connection* with the rail industry and maintains the position of locomotive engineer as his *regular railroad occupation*. This defies logic and legislative language should be introduced to re-define and update the program in more sensible terms.

Eliminate the Use of the One Job Aspect

Further complicating the agency's ability to properly administer the occupational disability program is the propensity to award occupational disability annuities based upon the applicant's inability to perform only one aspect of their *regular*

¹⁶ Disability Claims Manual Part 3 Initial Determinations, Section 3.2.3.

railroad occupation. Even though agency regulations are void of specificity regarding this issue area, and the standards are set as “the job demands of the employee’s regular railroad occupation,” our investigative experience has revealed that RRB disability claims examiners adjudicate applicants based upon their inability to perform a single job task, regardless of the frequency of this task.¹⁷ This means that occupational disability benefits could be approved based on a job aspect that the employee is not even required to perform. Agents interviewed a number of RRB occupational disability annuitants who admitted that they were granted an occupational disability based upon their inability to perform a single job aspect even though they were no longer required to perform this function due to seniority.

Make the Disability Program Experience-Rated

In addition to its disability program, the RRB also administers an unemployment insurance program for the nation’s railroad workers. Like state-run unemployment programs, the RRB’s unemployment program collects taxes from rail employers using an experience-rated contribution formula. This means that unemployment taxes are based upon usage.¹⁸ As an added program integrity measure, the RRA should be amended to incorporate an experience-rating provision similar to the RUIA; wherein, rail employers pay taxes calculated based upon program usage.

Eliminate the Three-Member Board Structure.

As noted previously, the RRB’s current three-member board structure is problematic because it allows special interest groups (rail employers and employees) to exercise control over a Federal agency, since they represent two-thirds of the Board.

While input from rail employers and employees is important, they should not be allowed to dictate the actions of a Federal agency. The RRA should be amended to shift the current rail representatives (Labor and Management Board Members) into advisory roles, while retaining the Chairman as the final decision maker.

Occupational Disability Benefits Should Be Temporary

An occupational disability annuity is generally provided for life to a railroad employee who is deemed eligible. The annuitant is required to notify the RRB in certain circumstances including if they return to work or if their condition improves, among other things.

Additionally, there is an alarmingly high rate of musculoskeletal injuries claimed as a basis for an occupational disability which, according to information from both the RRB and an external medical expert, should

¹⁷ 20 CFR § 220.13(b)(2)(iv)(f).

¹⁸ 45 USC § 358(a)(1)(c).

resolve in about 95% of people. Even in its own disability claims examiner training, RRB's medical consultants indicated that "[t]he main treatment for a herniated disk is a short period of rest with pain and anti-inflammatory medications, followed by physical therapy. Over 95% of people will follow these treatments will recover and return to their normal activities." A 2014 report by the RRB's Program Evaluation and Management Services, "shows that musculoskeletal impairments (Arthritis and Rheumatism; Other Diseases of the Musculoskeletal System) remain relatively consistent and constitute the majority of occupational disability awards...over the observed nine-year period."¹⁹

Without fundamental changes to program controls, including legislative reform (see attached legislative recommendations), the occupational disability program will remain vulnerable to fraud and abuse and benefits should be limited to either one or two years. This recommendation is in line with the 1990 Commission on Railroad Retirement Reform which recommended an amendment to the RRA to limit occupational disability benefits to 24 months.²⁰

Conclusion

Given the pervasive fraud exposed by my office, coupled with the inconceivable and continuing 98% approval rate, the occupational disability program requires significant change, both legislative and programmatic. While the RRB has taken some steps to increase oversight of the occupational disability program, it is my opinion that it is a veneer of improvement. The RRB's failure to address the institutional culture that supports the approval of nearly all claims and allows widespread abuse in the program is the reason I issued a seven-day letter. Without significant changes, the RRB's practice of awarding disability benefits based on questionable and even fraudulent applications will continue to cost the RRB and its eligible beneficiaries billions in unwarranted expenses. Disability claims examiners and RRB field office staff members should be the agency's front-line against fraud and abuse within the RRB's disability program, but there is a fundamental breakdown of this role.

If the RRB is unwilling to implement the necessary changes to be responsible public stewards, Congress should mandate several of the straightforward changes suggested. Conversely, I believe the railroad retirement system should be privatized and complete control and responsibility returned to the rail industry. (Please see Appendix III for further discussion regarding this topic.)

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee, this completes my prepared statement. I would like to first thank you and the other Members of Congress who have worked diligently to bring these matters to the forefront. Further, I would like to thank all of those in my office who contributed to this

¹⁹ Railroad Retirement Board, *Trend Charts and Analysis: Occupational Disability Awards, Calendar Year 2005-2013*, Report 15-02 (Dec. 10, 2014).

²⁰ Commission on Railroad Retirement Reform, *Final Report* (Washington, D.C., September 1990).

work, as well as the staff from the Federal Bureau of Investigation and the U.S. Attorney's Office for the Southern District of New York who participated in the prosecution of the LIRR case. I would be pleased to respond to any questions that you may have at this time.

Appendix I: Legislative Proposals to Reduce Fraud and Strengthen Program Integrity in the Railroad Retirement Board's Occupational Disability Program

Legislative changes incorporating the following recommendations would dramatically increase program integrity within the RRB's disability program and help the RRB meet its mission of paying benefits to the right people, in the right amounts.

1. The RRA should be amended to remove the *Independent Case Evaluation* process.

The RRA should be amended to require that all applicants for occupational disability benefits, who meet applicable age and years of service requirements but do not qualify under the matrix contained in 20 CFR § 220, appendix 3, to be medically disqualified by their current rail employer in order to be deemed occupational disabled.

2. The RRA should be amended to incorporate an experience-rating provision.

Similar to state-run unemployment insurance programs and the RRB's unemployment program, the RRA should be amended to incorporate an experience-rating provision similar to the RUIA; wherein, rail employers pay taxes calculated based upon program usage.

3. The terms *regular railroad occupation* and *current connection* should be redefined.

The terms *regular railroad occupation* and *current connection*, as currently defined, make the occupational disability program susceptible to abuse, are overly broad, and should be amended.

4. Rail employees who voluntarily relinquish their job rights, through retirement, should not be eligible for disability (or sickness insurance) benefits.

Once an employee retires or voluntarily leaves their position, they are no longer required to perform the functions of their position and they should not be eligible for disability (or sickness insurance) benefits. This common sense change should be implemented to protect the RRB trust funds.

5. The RRA should be amended to make occupational disability annuities temporary in nature.

As recommended by the Commission on Railroad Retirement Reform 25 years ago, the occupational disability provisions of the RRA should be amended to limit occupational disability benefits to 24 months.

- 6. The Occupational Disability Advisory Committee should be expanded to include a third physician/member who represents the Chairman and his constituents – the public.**

While the RRA requires a three-member Board to represent varying interests, the Occupational Disability Advisory Committee only represents two interests: employers and employees. 20 CFR § 220.10(b) should be amended to require a third Occupational Disability Advisory Committee physician/member who represents the Chairman and his constituents – the public.

- 7. The RRA should be amended to eliminate the three-member Board structure.**

The current structure of the Board allows special interest groups (rail labor and management) to exercise control over a Federal agency. While input from rail labor and management is important, they should not be allowed to dictate the actions of a Federal agency. The RRA should be amended to shift the current rail representatives (both labor and management) into advisory roles to the Chairman, who would have decision making authority.

- 8. Modify the structure of the RRB to better reflect its current operations by converting it to a private entity or a government corporation.**

See discussion in Appendix III.



UNITED STATES RAILROAD RETIREMENT BOARD

OFFICE OF INSPECTOR GENERAL

Memorandum

February 10, 2014

TO: Michael S. Schwartz
Chairman

FROM: Martin J. Dickman
Inspector General

SUBJECT: Seven-Day Letter to Congress

Statutory Reporting Requirements

Section 5(d) of the Inspector General Act of 1978, as amended, requires an Inspector General to immediately report to the agency head "particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of [the agency]."¹ This section also requires the agency head to transmit the Inspector General's concerns, along with the agency head's comments, to Congress within seven calendar days.

Under the above referenced statute, the Office of Inspector General (OIG) hereby alerts the Railroad Retirement Board (RRB) to particularly serious or flagrant deficiencies in the administration of the RRB's occupational disability program. Failure to properly address these deficiencies continues to unnecessarily expose the RRB's trust funds to fraud and increases the likelihood of improper payments among the RRB's \$2.3 billion in annual disability payments.

Long Island Rail Road Fraud Investigation

A number of deficiencies have been uncovered during our investigation into massive occupational disability fraud committed by individuals associated with the Long Island Rail Road (LIRR). To date, 33 people have been charged in connection with the LIRR disability fraud scheme: 28 of whom have pled guilty and 5 of whom have been convicted in Federal court. The pleas and convictions include two orthopedic doctors, a union official, and a former RRB District Manager. These judicial actions have netted the government approximately \$400 million in restitution and forfeiture. Additionally, another 44 individuals have entered into a voluntary disclosure program. These individuals avoided prosecution by (1) admitting that they submitted false information to the agency for the purpose of obtaining RRB occupational disability benefits and (2) agreeing to the termination of their occupational disability benefits.

¹ 5 U.S.C. App. 3, § 5(d).

After systemic problems within the occupational disability program were publicly exposed, the RRB attempted to increase oversight efforts for LIRR applications through Board Order 08-63. The occupational disability approval rate for LIRR applicants; however, remains essentially unchanged and continues to be near 96%. In fact, the RRB re-adjudicated a number of subsequently indicted LIRR annuitants under the 'increased scrutiny' of Board Order 08-63. Of these individuals, 100% were re-approved despite their eventual guilty pleas to committing fraud against the RRB. This illustrates the ineffectiveness of the RRB's ability to properly adjudicate the occupational disability program and gives me little assurance of their ability to enact real and meaningful change.

Serious Occupational Disability Program Deficiencies

Serious program integrity issues remain unresolved in the administration of the RRB's occupational disability program: a program which continues to have a staggering 98% approval rate. Over the past several years, we have issued numerous recommendations aimed at increasing program integrity within the RRB's occupational disability program; however, only a few of these recommendations have been implemented. The RRB's failure to adequately address deficiencies identified by the OIG, permits ineffective adjudication and unnecessarily increases the program's exposure to fraud, waste, and abuse.

The RRB owes it to the nation's railroad workers and their families to fulfill the agency's mission to "pay benefits to the right people, in the right amounts, in a timely manner, and . [to] take appropriate action to safeguard [their] customers' trust funds."² This entails the agency being proactive and not defensive by acknowledging areas of deficiency; instituting necessary corrective systems fully utilizing existing regulations; and, when necessary, pursuing regulatory change.

Board Orders 13-33 and 13-55

As you are aware, after the plea and conviction of the two aforementioned doctors, we recommended the immediate termination of occupational disability benefits for more than 700 annuitants who had utilized those doctors to support their RRB disability applications. We estimate that those benefits cost the agency approximately \$2 million per month. The RRB originally rejected our recommendation but finally agreed to terminate those benefits. Almost 500 of these same individuals have re-filed "new" disability applications under the terms set forth in Board Orders 13-33 and 13-55.

Critical Timing

The timing of this memorandum is critical because the RRB is in the process of finalizing the adjudication process for "new" disability applications filed under Board Orders 13-33 and 13-55.

² Railroad Retirement Board, *Mission Statement*. (Chicago, Illinois: September 2003). Retrieved from <http://www.rrb.gov/general/mission.asp>. Accessed February 5, 2014.

My review of the RRB's proposed adjudication process for these "new" applications provides me with little confidence in the RRB's ability to properly adjudicate the disability program. In particular, I find it inconceivable and unacceptable that the RRB plans on utilizing the same divisional disability claims examiner structure which had ineptly adjudicated applications throughout the duration of the LIRR fraud scheme. The LIRR investigation should have acted as the RRB's wake-up call that program integrity must be a top priority. To that end, I reiterate the following recommendations, which should be utilized for the "new" applications processed under Board Orders 13-33 and 13-55 and for all future disability applications adjudicated by the RRB.

- The RRB should employ a licensed medical doctor to oversee the entire disability program. This individual should have the authority to make final award determinations.
- The RRB should replace their current disability claims examiners with licensed medical staff to adjudicate disability applications.

Oversight efforts under Board Order 08-63 proved to be ineffective at identifying fraudulent applications and simply expanding the contract for third party medical review is a waste of RRB trust funds. Implementing the above recommendations, ensures that both the adjudication process and final determinations are conducted by medically trained individuals, which in my opinion, is a better use of funds.

Three-Member Board

The Railroad Retirement Act vests power with a three member Presidentially appointed and Senate confirmed Board that, in addition to your representation of the public's interest, includes one member to represent the interests of rail labor and one member to represent the interests of rail management. I hope that the entire Board will recognize the seriousness and magnitude of this situation and agrees to take substantial and meaningful actions to protect the integrity of the occupational disability program.

Recommended Legislative Changes

If the Board is unwilling to enact such changes, I recommend either of the following legislative changes.

1. The occupational disability program should be eliminated and disabled railroad workers should apply for benefits under the sickness insurance program. If the railroad worker is physically or mentally unable to return to work when their sickness insurance benefits terminate, they should then apply for a total and permanent disability annuity.
2. The occupational disability program should be a temporary program with a maximum benefit of one year. If the railroad worker is physically or mentally unable to return to work after their temporary occupational disability benefits terminate, they should then apply for a total and permanent disability annuity.

Conclusion

The three-member Board's continued inability to effectuate substantial and meaningful change within the RRB's occupational disability program warrants closer scrutiny by Congress where they can "use the full range of tools at its disposal to prevent further waste, fraud, or abuse."³ Please transmit this memorandum to the appropriate Congressional Committees and Subcommittees within seven calendar days.

cc: Walter A. Barrows, Labor Member
Jerome F. Kever, Management Member
Karl T. Blank, General Counsel
Martha P. Rico, Secretary to the Board

³ Chairman Darrell E. Issa, House Committee on Oversight and Government Reform letter to Inspector General Martin J. Dickman, August 3, 2012.

Appendix III: Organizational Structure of RRB and History of Discussions to Privatize

While the RRB has long been a Federal agency, there has been extensive discussion in prior decades about the most appropriate organizational structure for the entity. Several options have been discussed, including transitioning the RRB to a government corporation as the first step to converting it to a private corporation or entity. Based on the information presented in this statement, I believe revisiting the organizational structure of the RRB is again appropriate.

In his 1948 budget message, President Harry Truman explained his criteria to determine when a corporate option was appropriate. His explanation included government programs that: are predominately of a commercial character (those which are revenue producing, are at least potentially self-sustaining and involve a large number of business-type transaction with the public); have operations that require greater flexibility than customary appropriations budget ordinarily permit; and its usefulness is dependent on its ability to deal with the public in a manner employed by private enterprise for similar work. In the case of the RRB these criteria are generally applicable.

In a 2011 report by the Congressional Research Service, several key aspects of a government corporation were presented that are applicable to a discussion on the organizational structure of the RRB.²¹

- Traditional agencies receive the preponderance of their financial support from funds appropriated by Congress. Government corporations generally receive most, if not all, of their funds from users of their services. Through the NRRIT, the RRB invests approximately \$25 billion in publicly traded stocks and investment vehicles thus making it potentially self-sustaining and comparable to a private entity. Further, the RRB conducts work that is similar to many private pension plans.
- The location of a government corporation can vary greatly including being located in a Federal agency or assigned independent status.
- The form of governance can also vary. For example a government corporation can be managed by a full-time board, a chief executive officer, a part-time board consisting of Cabinet-level officials, or a mixed board of governmental and private appointees. The current RRB structure is actually one that is made up of a Board that represents private sector interests (Management and Labor Members).
- May be considered a useful alternative to privatization of some agencies or may be employed as a transition step toward eventual full privatization.

²¹ Congressional Research Service, *Federal Government Corporations: An Overview*, Order Code RL30365 (Washington, D.C., June 8, 2011).

In 1990, the Commission on Railroad Retirement Reform's Final Report extensively discussed options to restructure the pension system in the railroad industry. The work of the Commission was established via the Omnibus Budget Reconciliation Act of 1987, which charged the Commission with conducting a comprehensive study of issues pertaining to the long-term financial health of the railroad system including establishing a privately funded and administered pension plan, among other topics.²² In its Final Report, the Commission recommended the development of alternative systems for newly hired railroad employees only. In discussing this recommendation, the Commission noted several key factors.

- Given current conditions, creating a statutory retirement plan for railroad workers would not be justified today because the U.S. labor market is much better balanced now than it was at the time the RRB was established.
- Congress has responded to challenges regarding unfunded and underfunded retirements plans to protect participants in private plans.
- The railroad sector no longer has special needs that require Congress to mandate pension rules that are different from those that apply to other industries or companies in the private sector.

The Commission concluded that pension plan rules that generally applied to private industry should also apply to the railroad industry. One key change since the 1990 Commission report is the creation of the National Railroad Retirement Investment Trust (NRRIT), which is granted the ability to invest in equities and other private-sector securities and was specifically created as “not a department, agency, or instrumentality of the Government of the United States.” The long term financial insolvency of the RRB has largely been addressed a result of this funding structure. As a result, initiating a multi-year plan to transition retirement and disability benefits and Medicare benefits to other Federal agencies while also converting Tier II retirement benefits to the private sector as a multi-employer benefit plan should be considered. Transition of Tier I, disability, and Medicare programs eliminates a duplicative program and the need for the annual financial interchange process. Transitioning Tier II benefits better reflects the reality of the current structure of the RRB where Tier II benefits are more aligned with private pensions.

²² Pub. L. 100-203.

Biography of Martin J. Dickman, Inspector General of the Railroad Retirement Board

Martin J. Dickman was appointed by the President and confirmed by the Senate as Inspector General of the Railroad Retirement Board (RRB) in October 1994. As Inspector General, he is responsible for promoting economy, efficiency, and effectiveness; and for detecting any waste, fraud, or abuse in the programs and operations of the RRB.

Before his appointment as Inspector General, Mr. Dickman served from 1991-1994 as a prosecutor for the Cook County, Illinois State's Attorney's Financial and Governmental Crimes Task Force. His responsibilities included the investigation, indictment, and prosecution of criminal cases involving governmental and white collar crimes.

From 1972-1991, Mr. Dickman was a member of the Board of Trade of the City of Chicago. At the Board of Trade, he served as the presiding judicial officer at Exchange judicial hearings, and as a Director and Member of the Executive Committee. He established policy, long-range strategic plans, and international development for the multi-million dollar entity. He also developed legal and administrative policies, and approved budgets for over 800 staff employees and 3,000 members.

Mr. Dickman has conducted legal research and assisted in trial preparation as an Associate with the Law Firm of Peter Fitzpatrick and Associates in Chicago, 1973-89; and presided over tax-related disputes as a Hearings Referee for the Illinois Department of Revenue, 1976-80. He has also interpreted and drafted legislation as Legislative Counsel for the minority leadership of the Illinois House of Representatives, 1972-73; and represented the City of Chicago in various aspects of civil litigation as an Assistant Corporation Counsel, 1970-72.

A native of Chicago, Mr. Dickman is a graduate of the University of Illinois (B.S. 1966) and DePaul University College of Law (J.D. 1969). Mr. Dickman is a member of the Council of Inspectors General on Integrity and Efficiency.