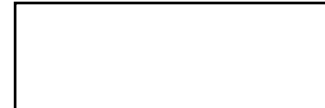


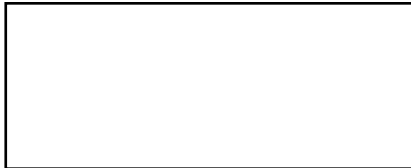
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Pension Benefit Guaranty Corporation  
1200 K Street, N.W., Washington, D.C. 20005-4026



NOV 18 2005



Re:

Appeal  Weirton Retirement Program, Case #197614  
Appeal  Weirton Steel Corporation Retirement Plan, Case #201097  
(the Plans)

Dear :

The Appeals Board has reviewed the appeals you filed on behalf of your client, . As explained below, we are denying the appeals.

*PBGC's Determinations and Your Appeals*

PBGC's October , 2004 determination letter told  that the \$86.89 per month benefit she is currently receiving under the Weirton Retirement Program is correct. By letter dated December , 2004, PBGC sent  its determination of her benefit under the Weirton Steel Corporation Retirement Plan, which stated that the monthly benefit of \$37.32 she currently receives under the Plan is the correct amount. Each determination letter pointed out that the benefit amount shown is the same amount  received from the prior Plan administrator (i.e., before the Plans terminated and PBGC became responsible for payment of benefits).

Your December  2004 and January  2005 letters of appeal said that you reviewed pension plan documentation that PBGC provided you pursuant to your  2004 information request and "noticed that my client is not receiving the automatic qualified joint and survivor annuity (QJSA)<sup>1</sup> guaranteed under federal law." You noted that PBGC provided you only one side of the Weirton *Post-Retirement Option Election and Certifications* form (Option Form). You stated that, based on the documentation you received from PBGC and your client, it is your position that

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<sup>1</sup> Your December , 2004 appeal letter includes reference to a pre-retirement survivor annuity (PRSA), which is not applicable in this case since the participant died *after* retiring.



any "purported waiver of the QJSA is invalid under the strict rules concerning waiver of the QJSA" under the Employee Retirement Income Security Act (ERISA), federal regulations, and the terms of the Plan. Specifically, you asserted that the waiver is invalid because:

1. The Option Form lacks the signature (and seal) of a notary public required under page 18 of the Summary Plan Description (SPD) for the Weirton Retirement Program;
2. The Plans failed to provide the retiree and spouse with a written explanation concerning the QJSA and the effects of waiving the QJSA;
3. The retiree and spouse did not receive a written explanation of the relative financial effects of waiving the QJSA in comparison with other optional forms of benefits; and
4. The Option Form "fails to advise the retiree and spouse as to the availability of any additional information or how they may obtain such information."

You contended that your client is entitled to the full amount of the QJSA.

In a letter dated May 4, 2005, you submitted the written "expert opinion" of Professor Colleen E. Medill of the University of Kansas School of Law. Professor Medill had reviewed the information on a "Post Retirement Option Election and Certifications"(Exhibit C to Professor Medill's opinion) and an "Explanation of Post Retirement Option" (Exhibit D to her opinion), which were documents that Weirton had used in processing benefit elections under the Plans. Professor Medill opined that the written content of Exhibit C failed to satisfy the legal standards under ERISA and applicable regulations for a QJSA waiver because the form:

- uses technical defined terms to describe the election options for the participant and the spouse, which are not defined or explained on the form;
- does not present a general explanation, written in nontechnical language, of the relative financial effect of an election to waive the QJSA form of benefit payment;
- contains no reference to the availability of additional information specified in Treasury Regulation § 1.401(a)-11(c)(3)(iii), or how a participant may obtain this information; and
- does not meet the requirements in Treasury Regulation § 1.401(a)-20, Q&A-36, which is applicable for Plan years beginning after December 31, 1988, concerning disclosure of additional information concerning the relative values of the optional forms of benefit payment as compared with the QJSA benefit. The form fails this additional information requirement because it does not explain which optional forms of Plan benefits are subsidized in comparison with the QJSA form of benefit payment and does not reveal the interest rates used to calculate the optional benefit forms of payment.



Professor Medill further concluded that, even if the Exhibit C form is supplemented by the Exhibit D document, the form fails to satisfy the legal standards for a valid QJSA waiver because:

- As with Exhibit C, Exhibit D fails to provide a general description of the technical terms "Surviving Spouse Benefit," "100% Co-Pensioner," and "50% Co-Pensioner";
- The method of presentation in the table at the bottom of Exhibit D fails to adequately explain the relative financial effect of an election to waive the QJSA form. For example, Exhibit D does not explain that the "Surviving Spouse Benefit" on line 1 of the Table is a separate and unrelated type of benefit to the QJSA monthly pension that is shown on line 2, and that therefore the decision of whether or not to waive the QJSA form does not affect the amount of the Surviving Spouse Benefit; and
- As is the case with Exhibit C, Exhibit D does not meet the requirements in Treasury Regulation § 1.401(A)-20, Q&A-36 concerning the relative values of the optional forms of benefit payment as compared with the QJSA benefit.

Professor Medill asserted that, for plan years beginning after December 31, 1984, a waiver of the QJSA is not valid unless "it has been executed in full and complete compliance with all of the technical legal requirements for such consent." She therefore asserted that, if the spouse of a participant in the Plan has not executed a valid waiver, the spouse as a Plan beneficiary is entitled to receive the benefit due in the absence of a valid waiver, which under the Retirement Equity Act amendments to ERISA must be a QJSA.

Background

According to the records PBGC auditors obtained from Weirton Steel Corporation (Company), your client's husband, [redacted], retired from the Company on June [redacted] 1984. On May [redacted] 1984, he signed the Company's Option Form, waiving the Automatic 50% Spouse's Option (the QJSA) and electing instead to receive his benefit as a Life Annuity. The Option Form applied to his benefits under both Plans.<sup>2</sup>

In addition to the QJSA and other benefit options, both Plans provided a surviving spouse benefit at no reduction to the participant's benefit. [redacted] died on March [redacted] 2000, and [redacted] began receiving the surviving spouse benefits from both Plans effective April [redacted] 2000. The Weirton Retirement Program terminated as of December 6, 2002, and the Weirton Steel Corporation Retirement Plan terminated as of October 21, 2003. PBGC is the trustee of both Plans.

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<sup>2</sup> While the wording on the Option Form does not specifically indicate that the Form covers both Plans, the files show that estimated benefit amounts on the Option Form are for [redacted] participation in both Plans. Please note that the Weirton Steel Corporation Retirement Plan was established in January 1984, only a few months before [redacted] retired; thus, he earned a very small benefit under that Plan.

The Option Form is a one page, two-sided document. Unfortunately, only the front page of [redacted] Option Form was initially included on PBGC's automated system, which is the reason you did not previously receive a complete copy of the document. We regret this oversight on PBGC's part. *Enclosure 1*, which the Appeals Board obtained from PBGC, is a complete copy of the Option Form that [redacted] signed when he retired from the Company.

Discussion

The Retirement Equity Act (REA), Public Law 98-397, 98 Stat. 1426 (August 23, 1984), required spousal consent for waivers of the Joint and Survivor Annuity (J&SA) or the QJSA. However, the spousal consent requirements under REA for J&S waivers applied only to annuity starting dates on or after January 1, 1985. These REA provisions also applied only if the participant had at least one hour of service or paid leave under the plan on or after August 23, 1984. [redacted] retired on June [redacted], 1984. Thus, REA did not apply to him for two reasons, i.e., his annuity starting date was before January [redacted], 1985, and he did not have an hour of service or paid leave after August [redacted], 1984.

Prior to REA's effective date, spousal consent was not required unless the provisions of the specific pension plan required it. While the normal form of benefit for married participants at the time of [redacted] retirement was the Automatic 50% Spouse's Option, the Plan document in effect at that time (i.e., the Pension Agreement between the Weirton Steel Division of the National Steel Corporation and the Independent Steelworkers Union, that became effective July 31, 1980) did *not* require that the spouse consent to the participant's election to waive the Automatic 50% Spouse's Option. As shown in *Enclosure 2*, section 3.15(a)(3) of the Summary Plan Description states:

A participant may revoke the Automatic 50% Spouse Option by written notice duly filed with the Company at any time within the 90-day period prior to the date the pension payments commence, or within 90 days following the date on which the Company provides written notice to the participant regarding the Automatic 50% Spouse Option, or, if the participant has not been given specific information regarding the terms and conditions of such Option and the financial effect upon his pension of electing such Option and within 60 days of receiving such notice regarding the Option makes a written request for such specific information, within 90 days following the date on which the Company provides such information, whichever is later, and

- (i) receive the regular pension otherwise payable under this Agreement during his lifetime, or
- (ii) elect a Co-Pensioner Option in accordance with the provision set forth in paragraph 3.16.

Section 3.15 (d) states: "Any revocation of the Automatic 50% Spouse Option shall be executed on the form prescribed for this purpose by the Company and shall be deemed to be duly filed when it shall have been received by the Company.

Section 3.15 (e) states: "Satisfactory proof of marriage of the participant and his spouse and the age of the participant's spouse will be required prior to the payment of monthly installments under this coverage [the Automatic 50% Spouse Option]. *No consent shall be required of the participant's spouse if the participant desires to revoke the Automatic 50% Spouse Option.*" [Emphasis added.]

Accordingly, [redacted] Option Form (i.e., the *Application for Post Retirement Option* prescribed by Weirton) *does not* include [redacted] signature as it was not required under Plan provisions. Therefore, your arguments regarding spousal notification and consent do not apply in his case.

The Option Form does provide for a witness to [redacted] signature waiving the 50% Spouse Option. The Plan document applicable to him, however, does not require that the witness be a notary public. As shown on the form, [redacted] signature was witnessed by a Plan representative, M. J. Bish. This signature by a Plan representative met applicable statutory requirements.

You contended that the Plans did not provide the written explanation of the waiver required by ERISA section 205(c)(3) and Treasury Regs. 1.401(a)-11(c)(3) and 1.417(e)-1(b)(2), and for that reason the waiver on the Option Form is invalid.<sup>3</sup> However, the Option Form itself demonstrates that the Company, as the Plans' Administrator, made an effort to comply with applicable statutory and regulatory requirements. The reverse side of [redacted] Option Form shows the various forms of benefits available to him and the benefit amount under each form. On the front side of the form, by way of his signature, [redacted] certified that the benefit options set forth on the reverse side had been explained to him and acknowledged that he understood the effects of election.

What you appear to be suggesting, however, is that the Company's efforts fell short of fully complying with the detailed requirements for QJSA waiver explanations that are set forth in Treasury Regs. 1.401(a)-11(c)(3) and 1.417(e)-1(b)(2), and for that reason the waiver should be found to be invalid. However, courts have held that procedural defects, such as a failure to comply fully with ERISA disclosure requirements, do not require a substantive remedy, unless they caused a substantive violation or themselves worked a substantive harm. *Davis v. Combes*, 294 F.3d 931 (7<sup>th</sup> Cir. 2002) (in ERISA cases, plan administrator's substantial compliance with the statute and regulations is sufficient); *Lewandowski v. Occidental Chemical Corp.*, 986 F.2d 1006 (6<sup>th</sup> Cir. 1993); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9<sup>th</sup> Cir. 1985). *Cf. Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990) (failure to comply with ERISA's disclosure provision does not provide participants with substantive rights with respect to claims for benefits in the absence of extraordinary circumstances). Accordingly, based on these legal precedents, the appropriate question appears to be whether in [redacted] case there was at least substantial compliance with the applicable requirements for written explanation.

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<sup>3</sup> Your appeal refers to the statutory and regulatory provisions that apply to post-REA benefit elections. The pre-REA requirements were somewhat different and less stringent. See Treasury Decision 7458, 1977-1 C. B. 99 (1977). However, the discussion that follows, which refers to the post-REA requirements, applies with equal force to the pre-REA requirements.

As noted earlier, a Plan representative presented the retirement form(s) to [redacted] and witnessed his signing of the form(s). This occurred more than 18 years before PBGC became responsible for payment of benefits under the Plans. Neither PBGC nor the Appeals Board participated in the retirement session(s) the Company had with [redacted]. Therefore, we have no way of knowing what documents were given to him (other than the Option Form),<sup>4</sup> nor do we know what he was told. However, it is the Board's view that a Plan representative likely would be knowledgeable about the provisions of the Plan and the policies and procedures for retiring and would communicate them to the retiring participant. Additionally, [redacted] certified that the benefit options under the Plans had been explained to him, and he acknowledged that he understood the effects of his decision. The Appeals Board concluded that the above circumstances are sufficient to establish a presumption that the Plan administrator had achieved, at minimum, substantial compliance with the statutory and regulatory requirements with respect to explanations concerning J&SA waivers.

You have not provided any specific information concerning [redacted] waiver that would rebut this presumption. For example, there is no evidence showing that any questions he may have had regarding his retirement were unanswered, or he was not provided with all the information he needed or requested. Therefore, the Appeals Board rejects your contention that [redacted] waiver should be held invalid and ineffective as a matter of law.

Further, the Appeals Board is unable to determine, based on the information in your appeal and in PBGC's records, whether or not [redacted] would have chosen a different benefit option regardless of whether he had been provided with additional information. We further observe that over 20 years have elapsed since [redacted] signed the waiver form and that, until these appeals were filed, there was no record that either [redacted] or [redacted] had disputed the form of his benefit. The Board concluded that it would be inappropriate under these circumstances to allow the election of a different form of benefits after the passage of this length of time.

As Mr. Eric Rofel's December [redacted] 2004 letter on behalf of the Appeals Board stated, in accordance with the Rules for Administrative Review of Agency Decisions, an opportunity to appear before the Appeals Board and an opportunity to present witnesses will be permitted at the Appeals Board's discretion. In general, an opportunity to appear will be permitted if the Appeals Board determines that there is a dispute as to material fact (see 29 Code of Federal Regulations §4003.55). There is no dispute of material fact in this case. Therefore, your request for a hearing before the Board is denied.

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<sup>4</sup> The Appeals Board concluded that the validity of [redacted] waiver should not be determined solely by examining the language on the Option Form. While the statutory and regulatory provisions you cite require that a participant be provided certain information about benefit options in writing, they do not require that the information be provided on the form itself.



Decision

For the reasons discussed above, the Appeals Board found that  waiver of the J&SA was properly executed and valid. Your appeals are therefore denied. This is the Agency's final action regarding  PBGC October 28, 2004 and December  2004 benefit determinations. Your client may, if she wishes, seek court review of this decision.

Sincerely,

Sherline M. Brickus  
Member, Appeals Board

Enclosures (2)

cc: