



Legal Opinion L-2002-01
February 22, 2002

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

TO : Ronald Russo
Director of Policy and Systems

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Occupational Disability Annuity Beginning Date

This is in reply to your inquiry of November 21, 2001, requesting my advice regarding the determination of an annuity beginning date where the employee has railroad service prior to the filing date of an occupational disability annuity application under the Railroad Retirement Act, but after the date disability is determined to have begun. For the reasons discussed below, I conclude that the annuity cannot begin prior to the day after the day on which the employee's last period of railroad service ended.

Six individual cases have been provided to illustrate the question, which I summarize as follows:

Applicant "B" was injured at work January 26, 2000. Mr. B returned to work July 22, 2001. After working three days, through July 25, 2001, Mr. B again left work, and did not return. He filed an application for an occupational disability annuity under the Railroad Retirement Act on September 4, 2001. The Disability Benefits Division of the Board's Office of Operations determined that Mr. B's disability began with his injury January 26, 2000; his five month waiting period therefore ended June 30, 2000. However, as the Disability Benefits Division further determined that Mr. B last worked for his railroad employer July 25, 2001, his annuity could not begin before July 26, 2001.

Applicant "V" underwent surgery for his impairment May 12, 2000. He returned to work November 28, 2000 and worked until December 7, when he took vacation until January 1, 2001. He returned again January 2 and left January 15, 2001. He filed for an occupational disability annuity on August 1, 2001. The Disability Benefits Division determined that Mr. V's disability began May 12, 2000, and his five month waiting period ended October 30, 2000. The Division further determined that Mr. V last worked for his railroad employer January 15, and consequently his annuity could not begin before January 16, 2001.

Applicant "A" underwent surgery for a non-work related impairment July 21, 2000. He returned to his railroad occupation March 12, 2001, and worked until April 10, 2001. He filed his application for a disability annuity June 21, 2001. Mr. A's disability was determined to onset with surgery in July 2000, and his five month waiting period ended December 31, 2000, but his annuity beginning date was restricted to April 11, 2001 based on his return to work.

Applicant "H" underwent surgery for a non-work related impairment on January 16, 2001 and again in April. He returned to work July 3 with restrictions until September 10, 2001, when his employer disqualified him from railroad employment. Mr. H applied for an occupational disability annuity October 1, 2001. His disability onset was determined to be January 16, 2001, and his waiting period ended June 30, 2001, but his annuity beginning date was restricted to September 11, 2001.

Mr. "S" left the railroad May 26, 2000 to undergo surgery for his impairment on May 31, 2000. He returned to the railroad January 8, 2001, and worked until May 21, 2001. Mr. S filed an application for a disability annuity June 14, 2001. Although Mr. S's disability was determined to have begun in May 2000 and his waiting period ended October 31, 2000; his annuity beginning date was determined to be May 22, 2001, based on railroad service ending May 21.

Applicant "O" was diagnosed with an impairment September 27, 1999, for which he underwent surgery October 11, 1999. He returned to work August 9, 2000, and worked until December 8, 2000. Mr. O filed his disability application December 14, 2000. The Disability Benefits Division determined that Mr. O's



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disability began September 27, 1999, and his waiting period would end February 29, 2000, but his annuity could not begin before December 9, 2000 based on his return to railroad service.

Disability annuity beginning dates are governed by section 5(a) of the Railroad Retirement Act, which provides in part as follows:

Sec. 5.(a) Subject to the limitations set forth below, an annuity under section 2 of this Act shall begin with the month in which eligibility therefore was otherwise acquired, but—

- (i) not earlier than the date specified in the application therefor;
- (ii) in the case of an applicant otherwise entitled to an annuity under paragraph (iv) or (v) of section 2(a)(1) * * * not earlier than the later of (A) the first day of the sixth month following the onset date of disability for which such annuity is awarded or (B) the first day of the twelfth month before the month in which the application therefor was filed; * * *
- (iii) * * * (C) in the case of an applicant otherwise entitled to an annuity under section 2(a)(1) or 2(c), the date following the last day of compensated service of the applicant * * *.

In addition, section 2(e) of the Act further provides in part that:

(e)(1) No individual shall be entitled to an annuity under subsection (a)(1) until he shall have ceased to render compensated service to an employer as defined in 1(a) [which defines covered railroad employers].

(2) * * * * *

(3) No annuity under subsection (a)(1) * * * shall be paid with respect to any month in which an individual in receipt of an annuity * * * thereunder shall render compensated service to an employer.

See also, regulations of the Board at 20 CFR 218.9(c), specifying that a disability annuity (for an individual not previously entitled to a disability annuity) may begin on the latest of the first day of the twelfth month prior to the month the application is filed, the first day of the sixth month following onset of disability, or the day after the day the claimant last worked for a railroad employer.

The effect upon a disability annuity beginning date of a short period of resumed railroad service prior to the application filing date was considered in Calderon v. United States Railroad Retirement Board, 780 F. 2d 812 (9th Cir., 1986).

Mr. Calderon was disqualified from his railroad occupation on November 23, 1981. He disputed this disqualification and was recalled to work by his employer for three days, June 16 through June 18, 1982. The Board determined that because Mr. Calderon was in compensated service to a railroad employer in June 1982, his annuity could not begin prior to June 19, 1982. See Board Order 83-148. On appeal, Mr. Calderon argued that in view of the oft-drawn analogy between the Railroad Retirement Act and the Social Security Act, the Board should have considered his three day return to work as a "trial work period" as provided by section 222(c) of the Social Security Act (42 U.S.C. 422(c)) for claimants disabled for all work under that Act.¹ That section provides in part:

¹ The Court's opinion cites to former section 1614(c)(4) of Title XVI of the Social Security Act, (42 U.S.C. 1382c(a)(4)) (amended by Public Law 99-643), which pertained to supplemental security income recipients. However, the analysis is applicable to the trial work provision of Title II of the Social Security Act.



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(c)(1) The term “period of trial work”, with respect to an individual entitled to benefits under section 223 * * * means a period of months beginning and ending as provided in paragraphs (3) and (4).

(2) * * * any services rendered by an individual during a period of trial work shall be deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period. For purposes of this subsection the term “services” means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type normally performed for remuneration or gain.

(3) A period of trial work for any individual shall begin with the month in which he becomes entitled to disability insurance benefits * * *.

(4) A period of trial work for any individual shall end with the close of whichever of the following months is the earlier:

- (A) the ninth month, in any period of 60 consecutive months, in which the individual renders services (whether or not the nine months are consecutive);
or
- (B) the month in which his disability * * * ceases (as determined after application of paragraph (2) of this subsection).

The majority of the Court rejected Mr. Calderon's argument and affirmed the Board's decision, finding that “it is clear that Calderon's disability annuity cannot begin until after his last day of compensated [railroad] service”. 780 F. 2d at 814. The Court noted it lacked authority to add a trial work period to the Railroad Retirement Act where Congress had not done so.²

Footnote 4 continued

² The dissenting judge in Calderon argued that an analogy may be drawn between the trial work period under section 222(c) of the Social Security Act and section 2(e)(3) of the Railroad Retirement Act, on the grounds that an annuitant who returns to work loses annuity payments only while working. It is true that 1954 amendments to section 2(a) of the Railroad Retirement Act of 1937 replaced a presumption that a disability annuitant who earned \$75 from any employment for six consecutive months had recovered from the disability with a provision for annuity deductions for non-railroad earnings which now appears as section 2(e) of the 1974 Act. See Legal Opinion L-54-368 (reviewing the effect of the 1954 amendments, Public Law 746, 83rd Congress). However, while this amendment liberalized criteria for determining an applicant's continued entitlement to a disability annuity, it did not affect the requirement that an annuity cannot begin to accrue prior to the employee's last date of compensated service to a railroad. This requirement has existed since the inception of the 1937 Act, and was unchanged by the 1946 amendments which added the occupational disability annuity provisions. See section 2(c)(1), Public Law No. 162, 75th Cong., 1st Sess., 50 Stat. 307, at 310. Moreover, at the time the trial work period was added to the Social Security Act, this office advised the Board that the impact of the new provision was limited to annuity increases paid under the social security overall minimum guaranty. See Legal Opinion L-60-381 (reviewing the provisions of the Social Security amendments of 1960, at item 16). The dissenting opinion's analogy to the trial work period was at variance with both the statutory and administrative history of the Railroad Retirement Act.



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Five years after the Calderon decision, on March 28, 1991, the Board added new subpart C, Part 220 of the regulations, (20 CFR 220 Subpart C) pertaining to disability for work in an employee's regular railroad occupation. Section 220.17 of that subpart introduced the concept of trial work period in occupational disability annuities as follows:

(a) *General.* Disability for work in the regular occupation will end if—

- (1) There is medical improvement in the annuitant's impairment(s) to the extent that the annuitant is able to perform the duties of his or her regular occupation; or
- (2) The annuitant demonstrates the ability to perform the duties of his or her regular occupation. The Board provides a trial work period before terminating a disability annuity because of the annuitant's return to work.

* * * * *

(e) *When the trial work period begins and ends.* (1) The trial work period begins with whichever of the following calendar months is the latest—

- (i) The annuity beginning date;
- (ii) The month after the end of the appropriate waiting period; or
- (iii) The month the application for disability is filed.

* * * * *

The period of return to work in the six example cases summarized above ranges from three days in the case of applicant B to approximately four months in the case of applicants S and O. All six therefore meet the duration requirement that a trial work period last not more than a total of nine months. However, all applicants also filed their disability annuity applications after the applicant left work the second time. The plain language of section 220.17(e) of the Board's regulations thus precludes consideration of the post-disability onset work performed by any of the six subject individuals as work in a trial work period. This result is consistent with that under regulations of the Social Security Administration as well. See 20 CFR 1592(e), stating the trial work period "cannot begin before the month in which you file your application for benefits".³ Accordingly, it is my opinion that a return to railroad service which occurs after the onset of an

³ The SSA regulation from which Board regulation 220.17(e) is derived equates the "month in which [the claimant] becomes entitled to disability insurance benefits" language of 222(c)(3) with the month the benefit application was filed. Further, SSA has taken the position under section 222(c) that the month the claimant "becomes entitled" means the month the benefit award is initially approved. Under SSA's interpretation, an applicant who returns to substantial gainful activity within twelve months of the disability onset date and before entitlement is determined is not eligible for a trial work period because the claimant has not shown an impairment which meets the one-year duration requirement necessary to evidence the impairment's severity. See Social Security Ruling 82-52, 1982 Cum. Ed. 106, at 108. Five of the claimants considered in this memorandum (V, A, H, S, and O) returned to work within twelve months of the impairment onset date and before the annuity was awarded. It would appear that these individuals would not be eligible for a trial work period under the reasoning of SSR 82-52 as well. However, several courts have rejected SSA's interpretation of 222(c), ruling that "month in which he becomes entitled to benefits" for purposes of section 222(c)(3) of the Social Security Act means any month after the end of the initial five month disability waiting period for which the individual is under a disability, is insured for



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impairment but before the date the disability application is filed cannot be considered a “trial work period” under section 220.17(e) of the Board’s regulations.

Railroad service performed following onset of an impairment is directly addressed by section 220.15(a) of the Board’s regulations:

- (a) *Disability Onset when the employee works despite impairment.* An employee who has stopped work in his or her regular occupation due to a permanent physical or mental impairment(s) may make an effort

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to return to work in his or her regular occupation. If the employee is subsequently forced to stop that work after a short time because of his or her impairment(s), the Board will generally consider that work as an unsuccessful work attempt. In this situation, the Board may determine that the employee became disabled for work in his or her regular occupation before the last date the employee worked in his or her regular occupation. No annuity will be payable, however, until after the last date worked. (emphasis supplied).

In my opinion the decision in each of the six example cases is consistent with section 220.15(a) of the regulations, sections 5(a) and 2(e) of the Railroad Retirement Act, and the decision of the Court of Appeals in Calderon. In each case, the employee left railroad service due to onset of an impairment, returned to the railroad for a period of time, then filed the application with the Board after the end of the later railroad service period. In each case, the evidence is that the employee actually did perform service to the railroad during the time he received compensation. On these facts, it was reasonable for the Office of Operations to conclude in each case that the employee did not cease railroad service until the last day of the period he returned to work. The annuity beginning date was therefore correctly determined to be the day after the day the employee last worked for a railroad employer.

In closing, it is also my opinion that an earlier annuity beginning date in each case cannot be established on the basis that the actual “date last worked” occurred when the employee initially left railroad service due to the onset of the impairment, with the later railroad service representing a “return to service” causing loss of the annuity only for those months. Applicants V and H returned to railroad service in the sixth month following disability onset. Railroad service would prevent payment of the annuity to these two individuals beginning that month even if the annuity could have been determined to begin at an earlier date. For remaining claimants B, A, S and O to establish an “intent to retire” at the earlier date, the current regulations of the Board require that a disability annuitant must either file the annuity application, or relinquish any right to return to the service of the railroad employer. See 20 CFR 218.26(b)(1). The evidence in the example cases does not show that the subject employees relinquished any right to return to their railroad employment prior to the date they filed their applications. Accordingly, their first act to

Footnote 4 continued

benefits, is below retirement age, and has filed an application. Walton v. Apfel, 235 F. 3d 184, (4th Cir. 2000) at 189; Salamalkis v. Commissioner of Social Security, 221 F. 3d 828, (6th Cir., 2000), at 834; Newton v. Chater, 92 F. 3d 688, (8th Cir., 1996), at 693-94; Walker v. Secretary of Health and Human Services, 943 F. 2d 1257, (10th Cir., 1991), at 1260; McDonald v. Bowen, 818 F. 2d 559, (7th Cir., 1986). It is significant that all social security applicants considered by the forgoing decisions resumed work after filing the application. For this reason, the Courts of Appeal decisions do not undercut the requirement under section 1592(e) of SSA’s regulations, and section 220.17(e) of the Board’s regulations, that the trial work period cannot begin prior to the application filing date.



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establish an intent to retire was taken the day the application was filed. Compare the result in Legal Opinion L-53-488 (disability claimant who selected the "earliest date permitted by law" was

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allowed full retroactivity from the application filing date where he left railroad service, relinquished any right to return, then entered non-railroad employment before ultimately filing the occupational disability application).⁴

I trust that the foregoing analysis will be of assistance to you.

cc: Robert E. Bergeron
Office of the Labor Member

⁴ The application under consideration in that opinion was initially denied, but revived following amendment to the annuity beginning date provision of the Railroad Retirement Act of 1937 pursuant to the former "continuing application" policy of the Board which ended September 7, 1961. See Board Order 61-153. Nevertheless, the analysis under former section 214.7(c) of the Board's regulations (20 CFR 214.7(c))(1952) remains the same as current section 218.26(b)(1).