

January 27, 1999  
L-99-3

TO : Claudia Walch  
Chief, Reconsideration Section

FROM : Steven A. Bartholow  
General Counsel

SUBJECT : Recovery of an Overpayment from Other than the Overpaid Individual

This is in reply to a memorandum dated January 5, 1999, from Paul McWilliams of your staff, regarding the recovery of an overpayment made to an employee from annuities due a legal widow and a deemed widow.

**Background:**

The employee, Raymond, married Gloria on June 15, 1963. In May of 1982 he obtained a divorce in Mexico, which was later determined to be invalid by the Board's bureau of law. Raymond married Ann in 1988 and both Gloria and Ann received annuities as Raymond's spouse and deemed spouse while he was alive. Upon Raymond's death in 1996, Gloria's annuity was converted from that of a legal spouse to a widow's annuity and Ann's annuity was converted to a deemed widow's annuity. In 1998 the Board determined that all three parties had received more benefits than they were entitled to receive due to an incorrect calculation of the RRA Max. Gloria and Ann were advised of the amount they had been overpaid, and were each requested to refund half of the overpayment made to Raymond. The request for legal advice presents the following questions:

- Issue 1:** Whether recovery of an employee's overpayment from a widow is appropriate under Section 10(c) of the Railroad Retirement Act where the employee and the widow did not reside together.
- Issue 2:** Whether recovery of the full amount of an employee's overpayment from one survivor annuitant is appropriate where more than one individual entitled to an annuity survived the employee.

**Discussion:**

Section 255.4 of the Board's regulations outlines provisions regarding persons from whom overpayments may be recovered and states, in pertinent part, as follows:

(b). *Other than overpaid individual.* The Board may recover an overpayment from a person other than the overpaid individual if such person is receiving benefits based upon the same record of compensation as the overpaid individual under a statute administered by the Board. \* \* \*

(c). *Individual not in the same household.* Recovery under paragraph (b) of this section may be made from an individual who was not living in the same household, as defined in part 216 of this chapter, as the overpaid individual at the time of the overpayment, if the individual from whom recovery is to be made either was aware that benefits were being paid incorrectly or benefitted from the overpayment.

In the case at hand, the employee, Raymond, and the legal widow, Gloria resided in different states. The overpayment made to the employee was the result of an incorrect calculation of the RRA Max. Unless the circumstances are such that Gloria knew that Raymond's rate was calculated incorrectly, or there is evidence to indicate that Gloria benefitted from the overpaid annuities, recovery of Raymond's overpayment from benefits due Gloria should not be pursued as it would be contrary to section 255.4(c) of the RRB's regulations.

On the other hand, the evidence indicates that at the time of the overpayment, Raymond and Ann were living in the same household. Consequently, recovery may be sought from Ann. The fact that there is more than one individual receiving annuities based upon Raymond's earnings has no relevance as to the amount of the overpayment which may be recovered. As a practical matter, recovery of an employee's overpayment, which the Board is unable to collect from the employee, is usually divided equally between all members of the family group. However, this is typically done for purposes of equity and fairness. There is nothing in the law which would preclude the RRB from recovering the entire overpayment made to Raymond from just one individual of the family group. Of course, whenever recovery is pursued from someone other than the overpaid individual, the person from whom recovery is being sought is entitled to waiver consideration as provided in section 255.10 of the RRB's regulations. If the conditions for waiver are not met, consideration should be given to administrative relief from recovery as provided in section 255.16 of the RRB's regulations.

In summary, while section 10(a) of the Railroad Retirement Act allows for the recovery of an overpayment from annuities due any individual receiving an annuity based upon the same compensation as the overpaid individual, recovery of the overpayment from someone not living in the same household as the overpaid individual at the time of the overpayment is in conflict with section 255.4 of the RRB's regulations unless recovery is being sought from an individual who

was aware that benefits were being paid incorrectly or who benefitted from the overpayment. Therefore, recovery of the overpayment made to Raymond may be pursued from Gloria only if she knew the rate paid to Raymond was incorrect or she benefitted from the annuities paid to him.

Recovery of the entire overpayment made to Raymond may be pursued from Ann, as she was living with Raymond at the time the overpayment occurred and therefore is presumed to have benefitted from the annuities paid to Raymond.