



Legal Opinion L-20004-14
December 3, 2004

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

TO : Marie C. Leeson
Chief of Calculation Analysis and Systems
Through: Ronald Russo
Director of Policy and Systems

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Penalties and End-of-Year Adjustment for Disability Work Deductions

This is in reply to your inquiry regarding the imposition of penalties in connection with disability work deductions involving the employee's second or later failure to report earnings. You indicated that the Office of Programs currently imposes a penalty deduction in the amount of one month's annuity for each month in which an annuitant has excess earnings and fails to report those excess earnings while receiving an annuity. The question has been raised, however, as to whether the year-end adjustment should limit the total number of work deduction months and penalty deduction months to the number of months in the calendar year during which the excess earnings occurred. In other words, you ask whether the end-of-year adjustment should be limited so that an annuitant would lose no more than 12 months of annuity.

You point out that section 2(e)(4) of the Railroad Retirement Act and section 220.164 of the RRB's regulations provide for an end-of-year adjustment for a disabled employee whose annuity was withheld for

earnings over \$400.00 per month. Section 2(e)(4) provides in pertinent part that:

* * * A deduction shall be imposed, with respect to any such individual who fails to make such report, in the annuity or annuities otherwise due the individual, in an amount equal to the amount of the annuity for each month in which he is paid such earnings in such employment or self-employment * * *.¹

You advise that, in a specific case, applying current procedure in making the end-of-year adjustment, the employee-annuitant was assessed 12 penalty deduction months in addition to the 3 months of work

¹ The final sentence of that section states that:

If the total amount of such individual's earnings during such year (exclusive of earnings for services described in subdivision (3)) is in excess of \$4,800 (after deduction of disability related work expenses), the number of months in such year with respect to which an annuity is not payable by reason of such first and third sentences shall not exceed one month for each \$400 of such excess, treating the last \$200 or more of such excess as \$400; and if the amount of the annuity has changed during such year, any payments of annuities which become payable solely by reason of the limitations contained in this sentence shall be made first with respect to the month or months for which the annuity is larger.

While this provision operates to reduce the dollar amount of the annuity withheld due to excess earnings depending on the amount of the excess earnings, it does not affect the resolution of the issue under consideration here, which is the number of months of annuities which may be subject to the penalty.



Legal Opinion L-20004-14 December 3, 2004

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

deductions. You ask whether a loss of 15 months of annuities is appropriate and whether instead the number of penalty deduction months should be limited to the number of months of annuity that have not already been lost to the work deductions within the calendar year in question. Therefore, in the example case, if imposition of the penalty were limited, the employee would have been assessed 3 work deduction months and 9 penalty deduction months.

It should be noted that section 220.164(c)(2) of the RRB's regulations provides in pertinent part that:

* * * If it is the employee's first failure to report, the penalty deduction is equal to one month's annuity. If it is the employee's second or later failure to report, the penalty deduction equals the annuity amount for each month in which the employee earned over \$400.00 and failed to report it on time.

The regulation does not limit the number of penalty deduction months to the months in the calendar year for which no annuity has already been lost due to excess earnings. Rather, the regulation gives effect to the wording of the language in section 2(e)(4) of the Railroad Retirement Act and provides that an annuitant shall lose one month's annuity as a penalty for each month in which the annuitant works and does not timely report earnings to the Board.

The current procedure used by the Office of Programs is consistent with the legislative history of the provision in the Railroad Retirement Act. Specifically, section 2(e)(4) is essentially a reenactment of a portion of section 2(d) of the Railroad Retirement Act of 1937, the predecessor of the Railroad Retirement Act of 1974. The monthly earnings limitation and penalty provision of section 2(d) were added to the 1937 Act in 1954 (Public Law 746, 68 Stat. 1038). The language in the current section 2(e)(4) of the Railroad Retirement Act of 1974 is virtually identical to that added in 1954, except that the monthly amount which can be earned without a loss of benefits is now \$400.00. In 1954, the limit established was \$100.00.

The legislative history of the 1954 amendment reflects a concern that there be a limitation imposed upon earnings by a disability annuitant:

The fourth sentence of the last paragraph of section 2(a) of the Railroad Retirement Act provides for presumptive recovery from a disability. Under this provision, an individual is

considered to have recovered from a disability if he earned more than \$75 in service for hire, or in self-employment, in each of 6 consecutive calendar months. The purpose of this provision has been misunderstood, and in some cases, I regret to say, has been abused. In some instances the disabled individual has made arrangements to earn at least as much, if not more, than he did before he retired on disability and managed to continue to receive the disability annuity. In any event, this provision has proved very difficult to administer, and the Board and all the standard railway labor organizations are in agreement that this provision should be stricken and a new provision in lieu thereof should be adopted. Therefore section 2 of the bill provides for striking the fourth sentence of the last paragraph of section 2(a) which contains this provision.



Legal Opinion L-20004-14 December 3, 2004

U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
Web: <http://www.rrb.gov>

(Amending Railroad Retirement Act, Railroad Retirement Tax Act, and Railroad Unemployment Insurance Act: Hearings on S. 2930 Before the Special Subcomm. On Railroad Retirement Legislation of the Senate Comm. On Labor and Public Welfare, 83rd Cong., 2d Sess. 31-32 (1954) (statement of A.E. Lyon, Executive Secretary, Railway Labor Executives Association).

The House Report explained how the new provision would work:

To remedy the situation and still provide a practical disability or retirement test, the present test is eliminated and section 3 of the bill adds to section 2(d) of the Railroad

Retirement Act a new paragraph providing a month-to-month work clause under which a disability annuitant would not be paid his annuity for any month in which he receives more than \$100 in earnings from employment or self-employment of any form. . . .

* * * * *

The provision, in disability cases, for loss of an additional amount equal to the amount of the annuity for any month with respect to which no report was made to the Board as required, is patterned after a similar provision in the Social Security Act, and is intended to have the same general effect. If, for example, a disability annuitant had accrued earnings of more than \$100 in each month between April and October, inclusive, he will for 7 months have received annuities to which he was not entitled. Assuming the annuity was \$100 a month, the Board would require him to repay the \$700 overpayment either by deductions from later benefits or otherwise. In addition, the Board would make a deduction of 1 month's annuity from any later annuities due him if he fails to report these accruals before accepting his annuity check dated July 1 (which would be for June, the second month following April), even though he does not make the report until December or does not make it at all. Limiting the penalty for failure to report to 1 month's annuity would apply in this case only because it is his first failure to report. If, however, the same individual should return to work (in employment or self-employment paying in excess of \$100 a month) for the same 7 months of the next year,

with the Board continuing to pay the annuity for these months, he will have again been overpaid \$700 in annuities as he was the year before, but if he should again fail to make the required report, the Board would not only recover the overpayment of the annuities but would have to make a deduction from annuities later due the employee in an amount equal to the total of the annuities for the 7 months with respect to which he failed to make the report. (H.R. Rep. No. 1899, 83rd Cong., 2d Sess., 17 – 18 (1954).

The legislative history quoted above makes clear that the penalty deduction imposed by section 2(e)(4) is not a penalty for earnings in excess of the monthly earnings limitation, but is a penalty for the failure to report such earnings to the Board in a timely manner. The enactment of the original restriction in 1954



Legal Opinion L-20004-14 December 3, 2004

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

was in response to abuses by disability annuitants. Congress recognized that the assessment of an overpayment alone might not deter violation of the requirements of the earnings limitation. Yet the initial penalty imposed for the first failure to report excess earnings is equal to only one month's annuity. A more substantial penalty is imposed only when a disability annuitant fails again to make the required report.

The provisions calling for a year-end adjustment in the assessment of disability work deductions were added to the Railroad Retirement Act of 1937 in 1959 (Public Law 86-28, 73 Stat. 25). The section-by-section explanation of the bill stated that:

Under the present provision of section 2(d) of the act, the disability annuity of an individual under age 65 is not paid for any month in which he earns above \$100 in any form of employment. Subsection (b) would amend such section 2(d) to provide that the annuity for a month

or months which is withheld because of such earnings or any deduction which is applied for 1 or more months by reason of a failure to report earnings for such month or months is to be restored if the earnings of the disability annuitant for the whole calendar year do not exceed

\$1,200. Further, where the annuitant's total earnings exceed \$1,200 in a calendar year the number of months for which his annuity is not paid in such year because of earnings of over \$100 in each such month is in no event to exceed 1 month for each \$100 of earnings over \$1,200 (with the last \$50 or more of such excess being treated as \$100). (S. Rep. No. 222, 86th Cong. 1st Sess., April 24, 1959, pp. 25-26).

The section-by-section explanation of the 1959 amendment clearly indicates that the year end adjustment will result in a removal of a penalty imposed for not reporting earnings only when the disability annuitant's earnings for the entire year do not exceed the annual limit. In a case, however, where the annual earnings do exceed the annual limit, only the annuity amount lost due to the excess earnings may be adjusted; no adjustment is to be made for the penalty imposed for not timely reporting those earnings.

It is our opinion that the use of the term "otherwise" in the phrase "in the annuity or annuities otherwise due the individual," merely means that the deduction may be made from any annuity payments which may become due to an individual at any time, and not just from those annuity payments due for the calendar year at issue. The plain language of section 2(e)(4) of the Railroad Retirement Act supports the procedure currently used by the Office of Programs. Specifically, in a case where a disability annuitant fails to report excess earnings for a second (or other subsequent time after an initial failure to report excess earnings), section 2(e)(4) requires that a penalty in the amount of one month's annuity be assessed for each month that the annuitant has excess earnings and fails to report them to the Board. Imposition of the penalty in this manner was upheld in Reese v. Railroad Retirement Board, 906 F.2d 355 (8th Cir. 1990), where the Court included a footnote which showed that in 1981 the employee had earnings over the earnings limitation in 7 months. In that case, the Board determined there to be an overpayment of the annuity amount for each of the 7 months and also imposed a penalty of the annuity amount for each of the same 7 months. The Court noted that the Board was "required" to impose the penalty.

In summary, for the reasons discussed above, it is my opinion that in making the year-end adjustment of disability work deductions, it is appropriate to assess a penalty deduction in the amount of one month's



Legal Opinion L-20004-14
December 3, 2004

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

annuity for each month in which the annuitant had excess earnings and failed to timely report those earnings to the Board.