October 21, 1999
L-99-14

TO : Philip H. Arnold
Chief of Records, Analysis & Systems
Through: Ronald Russo
Acting Director of Policy and Systems

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Administrative Finality - Effect of Prior Denial Decisions on the Adjudication of Subsequent Disability Applications

This is in response to your memoranda dated August 9, 1999, requesting legal opinions on the handling of two cases where disability annuities were awarded to employees whose prior applications had been denied. The opinions are being combined since the cases involve similar issues.

Both of the requests make reference to Legal Opinion L-77-195, which was issued March 17, 1977. In that opinion, this office held that a decision by the Bureau of Hearings and Appeals upholding the denial of an application for a disability annuity could be disregarded by lower level units for purposes of setting an annuity beginning date where the claimant filed a subsequent application accompanied by new evidence sufficient to prove the existence of a disability. In arriving at that conclusion, this office noted that the Board=s regulations were lacking any provisions which would prevent the lower level unit from disregarding a decision issued by the Bureau of Hearings and Appeals. Such is no longer the case, and Legal Opinion L-77-195 is now obsolete.

Effective September 29, 1997, the Board=s regulations were amended to include Part 261, published August 29, 1997, which sets forth rules governing the finality of decisions under the Railroad Retirement Act and when such decisions may be reopened. In accordance with the regulations, an initial decision becomes final when the prescribed time limits for review expire. Once a decision becomes final, the regulations now provide that it may be reopened only by the bureau, office or entity that made the final decision, or by a bureau, office or entity at a higher level, which has the claim properly before it.

In Legal Opinion L-77-195, this office reasoned that a decision on a prior application could be disregarded by a lower level unit because that decision was concerned with a separate application

in support of which there was insufficient evidence to prove the existence of a disability. Regulations governing the reopening of prior decisions were not in place at the time L-77-195 was issued. Therefore, such reasoning allowed for equitable results where the evidence submitted with a subsequent application established the existence of a disability. However, with the publication of Part 261, the public is put on notice as to the conditions which must be satisfied to reopen a prior denial determination.

Under Part 261, a determination must first be made as to whether an entity has the proper authority to reopen a decision. As stated above, a final decision may be reopened only by the bureau, office or entity that made the final decision, or by a bureau, office or entity at a higher level, which has the claim properly before it. An entity with proper authority may reopen a final decision
for any reason within 12 months of the date of the notice of the decision, or within four years of the date of the notice of the 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. The 12-month and 4-year periods begin to run with the issuance of a decision, regardless of whether or not the decision is protested.

ANew and material evidence@ is defined in section 261.1(d) of the Board=s regulations as evidence that may reasonably be expected to affect a final decision, which was unavailable to the agency at the time the decision was made, and which the claimant could not reasonably have been expected to have submitted at that time. For Aadjudicative error@ to be present, it must be absolutely clear that an error on the face of the evidence resulted in a decision which was indisputably wrong. That is, based on all the evidence at the time the determination was made, it is unmistakably certain that the determination or decision was incorrect. As explained in RCM 6.2.13, adjudicative error requires more than a mere difference of opinion between the fact-finders or a shift in the weight of the evidence. A decision which was reasonable on the basis of the evidence in the file and on the statute, regulations, instructions, precedents, etc., existing at the time the determination or decision was made, does not constitute error on the face of the evidence which would permit reopening. *Cf*. Social Security Administration=s regulations at 20 CFR 404.989.

Where more than four years have passed since the date of the notice of a final decision, an entity with the proper authority may reopen a final decision only if

specific circumstances are present.[1] See section 261.2(c) of the Board=s regulations and R.C.M. 6.2.2.C. Of significance to this opinion is subparagraph (7) of section 261.2(c) of the Board=s regulations, which provides that a final decision may be reopened at any time if 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 decision was made. See Legal

[1]The exception to this rule is the three-member Board which, in accordance with section 261.11 of the Board=s regulations, may reopen a final decision at its discretion.

Opinion L-98-6, a copy of which is attached, for examples of clerical errors and errors on the face of the evidence.

If a decision on a disability application becomes final and a subsequent application is filed alleging disability for a period of time that was not adjudicated in the final decision on the prior claim, the adjudicating unit should consider the issue of disability with respect to the unadjudicated period of time. The question of whether the decision on the prior application may be reopened is subject to the rules outlined in the Board=s regulations. If the adjudicating unit does not have the authority to reopen the prior decision, or has the authority but the conditions for reopening are not satisfied, administrative finality should be applied to the claim of disability for the prior period of time. Furthermore, if the adjudicating unit believes the conditions for reopening are satisfied, except for the lack of authority, the case should be forwarded to the entity which made the prior decision for reopening consideration, with a memorandum as outlined in established procedure. (See RCM 6.2.8.B).

Having summarized the law as it exists today, we now turn to the two cases at issue. In the first case, Mr. F filed an application for a disability annuity which was denied initially on June 8, 1992, and the denial was upheld at all administrative levels within the agency, with the most recent decision being the Board=s decision issued December 27, 1994. The decision of the Board was affirmed by the Eighth Circuit of the Court of Appeals on April 19, 1996. Mr. F filed a second application for a disability annuity on July 25, 1995 and was awarded a disability annuity on December 3, 1996 at the initial level with a disability onset date of October 1, 1993. You question whether the 1996 award action should be reopened since the established disability onset date is earlier than December 27, 1994, the date of the most recent Board decision upholding the denial of Mr. F=s prior application.

Initially, it should be noted that the Disability Benefits Division (DBD) would have the appropriate authority to reopen the 1996 decision, as that decision was made at the initial level. Since DBD has the authority to reopen the 1996 decision, the next question which must be addressed is whether the criteria for reopening are satisfied. While more than 12 months have passed since the 1996 decision, more than four years have not yet passed. Therefore, the 1996 decision may be reopened <u>if</u> there is new and material evidence or there was adjudicative error not consistent with the evidence of record at the time of adjudication. We have received no new evidence since the 1996 decision was issued. Therefore, the 1996 decision may only be reopened if there was adjudicative error *not consistent with the evidence of record at the time of adjudication*.

To determine if adjudicative error took place in 1996, we must look to the policy of the Board at the time the 1996 decision was made. Since Part 261 of the Board=s regulations did not become effective until September 29, 1997, the legal interpretation in effect at the time the 1996 decision was made was Legal Opinion L-77-195. As noted above, in that opinion this office held that a decision upholding the denial of an application for a disability annuity could be disregarded by

lower level units for purposes of setting an annuity beginning date where the claimant filed a subsequent application accompanied by new evidence sufficient to prove the existence of a disability. The 1996 decision, finding the claimant disabled effective October 1, 1993, was reportedly based on new evidence. Consequently, the 1996 decision was not inconsistent with Legal Opinion L-77-195, and it is my opinion that the establishment of October 1, 1993 as Mr. F=s disability onset date did not constitute adjudicative error at the time of adjudication. As the conditions specified in Part 261 are not satisfied, the 1996 decision is a final decision and should not be reopened.

The facts of the second case are as follows. Mr. S filed an application for a disability annuity on April 11, 1989, which was denied initially on October 6, 1989. The denial decision was upheld at all administrative levels within the agency, with the most recent decision being the Board=s decision issued June 8, 1992. On July 22, 1996, Mr. S filed a second application for a disability annuity and, in January of 1997, was rated disabled at the initial level with a disability onset date of June 9, 1992. In addition to filing for benefits under the Railroad Retirement Act, Mr. S filed for benefits payable under the Social Security Act. In accordance with a June of 1995 decision by the United States District Court for the District of Oregon, the Social Security Administration rated Mr. S disabled for SSI entitlement purposes effective December 3, 1991.

Mr. S has recently inquired about entitlement to early Medicare coverage. To meet the earnings requirement for early Medicare coverage, Mr. S must be found to be disabled prior to 1992. You inquire as to whether Legal Opinion L-77-195 allows for the establishment of a disability onset date prior to June 9, 1992. If so, you then question whether the examiner=s finding to the contrary constitutes adjudicative error as provided in section 261.2(b) sufficient to justify the reopening of the examiner=s decision that the employee was not disabled until June 9, 1992.

As recounted previously, in Legal Opinion L-77-195, which became obsolete effective September 29, 1997, this office held that a decision upholding the denial of an application for a disability annuity could be disregarded by lower level units for purposes of setting an annuity beginning date where the claimant filed a subsequent application accompanied by new evidence sufficient to prove the existence of a disability. A review of the file indicates new evidence was obtained from the Social Security Administration subsequent to the filing of Mr. S=s second application for a disability annuity. Consequently, in accordance with Legal Opinion L-77-195, the examiner could have established a disability onset date prior to June 9, 1992.

While the examiner could have established a disability onset date prior to June 9, 1992, the examiner was not compelled to do so and I do not believe the establishment of June 9, 1992 as Mr. S=s disability onset date constitutes administrative error sufficient to reopen the 1997 decision. Based on all the evidence at the time the decision was made, it is not unmistakably certain that the 1997 decision that Mr. S was not disabled prior to June 9, 1992 was incorrect, especially in light of the fact that an administrative law judge and SSA=s Appeal Council

reviewed the same evidence and determined that Mr. S was not disabled. Consequently, the conditions for reopening the 1997 decision are not satisfied.

Finally, it must be noted that a review of the claim file reveals a discrepancy as to whether a decision was ever released regarding Mr. S=s second application for a period of disability. If a decision was not released, then L-77-195 has no relevance to the processing of Mr. S=s second application since a final decision was not issued prior to September 29, 1997, the effective date of Part 261 of the Board=s regulations. If not yet released, an initial decision should be released to Mr. S as to his disability status for the period June 9, 1992 and later - that is, the period of time not covered in the prior decision. Mr. S should be advised that administrative finality applies to his claim of disability for the period prior

to June 9, 1992. If you believe the new evidence is sufficient to justify the reopening of the October 6, 1989 decision, which was upheld by the Board on
June 8, 1992, the case should be forwarded to the Board for reopening consideration.

Attachment

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