February 18, 1998
L-98-6

TO : John Thoresdale
Director of Policy and Systems

FROM : Catherine C. Cook
General Counsel

SUBJECT: Regulations part 261 - Administrative finality

This is in response to your memorandum of October 27, 1997, wherein you pose a number of questions concerning the implementation of part 261 of the Board's regulations. Your questions are restated below followed by our answers.

Question 1: **If the effective date of a benefit that requires a tier I offset (e.g., Social Security or Public Service Pension) is after the initial award date of our final decision, is the resulting adjustment in the RR annuity a reopening or are we simply dealing with a new initial decision?**

Answer: In general, this would be a new initial decision to adjust the annuity. The reopening regulations apply to "decisions" which are actions taken based upon information provided or contained in Board records. See section 260.1 of the Board's regulations. The failure to take a post-adjudicative action due to the fact that the Board is unaware of an event which occurs after an initial decision is not a decision. Thus, where the Board later learns of the event any post-adjudicative action taken is not a reopening but a subsequent initial decision. This is in accord with the interpretation of the Social Security Administration whose regulations provided the basis for part 261. Compare SSA procedure GN 04001.030. However, we also understand question 1, in conjunction with question 4, to be seeking advice as to when failure to take action is a decision for purposes of reopening. Since this presents a policy question, we have sought the advice of the Board on this issue.

Question 2. Does "any time" in RCM 6.2.2 C mean any time after the 1 and 4 year periods of 6.2.2 A and B have run? If not, should we first determine whether one of the 10 situations applies before we consider whether A and B apply?

Answer: The intent of part 261 is to provide a sequential approach to reopening based upon the time that has passed since the initial decision. If a decision can be reopened under 6.2.2.A., it should be reopened under that section. If it cannot be reopened under 6.2.2.A., 6.2.2.B. should be considered next and then 6.2.2.C. However, "any time" means any time. Accordingly, an incorrect decision that is less than 1 year old or 4 years old, but which cannot be reopened under A or B, respectively, can be reopened under C, if it meets the criteria.

John Thoresdale

Question 3: Does RCM 6.2.2.C.1 (dealing with fraud or similar fault) apply whenever the annuitant has a duty to inform the RRB of the receipt of a benefit but does not? Does C.1 require that failure to report reopens the final decision and mandates recalculation of the annuity retroactive to the beginning date of the other benefit?

Answer: "Similar fault" exists when a person knowingly makes an incorrect or incomplete statement which is material to the determination or when a person knowingly conceals information that is material to the determination. However, fraudulent intent is not required. Heins v. Shalala, 22 F.3d 157 (7th Cir., 1994). See also Social Security Administration procedure GN 04020.010. Failure to report, without evidence that the annuitant had knowledge of the duty to report, does not constitute "similar fault. However, we are of the opinion that "knowledge" can be established by evidence such as a certification in the file that the duty to report was explained to the annuitant, or where the circumstances indicate that it was a knowing failure to report.

Example 1. The claimant applies for an annuity and states that he intends to work for employer A, a non railroad employer. Based upon his expected earnings, work deductions are applied. The following year he reports that he will not make over the exempt amount and work deductions are removed. However, the annuitant earns considerably more than the exempt amount, but he does not report this to the Board. The Board discovers the excess earnings 5 years later. Based upon the circumstances, the Board can presume that the employee knowingly concealed his earnings and that the decision to remove work deductions was obtained by "similar fault." Consequently, the agency may apply work deductions for the year in question and assess an overpayment.

Example 2. Same as the above except that the employee had no intention of working at the time of his application but then later decides to return to work. He earns over the exempt amount but never reports his earnings. Since the Board never made a decision with respect to the application of excess earnings, it may adjust the annuity rate for the period in question and assess an overpayment at any time. This is not a reopening but merely a post-adjudicative action. See Question 1.

Question 4: Does RCM 6.2.2.C.10 only apply when the RRB fails to make a reduction in tier I when we should have or does C.10 apply in all tier I reduction cases regardless of fault? For example, a letter or an application in file informed us that the annuitant was receiving a public service pension but we did not reduce the tier I for it in error.

Answer: See answer to question 1.

Question 5: CFR 262.2(c)(7) uses the terms "clerical error" and "an error that appears on the face of the evidence." We understand a clerical error to be an error made in completing a form, copying or entering data into a computer, transposing numbers. We understand an

error that appears on the face of the evidence to mean an "obvious adjudicative error" or an "obvious error in applying the law to the facts of the case." Are these assumptions correct? Could you provide some examples of clerical errors and errors that appear on the fact of the evidence?

Answer: Your understanding of clerical errors is correct. See Social Security Administration Procedure GN 0401 0.010. An "error on the face of the evidence" exists where it is absolutely clear that the determination or decision was incorrect, that is, based on all the evidence before the Board, it is unmistakably certain that the determination or decision was incorrect. See Social Security Administration procedure GN 04010.020. A determination or decision which was reasonable on the basis of the facts and law existing at the time the determination or decision was made will not be reopened merely because there was a shift in the weight of evidence, a different rule of law would now be applied (unless a change in law specifically provides for retroactive effect), or a different inference is now drawn from the evidence. The following examples illustrate this point.

Example 1. The examiner denies a claimant a divorced spouse annuity on the basis that she has been married to the employee for less than 10 years. The claimant never appeals the decision. However, the proof of marriage and divorce decree in the file at the time of the initial decision indicate that they were married 15 years. This is an error on the face of the evidence and the denial may be reopened with full retroactive effect at any time. See section 261.2(c)(7) of the Board's regulations and R.C.M. 6.2.2.C. 7.

Example 2. The examiner denies the claimant a disability annuity citing a "grid rule" which assumes the employee is under age 50. The claimant never appeals the decision. The evidence of record at the time of the denial clearly shows that the claimant was age 55 and the applicable "grid rule" would dictate a finding of disabled. Same result as in Example 1.

Example 3. The examiner denies a claimant a disability annuity on the basis that she can perform unskilled light work with a result that the appropriate "grid rule" dictates a denial. The decision is not appealed. Five years later the claimant submits another application for a disability annuity. She submits no new evidence. A different examiner finds on the same evidence that the claimant can only perform unskilled sedentary work; if this second examiner applies the "grid rule" applicable at the time of the first application, the result would be a finding of disabled. The fact that the second examiner reached a different conclusion based upon the same evidence does not mean that the initial denial in this case was based on an error that appears on the face of the evidence. The examiners merely weighed the evidenced differently.

John Thoresdale

Question 6: Must offices of the RRB consider the finality rules in 20 CFR 261 before designing studies or audits on final decisions of the Office of Programs Operations? For example, should audits be limited to actions taken in the last 4 years?

Answer: Part 261 places no restriction on what should be reviewed or audited for purposes of quality assurance. However, part 261 should certainly be considered in connection with any audit or review.

Question 7: We often find errors in an employee's annuity when we are adjudicating an award of spouse benefits or when we are converting a spouse computation to a widow computation. This is because the calculation of spouse and widow benefits are based on the computation of the employee's annuity. If the employee's annuity is final, would we make corrections in the employee annuity?

Answer: Whether a decision impacting on the employee's annuity is reopened depends on the application of the criteria found in part 261, as explained above, to the facts. The payment of a spouse or widow's annuity on the employee's compensation record, in and of itself, has no bearing on reopening a decision impacting on the employee annuity.

I have also made certain proposed editorial revisions to the draft procedures you attached to your memorandum.

Enclosure

cc: Director of Programs
Director of Assessment and Training
Director of Hearings and Appeals