U.S. Railroad Retirement Board
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Legal Opinion L-2002-03
March 7, 2002

TO : Thomas W. Sadler
Director of Hearings and Appeals

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Inclusion of Adopted Child in Social Security Overall-Minimum Guaranty Computation

This is in reply to your inquiry of November 26, 2001, requesting my advice as to whether the subject employee's annuity may be increased pursuant to section 3(f)(2) of the Railroad Retirement Act (the social security over-all minimum guaranty provision) from the date he adopted his grandson. For the reasons stated below, it is my opinion that his annuity may be increased effective March 2001 if you find that the child was dependent upon the employee in February 1993.

The employee in the case submitted was born in October 1948 and applied for an annuity on the basis of disability for all work on September 29, 1992. He claimed his disability began in August 1992. The initial denial of his application was reversed on appeal, and he was awarded an annuity under section 2(a)(1)(v) of the Act beginning February 1, 1993, the first day of the sixth month following the month his disability began. Pursuant to the authority granted the Board by section 7(d) of the Railroad Retirement Act, the employee was also awarded a period of disability under section 216(i) of the Social Security Act for purposes of benefit entitlement under the RRA.

At the time the employee filed his annuity application, he was court-appointed guardian of a grandson born in June 1990 to his 16 year-old daughter. On August 31, 2000, the employee filed an application with the Board to increase his annuity under section 3(f)(2) on the basis of a dependent grandchild in his care. He petitioned for formal adoption in Arkansas court in October 2000, which was granted by court order dated February 2001. The employee states that he has supported his grandson since birth, had included him in his health insurance coverage, and declared the child as a dependent for Federal income tax purposes.

Section 3(f)(2) of the Railroad Retirement Act, which provides for the increase of an employee annuity to the total amount which would have been paid to the employee and his family under the Social Security Act if his earnings had been credited under that Act, reads in pertinent part as follows:

> (f)(2) If for any month in which an annuity accrues and is payable under this Act the annuity to which an individual is entitled under this Act * * * together with the annuity, if any, of the spouse and divorced wife of such individual, is less than the total amount, or the additional amount, which would have been payable to all persons for such month under the Social Security Act if such individual's service as an employee after December 31, 1936, were included in the term "employment" as defined in that Act, the annuities of the individual and spouse shall be increased proportionately to such total amount, or such additional amount * * *. For purposes of this subdivision, * * * (ii) after an annuity has been certified for payment and this subdivision was inapplicable after allowing for any waiting period under section 223(c)(2) of the Social Security Act, and after having considered the inclusion of all persons who were then eligible for inclusion in the computation under this subdivision, or was then applicable but later became inapplicable, any recertification in such annuity under this subdivision shall not take into account persons not entitled to an annuity under section 2 of this Act except a spouse who could qualify for an annuity under section 2(c) of this Act when she attains age 60 or age 62 * * * and who was married to such individual at the time he applied for his annuity * * *. (emphasis supplied).

The text of 3(f)(2)(ii) above is essentially identical to that of 3(e)(vii) of the Railroad Retirement Act of 1937, which was added to that Act in 1972. See Public Law 92-460, section 1(d), (86 Stat. 765-766). The Senate report on the bill which became P.L. 92-460 summarized the purpose of amended section 3(e)(vii) as follows:

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> (2) After an amendment to the Social Security Act, the Board must now make inquiries whether the family of an individual to whom a regular annuity was awarded, was increased or otherwise changed, so that his annuity would have to be recomputed under the special formula. The Committee substitute would relieve the Board of this burden by requiring it to disregard new additions to the family of a retired employee, except a newly acquired wife who qualifies for a spouse's annuity. S. Rep. No. 460, 92nd Cong., 2nd Sess. 8, reprinted in 1972 U.S. Code Cong. and Ad. News 3469, at 3476.

The Retirement Claims Manual, at section 8.3.13, provides:

> The annuity rate cannot be changed from the RR [regular formula computation] to the 100% O/M [social security guaranty formula] * * * if it was initially determined that the O/M did not apply or the O/M did apply but later was removed, breaking the continuity of the O/M computation, when the * * * employee adopts a child after the ABD [annuity beginning date] * * *.

The Board's interpretation of section 3(f)(2)(ii) to preclude consideration of an otherwise eligible child at the time the child becomes part of the employee's family was approved by the Court of Appeals in Cvikich v. Railroad Retirement Board, 860 F. 2d 103, (3rd Cir., 1988). Mr. Cvikich applied for a total and permanent disability annuity under the Railroad Retirement Act in 1975, which was awarded with a beginning date of November 1, 1974. At that time, the social security guaranty computation did not exceed his annuity rate under the regular formula. In July 1978, Mr. Cvikich, who had separated from his wife for over eight years,
fathered a son by another woman. The Board determined that pursuant to section 3(f)(3)(ii), the child could not be considered for purposes of eligibility for the annuity increase until the employee reached retirement age. See Board Order 87-53 (May 6, 1987). The Court of Appeals, finding the meaning of the statute unclear on its face, conducted an extensive review of the legislative history of the 1972 amendment to the 1937 Act, and concluded "the Board has adopted the only construction which could give meaning to the entire, tortured text of proviso (ii) without adding words to it * * * which Congress did not use." 860 F. 2d at 109-110. In affirming the decision of the Board, however, the Court noted that "The language of proviso (ii) * * * may well deserve the attention of Congress and the Board." Id. at 110.

On October 15, 1993, the Board promulgated new Part 229 of the agency's regulations. See 58 Fed. Reg. 53396. Section 229.32 of those regulations (20 CFR 229.32) addresses the question of children under the social security minimum guaranty as follows:

229.32 When a child can be included in the computation of the overall minimum rate.

> A child who meets the requirements of 229.30(b) of this part can be included in the computation of the overall minimum rate in the month in which:
>
> (a) The employee is first eligible for an increase in his or her annuity rate under the overall minimum, as shown in 229.22 of this part; or
>
> (b) In the case of a child born or adopted by the employee after the employee's annuity beginning date, such child can be included only when the overall minimum rate is already payable in the month before the month in which the child is born, or adopted except where:
>
> > (1) The child is born or adopted prior to the employee's attaining age 62 or becoming eligible for a period of disability * * *; or

[1] Former section 3(f)(3) of the 1974 Act has been redesignated as section 3(f)(2) by Public Law 107-90, which repealed former section 3(f)(1) (the railroad retirement maximum limitation).

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(2) The child who is adopted after the employee's annuity beginning date meets the dependency requirements set forth in 222.53 of this chapter.

(c) * * *. (emphasis supplied).

Section 222.53 of the Board's regulations (20 CFR 222.53) defines dependency requirements for children who are not the natural children, stepchildren, grandchildren or stepgrandchildren of the employee, and who are adopted "after the employee could become entitled to an old age or disability benefit under the Social Security Act (treating his or her railroad compensation as wages under that Act)". In addition to requiring that the adoption occur in the United States and that the child begin living with the employee prior to age 18, the child must meet one of two alternatives (20 CFR 222.53(c) and (d)):

(c) The child is living with the employee in the United States and received at least one-half of his or her support from the employee for the year before the month in which—

(1)The employee could become entitled to a social security benefit * * * [if his railroad earnings were credited under Social Security Act];

or

(2) The employee becomes entitled to a period of disability which continues until he or she could become entitled to a social security benefit as described above.

(d) In the case of a child born within the one-year period stated in paragraph (c) of this section, at the close of such period the child must have been living with and have been receiving at least one-half of his or her support from the employee for substantially all of the period that began on the date the child was born.

Section 229.32 of the Board's regulations thus states both a general rule and an exception. Consistent with the agency's historic interpretation of the law, section 229.32(a) initially states that children, adopted or born after an employee annuity begins, may not later cause the employee annuity to increase under section 3(f)(2). However, where the social security minimum guaranty was available but not payable because the employee's regular annuity formula computation was higher at the time his annuity begins, section 229.32(b) allows the employee annuity to increase under section 3(f)(2) when the employee adopts a child after the initial month of eligibility for the 3(f)(2) increase. The adopted child must have been dependent upon the employee (as defined by section 222.53 of the Board's regulations) for one year prior to the time the employee becomes eligible for the 3(f)(2) social security minimum guaranty (i.e., at inception of the period of disability or at age 62). The guaranty computation includes the child from the first full month in which the child would have been entitled to a social security benefit based upon the employee's earnings. See regulations of the Social Security Administration at 20 CFR 404.352(a)(2).

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[2] Although section 229.32 refers only to section 222.53, I note that section 222.54 of the Board's regulations contains essentially the same definition with respect to grandchildren or stepgrandchildren adopted after the employee annuity entitlement begins.

[3] The dependency requirements of Board regulation 222.53 are identical to those of the Social Security Administration for children adopted by the insured wage earner after becoming entitled to old age or disability insurance benefits. See 20 CFR 404.362(b).

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Section 229.32(b) departs from the Board's prior interpretation of 3(f)(2) and the predecessor provision of the 1937 Act by allowing the employee annuity to increase to the social security guaranty rate based on a child after the Board earlier determined the guaranty did not apply without that child. However, the regulation does not allow payment of the social security minimum increase for every child born or adopted after the annuity begins. The employee must have supported the child for a year prior to the month the guaranty was available, or for a year prior to the month the guaranty is later tested due to inception of a period of disability or attainment of age 62. Although initially ineligible, the adopted child has thus been dependent on the employee for support prior to either adoption or to the employee's later date of eligibility for the social security guaranty. See Legal Opinion L-97-42 (an employee's annuity could not be increased under section 229.32(b) to social security minimum guaranty rate on the basis of an adopted child born after award of a disability annuity because the child could not meet the dependency requirements on the annuity beginning date; eligibility could be tested again when the employee attained age 62). In view of ambiguities in the
language of and Congressional intent regarding 3(f)(2)(ii) as noted by the Court of Appeals in Cvikich, in my opinion the extension of eligibility to these children is a reasonable and limited interpretation of the statute which is within the agency's authority.

In the case you have submitted, the child was born in 1990; the employee annuity began February 1993; and the adoption order issued in February 2001. If you find that the child was dependent upon the employee for a year prior to February 1993, the child would qualify for inclusion in the 3(f)(2) social security minimum guaranty March 2001, the first month throughout which the child was eligible for a child's benefit under the Social Security Act.

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

cc: Director of Policy and Systems