



Legal Opinion L-2004-13
December 1, 2004

U.S. Railroad Retirement Board Phone: (312) 751-7139
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TO : Ronald Russo
Director of Policy & Systems
Office of Programs

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Inclusion of Adopted Grandchildren in the
Social Security Overall-Minimum Guaranty

This is in reply to your request for my opinion as to the point in time when an adopted grandchild may be included in the computation of an employee annuity increase under section 3(f)(2) of the Railroad Retirement Act (the social security overall-minimum guaranty provision), and whether at that time the regular formula annuity rates are to be compared under the 3(f)(2) guaranty with the disability insurance benefit family maximum or the retirement insurance benefit family maximum.

As an example, you provide a case where the employee was initially awarded an occupational disability annuity in 1982, and then was determined to be entitled to a period of disability under section 216(i) of the Social Security Act beginning August 1995. In September 2002, the employee adopted a grandchild which had been born in 1999. The employee attained age 62 on August 4, 2003, and his wife began receiving an annuity based on a child in her care beginning August 1, 2003.

As you know, section 3(f)(2) of the RRA 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. Paragraph 3(f)(2)(ii) in general limits the point in time at which an annuity may be increased to the date the employee annuity begins, or if later, the month following the month the employee attains age 62, attains full retirement age, or the month the employee becomes entitled to a period of disability under section 216(i) of the Social Security Act. The employee's annuity may also be increased under section 3(f)(2) to consider a qualified spouse under certain conditions. In Legal Opinion L-2002-3, I advised that where the social security minimum guaranty rate was not payable because the employee's regular annuity formula computation was higher at the time his annuity begins, section 229.32(b) of the Board's regulations allows the employee annuity to increase under section 3(f)(2) in certain cases when the employee adopts a child after the initial month of eligibility for the 3(f)(2) increase. That regulation provides in part 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



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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.

* * *

(emphasis added).

To establish dependency, a grandchild must show that the adoption occurred in the United States and that the grandchild began living with the employee prior to age 18. See regulations of the Board at 20 CFR 222.54.¹ An adopted grandchild must also meet one of the four alternatives specified by 222.54(c) and (d):

(c) The grandchild 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's annuity was increased under the social security overall minimum provision by including the grandchild; or

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

(3) 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 grandchild born within the one-year period referred to 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 grandchild was born. * * *

In your example case, the child had not yet been born on the employee's annuity beginning date in 1985, nor when the employee was awarded a period of disability beginning August 1995. The earliest date from which the child could be included in the section 3(f)(2) calculation is therefore September 1, 2003, the first full month throughout which the employee was age 62 (assuming the child was dependent on the employee for at least one-half of support for the year before September 2003). See Legal Opinion L-97-42 (advising an adopted child could be considered when the employee attained age 62); and regulations of the Social Security Administration at 20 CFR 404.311(a) (specifying when an old age insurance benefit begins) and 404.352(a)(2) (specifying when a child's insurance benefit begins). Though the date for testing whether the overall minimum guaranty will be paid is based on the employee's age, the comparison for making the 3(f)(2) guaranty determination would be based on the employee's entitlement to a disability insurance benefit considering his period of disability, rather than on the retirement insurance benefit family maximum.

¹ I note that section 229.30(b)(2) quoted above refers only to 222.53 of the Board's regulations (20 CFR 222.53). Section 222.53 defines dependency requirements for adopted children who are neither the natural children or stepchildren nor the grandchildren or step grandchildren of the employee. The above-quoted passage of 229.30(b)(2) does not mention section 222.54 of the Board's regulations, which defines dependency for grandchildren or step grandchildren adopted after the employee annuity begins. However, both 222.53 and 222.54 define dependency in essentially the same terms. Moreover, the analogous regulations of the Social Security Administration make no distinction between these two categories of adopted children. See 20 CFR 404.362(b)(1). Accordingly, section 229.30(b)(2) should be read as referring to both 222.53 and 222.54.