



Legal Opinion L-2004-12
November 17, 2004

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TO : Ronald Russo
Director of Policy & Systems
Office of Programs

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Reopening annuities due to compensation paid for time lost

This is in response to an informal inquiry from your staff regarding the relationship between sections 261.2 and 261.4(a) of the Board's regulations when determining whether to reopen previous payment decisions in cases where compensation is credited as pay for time lost after an annuity has been awarded. As this situation arises with some frequency, I am directing my advice to your attention.

As you know, section 2(e)(1) of the Railroad Retirement Act states that no one shall be entitled to an employee annuity "until he shall have ceased to render compensated service to" a railroad employer. Section 5(a)(ii)(C) provides that an annuity cannot begin earlier than "the date following the last day of compensated service" to a railroad employer. Section 2(e)(3) of the Act requires that an annuity may not be paid for any month in which the employee is credited with railroad service. Regulations of the Board further define a month of railroad service to include a month for which the employee receives pay for time lost, and specify that an annuity cannot begin before the end of a period for which pay for time lost is credited. See sections 210.3(a) and 218.29.

In accord with the foregoing, an employee cannot be paid an annuity for a month in which he or she is credited with compensation and service as pay for time lost. If pay for time lost is later credited through the date an annuity was earlier determined to begin, or if it is later discovered that pay for time lost has been credited through the annuity beginning date but had been overlooked, then the award of an annuity based on that application would be erroneous. The question becomes whether or to what extent the original decision to make that award may be reopened.

I. REOPENING UNDER SECTION 261.2

Reopening of final decisions on claims for benefits is governed by Part 261 of the Board's regulations (20 CFR Part 261). Section 261.1(b) of that Part defines a final decision as one with respect to which the 60 day time limit for administrative review under Part 260 of the regulations has expired. Two sections of Part 261 are pertinent to reopening payment decisions made before the crediting or the discovery of service and compensation credited by reason of pay for time lost.

The first regulation is section 261.2, which states in part that:

261.2 Conditions for reopening.

A final decision may be reopened:

- (a) Within 12 months of the date of the notice of such decision, for any reason;



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(b) Within 4 years of the date of the notice of such decision, if there is new and material evidence or there was adjudicative error not consistent with the evidence of record at the time of adjudication; or

(b) At any time if:

(1) The decision was obtained by fraud or similar fault;

[or]* * * * *

(7) The decision is wholly or partially unfavorable to a party, but only to correct clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made;

* * * * *

The criteria set forth under sections 261.2(b) and 261.2(c)(1) for reopening a final decision were first applied to reduce annuities or to cancel entitlement under the former Railroad Retirement Act of 1937 by Legal Opinion L-39-527, adopted as Board Order 39-547. The Board determined in that decision that final certifications of benefits "must be reopened" when based on "a clear and obvious mistake" of fact or law, when the "evidence as of the date of certification does not reasonably support the certification" or when the award was "induced by fraud or other fault of the applicant". In such cases, the Board directed that "If, in any of the foregoing cases, reopening results in reduction or cancellation, past payments must be recovered, unless recovery is waived". These standards for reopening final decisions to correct annuity rates and recover erroneous payments, as re-adopted by section 13 of Board Order 61-184, remained in effect at the time the 1937 Act was replaced by the current Railroad Retirement Act of 1974, when they were re-issued as section 17 of Board Order 75-5. It is notable that none of these statements of agency policy imposed any limitations on reopening based on the time elapsed between the erroneous decision, and the decision to reopen the case.

In 1997, the Board replaced section 17A of Board Order 75-5 with Part 261 of its regulations. See: 62 Fed. Reg. 45712 (August 29, 1997). Unlike the internal Board Orders which it superceded, Part 261 now states that reopening of erroneous decisions is discretionary, rather than mandatory, in all cases. Moreover, Part 261 specifies after the first year passes, a decision in a claim may be reopened only if it falls within one of the criteria specified by sections 261.2(b) or 261.2(c). In other words and in contrast to agency policy expressed by Board Order 75-5 and its predecessors, unless a case meets all criteria within the applicable time limitation, a favorable decision must not be reopened except at the discretion of the members of the Board itself. See section 261.11 of the regulations.

Because a decision to award an annuity may be reopened for any reason within the first year, section 261.2(a) would clearly encompass any circumstance related to crediting of pay for time lost during that time. Moreover, the crediting of pay for time lost within four years of the initial decision to award an annuity would clearly be new and material evidence; and a decision which overlooked the existence of service already credited at the time as a result of pay for time lost would clearly be adjudicative error, for purposes of reopening under section 261.2(b) of the regulations. Both 261.2(a) and 261.2(b) afford a basis for reopening such a case within the first four years.

Section 261.2(c) specifies when the initial decision to award the annuity may be reopened after four years. Under section 261.2(c)(1), the decision to set an annuity beginning date must have been obtained through fraud (i.e., the employee deliberately intended to deceive the Board and received payment as a result) or "similar fault" (i.e., the employee did not act with deliberate intent



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to defraud the Board into setting an incorrect beginning date, but acted with a conscious indifference to the consequences amounting to more than the inattention to detail which may constitute fault when determining waiver of recovery pursuant to section 255.11 of the Board's regulations). This determination must be made by the adjudicator based on the evidence in each particular case. If a decision to make annuity payments without regard to service and compensation credited by reason of pay for time lost was not obtained by fraud nor similar fault, then the decision cannot be reopened pursuant to section 261.2(c)(1).

In my opinion, no other provision of section 261.2(c) would apply to these situations, including section 261.2(c)(7). A close reading of that section in the general context of the other provisions of section 261.2(c) shows paragraph (c)(7) specifies conditions where unfavorable final decisions previously made may be reopened, rather than conditions for making a decision to reopen which is itself unfavorable to the claimant. This interpretation is consistent with application of the analogous regulation under the Social Security Act as interpreted by the Social Security Administration. See 20 CFR 404.988(c)(8), and Program Operation Manual System section GN 04010.010 "Reopenings – Clerical Error". By definition, the original decision to set an earlier annuity beginning date contrary to sections 2(e)(1) and 5(a)(ii)(C) is favorable to the annuitant. Accordingly, section 261.2(c)(7) does not apply to such a case.

II. REOPENING UNDER SECTION 261.4

The question has also been raised as to whether section 261.4(a) affords a basis, independent of the criteria of section 261.2, for reopening payments which would be erroneous due to service credited as a result of pay for time lost. Section 261.4(a) specifically addresses receipt of compensation after an annuity begins:

261.4 Decisions which shall not be reopened.

The following decisions shall not be reopened:

- (a) An award of an annuity beginning date to an applicant later found to have been in compensated service to an employer under Part 202 of this chapter [defining covered railroad and labor organization employers] on that annuity beginning date and who is found not to be at fault in causing the erroneous award; provided, however, that this exception shall not operate to permit payment of benefits for any month in which the claimant is found to be engaged in compensated service.

The relationship between sections 261.2 and 261.4 of the regulations is explained by the relationship of the antecedent Board Order provisions. Unlike section 261.2, the language of section 261.4(a) did not appear in the Board Orders issued under the 1937 Act, nor in Board Order 75-5 as originally issued, but was added as part of a revision of section 17 of Board Order 75-5 in April 1988. See Board Order 88-59. As amended, B.O. 75-5 required at section 17A(1)(a) that "A final certification shall be reopened for reduction or cancellation when, except as provided in [section] A(3), the certification is erroneous." If the reduction or cancellation caused an overpayment of annuities, "past payment must be recovered unless recovery is waived".

The 1988 Board Order amendment added section 17A(3)(a) as an exception to the general requirement of 17A(1)(a) that erroneous decisions must be reopened and all payments recovered. If the annuitant was without fault, this exception allowed the annuity entitlement decision to stand when it was later learned the annuitant had worked through the annuity beginning date, but allowed a separate determination that the annuity payments for the months worked were erroneous. The annuitant retained entitlement to future annuities based on the



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otherwise invalid beginning date, but lost entitlement only to those months in which he or she worked for a railroad.

Section 17A(3)(a) of the former Board Order was clearly intended to ameliorate the severe impact otherwise required by the extant general policy which would otherwise have required reopening and cancellation of the annuity award in cases where additional compensation was credited, even though the annuitant was not at fault. Section 261.4(a) of the current regulations contains essentially the same language as section 17A(3)(a) of the former Board Order. To now consider section 261.4(a) to be an independent basis for reopening would allow reopening and recovery at any time of erroneous payments occurring for this reason alone, even beyond the time limitations of section 261.2. This would be a harsher result for these faultless annuitants than if erroneous payments had occurred for another reason, and reopening was subject to the general policy of section 261.2. A consequence harsher than the general rule would not be consistent with the original beneficial purpose of the predecessor section 17A(3)(a) of the former Board Order. This could not

have been intended when the Board replaced the Board Order with Part 261. In my opinion, section 261.4(a) is therefore intended to perform the same function with regard to reopening under section 261.2 as did section 17A(3) to reopening decisions under section 17A(1)(a): once a decision to reopen is made under section 261.2, section 261.4(a) limits the scope to recovery of months to which compensation is credited if the annuitant was not at fault.

In sum, if a case cannot be reopened under section 261.2, then the analysis stops, and the payments are not recoverable. If a case can be reopened under section 261.2, then a separate decision must be made under section 261.4(a) as to whether the entire annuity is erroneous, or only the months in which railroad service is reported.

I trust that the foregoing discussion will be of assistance to your Office in handling cases where these circumstances occur.