



Legal Opinion L-2002-06
December 5, 2002

U.S. Railroad Retirement Board Phone: (312) 751-7139
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TO : Robert E. Bergeron
Assistant to the Labor Member

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Application Deeming Provision of Section 103(f) of Public Law 107-90

This is in response to your memorandum dated April 3, 2002 on the above subject. Section 103(f) of the Railroad Retirement and Survivors' Improvement Act of 2001, P.L. 107-90, amended section 5(b) of the Railroad Retirement Act (45 U.S.C. § 231d(b)) to provide that the application filed with the Railroad Retirement Board for an employee, spouse, or divorced spouse annuity based on an employment record of less than 10 years of service is deemed to be an application for a benefit under the Social Security Act. Your memorandum asks whether an individual entitled to an annuity based on more than ten years of service and that individual's spouse entitled based on less than ten years of service may waive the payment of the social security benefit that they are deemed to have filed for.

Section 103(f) of P.L. 107-90 provides that an application for an employee, spouse, or divorced spouse annuity based on an employment record of less than 10 years of service is deemed to be an application for a benefit under the Social Security Act. A person who has filed an application for benefits under the Social Security Act may waive entitlement to that benefit for months "which occur before the month in which such individual files application for such benefit". Section 202(j)(3) of the Social Security Act (42 U.S.C. § 402(j)(3)). Since in accord with section 103(f) of P.L. 107-90, the individual with less than 10 years of service is deemed to have filed an application for a social security benefit at the same time as the application for a railroad retirement benefit is filed, there can be no waiver of entitlement under the Social Security Act after that filing date.

There is no provision of the Social Security Act that permits an individual to waive entitlement to a social security benefit after the month in which the application is filed.¹ The Social Security Administration does permit a person to withdraw an application for a benefit. The effect of that withdrawal is the same as if the application had never been filed. See 20 CFR 404.640. However, due to the deemed filing created by section 103(f) there can be no withdrawal of the application for a social security benefit unless the application for a railroad retirement annuity is also cancelled.

The conclusion that the employee and the spouse entitled on less than 10 years of service may not waive entitlement to the social security benefit for months after the month of filing is further buttressed by the reenactment of the now third sentence of section 5(b) of the Railroad Retirement Act. That sentence permits a person who files an application for benefits under the Railroad Retirement Act based on an earnings record containing at least 10 years of railroad service to have the option of having the application filed under the Railroad Retirement Act to be considered an application under the Social Security Act. The language of section 5(b), as amended clearly means that individuals applying based on less than 10 years of service have no option to the deemed filing of an application for a benefit under the

¹ Waiver of entitlement to a social security benefit should not be confused with waiver of benefits payable. See Legal Opinion L-94-51, which held that the RRB should recognize waiver of a social security benefit for purposes of computing an employee tier 1 and a spouse tier 1. L-94-51 cited the Social Security Administration's POMS as authority for waiver of benefits payable.



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Social Security Act. They may not waive any entitlement under the Social Security Act based on that application.