

2101 Provisions of Regulations Part 349 and Part 320

Part 349

Part 349 of the Railroad Retirement Board's (RRB) Regulations pertains to the "Finality of Decisions Regarding Unemployment and Sickness Insurance Benefits". These regulations contain the time limits for reopening similar to Part 261 of the Board's regulations on reopening of decisions under the Railroad Retirement Act.

Certain determinations to recover benefits are set forth in Sections 2(f), 4(a-1)(ii), and 12(o) of the Railroad Unemployment Insurance Act (RUIA). Determinations of claims to which those sections of the Act are not applicable are to be reopened only in the circumstances set forth in Part 349.

Part 320

Part 320 of the RRB's regulations pertains to "Initial Determinations Under the Railroad Unemployment Insurance Act and Reviews of and Appeals from such Determinations". These regulations explain which units of the RRB are authorized to make initial determinations with respect to entitlement to benefits and waiver of recovery of overpayments under the RUIA. It also explains how notice of such determination is to be communicated to the claimant and to his or her base-year employer(s) and how these determinations may be appealed.

2102 Definitions

2102.01 Reopening

A conscious determination on the part of the agency to reconsider an otherwise final decision for purposes of revising that decision.

2102.02 Final Decision

Any decision made with respect to each claim for unemployment or sickness benefits by the appropriate adjudicating office where the time limit for review, as set forth in Part 320 or in the RUIA has expired.

2102.03 New and material evidence

Evidence which was unavailable to the agency at the time the decision was made, which would have been likely to influence the outcome of the decision, and which the claimant could not reasonably have been expected to have submitted at that time.

2102.04 Diligently Pursued

In view of the facts and circumstances of a particular case, the necessary action was undertaken and carried out as promptly as the circumstances permitted. Diligent pursuit is presumed to have been met if the investigation is concluded and, if necessary, the decision is revised within 6 months from the date the investigation began.

If the investigation is not diligently pursued to its conclusion, the decision will be revised if a revision is applicable, and if it is favorable to the claimant. It will not be revised if it is unfavorable to the claimant.

2103 Authority to Reopen Determinations

Field offices are authorized to reopen determinations, which they have made denying claims. **But**, are **not** authorized to reopen determinations, which they have made allowing claims. Field Service (FS) is authorized to reopen determinations, both those allowing and denying claims, which were made by the field offices. The Sickness and Unemployment Benefits Section (SUBS) is authorized to reopen any determination but will generally reopen only such determinations as were initially made in the division. The authority to reopen determinations is delegated to the Chief of SUBS and to such employees of the division, GS-7 and over, as he or she may select, and to field employees, GS-7 and over, as he or she may select.

2104 Circumstances for Reopening

2104.01 Within 12 Months

A final decision may be reopened within 12 months of the date of notice of such decision for any reason.

2104.02 Within 4 years of the date of notice:

- a. if there is new and material evidence or
- b. if the decision is not reasonably consistent with the evidence of record at the time of adjudication.

2104.03 At any time:

- a. if the decision was obtained by fraud or similar fault or
- b. if the decision was that the employee was not a qualified employee and he or she is now qualified because compensation was credited to the employee's record of compensation in accordance with Part 211 of the Regulations

1. to correct errors apparent on the face of the compensation record;
 2. to enter items transferred by the SSA which were credited under the SSA when they should have been credited to the employee's railroad retirement record; or
 3. to correct errors made in the allocation of earnings to individuals or periods which would have made him or her a qualified employee at the time of the decision if the earnings had been credited to his or her earnings at that time.
- c. If the decision was wholly or partially unfavorable to the claimant, but only to correct a clerical error or an error that appears on the face of the evidence that was considered when the decision was made.

2104.04 Discretion of the three member Board to reopen or not to reopen a final decision

Whether a final decision is reopened or not reopened is solely within the discretion of the Board, except where reopening is required by sections 2(f), 4(a-1)(ii), or 12(o).

2105 No Basis for Reopening

If a decision now known to be erroneous cannot be reopened under Part 349, the benefit payment is final and should not be considered for recovery.

2106 Provisions of the Act Requiring Recovery

2106.01 General

Sections of the Act described below require recovery of benefits in specified circumstances. Recovery under these provisions of law is made in accordance with instructions in articles of the AIM specifically concerned with those provisions. The provisions of this article regarding reopening are not ordinarily applicable except as indicated in the paragraphs below.

2106.02 Section 2(f)

When pay for time lost or a protective payment is found to be payable for a period including days for which unemployment benefits were paid, the employer ordinarily withholds from the payment and remits to the RRB an amount determined by the RRB to be recoverable. If recovery is not thus affected, the adjudicating office should decide whether there is a basis for reopening with a view to recovering from the claimant the amount that should have been paid to the RRB under Section 2(f).

- a. If the failure to affect recovery from the employer is due to a mistake by the adjudicating office, the determination allowing benefits may be reopened within 4 years to affect recovery from the claimant because “the decision was not reasonably consistent with the evidence of record at the time of adjudication”.
- b. If the failure to affect recovery from the employer was induced by fraud or similar fault of the claimant, benefits are recoverable from the claimant “at any time”. For example, a claimant falsely states to an RRB representative that he or she has not claimed time lost, so amounts due under Section 2(f) are not recovered from the employer. A further example: a claimant receives a protective payment from which the employer made no deduction for benefits paid and the claimant knew or should have known that some or all of the payment should have been withheld for the RRB.

2106.03 Section 4(a-1)(ii)

Adjustments (dollar-for-dollar) of benefit payments under Section 4(a-1)(ii) of the Act are to be made in accordance with instructions in AIM-17; such adjustments are not subject to the provisions of this article. In contrast, unemployment, maternity, or sickness payments under another law are excepted from the adjustment provisions of Section 4(a-1)(ii). RUIA benefits paid to a claimant for days for which he or she also received such other unemployment insurance payments are recoverable if the RUIA benefits were paid erroneously within the meaning of this instruction.

2106.04 Section 12(o)

Benefit payments to which Section 12(o) is found to be applicable are to be adjusted in accordance with the instructions in AIM-30, Title II. The provisions of the present article are not applicable with respect to any payment affected by the provisions of Section 12(o).

2107 Old Board Order 75-8

Prior to the establishment of Part 349, this Board Order authorized the reopening of determinations of claims for benefits under the RUIA. This Board Order stated that a reopening was appropriate if the initial determination was:

1. made on the basis of a clear and obvious mistake of fact;
2. based on evidence, as of the date of determination, which did not reasonably support the determination;
3. made on the basis of a clear and obvious mistake of law; or

4. even though made on the basis of reasonable evidence and laws, induced by fraud or other fault of the claimant.

Part 349 superseded Board Order 75-8 effective November 6, 2000.

2108 Reopening after time limits

A decision may be re-opened after the one-year and the four-year time limits if the Board:

- a. has begun an investigation into whether to revise the decision before the applicable time period expires and
- b. the agency diligently pursues the investigation to the conclusion.

The investigation may be based on a request by a claimant or on action of the Board.

2109 Notice to Claimant

2109.01 Erroneous Payment

When a redetermination cancels or reduces a previous allowance of claimed days of sickness or unemployment and there is an erroneous payment, the claimant shall be notified. The claimant shall be requested to make repayment unless it is concluded that full recovery will be made by offset. The notice shall be sent to their last known address and state the basis and effect of the decision. The notice will also inform the parties of their right to review.

2109.02 Determination Affirmed

When a redetermination affirms a previous determination denying benefits, the claimant shall be notified.

2109.03 Benefits Payable

When a redetermination allows benefits, or increases a previous allowance, the claimant need not be advised by letter of the redetermination.

2109.04 Hearings Officer/Board Revision

If a hearings officer or the three member Board proposes to revise a decision, and the revision would be based only on evidence included in the record on which the prior decision was based, all parties will be notified in writing of the proposed action. If the revised decision is issued by a hearings officer, any party may request that it be reviewed by the three member Board, or the three member Board may review the decision on its own initiative.

2110 Record of Reopening

Each redetermination shall be recorded. Where reopening a claim results in payment, examiner remarks on the claim redetermination input detail will be a sufficient record. Where reopening reduces benefits, a Statement of Determination is to be prepared.

2111 Effect of Revised Decision

A revised decision is binding unless:

- the revised decision is being reconsidered or appealed under Part 320 of the regulations.
- the three member Board reviews the revised decision.
- the revised decision is further revised consistent with this part.

2112 Time and place to request a review and/or hearing on revised decision

A party to a revised decision may request further review of the decision under Part 320 “Initial Determinations Under the Railroad Unemployment Insurance Act and Reviews of and Appeals from such Determinations”.

2113 of record at the time of adjudication

Evidence of record means evidence the adjudicating office possesses when it makes the determination. It also includes information in the possession of other offices of the Board that they could reasonably be expected to use in the normal course of adjudication

2114 Change of legal interpretation /opinion

A change of legal interpretation or administrative ruling upon which a decision is based does not render a decision erroneous, and is not a basis for reopening. For example, an opinion of Policy and Systems advising that it does not concur in a determination of an adjudicating office allowing benefits may serve as a precedent with respect to subsequent cases. However, the Policy and Systems opinion does not constitute grounds for reopening the determination, if the evidence available as of the date of determination reasonably supported the determination awarding benefits.

2115 Fraud or similar fault of claimant

The decision may be reopened at any time if obtained by fraud or similar fault.

2115.01 Fraud

A determination induced by fraud of the claimant is one which would have been rendered to the contrary if the claimant had not knowingly made a false statement or claim for the purpose of causing benefits to be paid. The payments induced by fraud, as well as payments for the 75-day period of disqualification, are erroneous.

2115.02 Fault similar to fraud

A determination is considered to have been induced by fault similar to fraud if available evidence which a claimant knew or ought to have known was material to the case and which would have necessitated a different determination, was concealed or not furnished and the claimant should have furnished such evidence. In deciding whether a claimant knew or ought to have known that certain information was material to the case, consideration must be given to all the facts relating to the claimant's knowledge and understanding of the pertinent requirements, and to the conditions under which he/she failed to furnish information or furnished incorrect information. The following matters are among those which should be considered:

- a. The claimant's education, literacy, and general level of intelligence.
- b. The claimant's understanding of the pertinent requirements as demonstrated in the past.
- c. Specific explanations that Board employees made to him or her and the circumstances of such explanations.
- d. The claimant's explanation of his or her failure to furnish information or his or her failure to furnish correct information.
- e. The claimant's diligence using information booklets furnished to him or her.
- f. The reasonableness of the claimant's misunderstanding or misinterpretation of terms or instructions.
- g. The claimant's diligence in reporting, at the earliest possible moment, any change in his or her circumstances affecting his or her claim.

2116 Guidelines for Reopening in Selected Cases

This section gives some examples of circumstances in which reopening applies. This is not a definitive listing.

2116.01 Remuneration

If remuneration and benefits are attributable to the same days, the determination allowing benefits should ordinarily be reopened. Fraud or similar fault of the claimant is the most likely reason for reopening; therefore, the decision could be reopened at any time. In some situations it may be assumed, without investigation, that the determination was induced by fault (similar to fraud) of the claimant because in the given circumstances any claimant would be expected to know that benefits were not payable. Such an assumption may be made, for instance, when a day for which benefits were paid is:

- a. a day on which the claimant worked for an employer (railroad or non-railroad) and for which he received an identifiable amount of remuneration, or
- b. a day in a vacation period for which the claimant received pay for vacation (rather than pay in lieu of vacation).

2116.02 Availability for work

A finding that a claimant was not available for work on days for which unemployment benefits were paid may require reopening of the determination. The finding can be reopened within one-year for any reason.

Benefits are occasionally paid to a claimant, through oversight, after he or she has been held to be not available for work. If there is evidence as to the claimant's unavailability on the days for which benefits were paid, it must be concluded that the decision is not reasonably consistent with the evidence of record at the time of adjudication, hence the payment is erroneous. The decision can be reopened within four years of that date.

It is seldom found that payment of benefits for a period of unavailability was induced by any type of claimant fault. A claimant's statement that he or she is willing to perform some work, irrespective how trivial, and that he or she is in a position to perform such work is not inconsistent with his or her certification on Form UI-3 that he or she is available for work. However, where a claimant states that he or she is not willing to accept any work, or that he or she is not in a position to perform such work under any condition, the claimant should be asked to reconcile either of these statements with his or her certification on Form UI-3 that he or she is available for work.

2116.03 Ability - inability to work

Consideration should be given to reopening a determination of a claim allowing unemployment benefits if medical evidence is received clearly establishing that the claimant was not able to work. (Example: a claimant applies for sickness benefits shortly after exhausting unemployment benefits and the statement of

sickness shows that he became unable to work in the period for which unemployment benefits were paid.) Similarly, consideration must be given to reopening a determination of a claim allowing sickness benefits if it is established that the claimant was able to work during the period covered by the claim. Such determinations shall be reopened for reduction or cancellation of the allowance of benefits if the time limits required for reopening are found.

However, a determination allowing benefits may be reopened without investigation in any case in which the benefits to which the claimant is found not entitled may readily be recovered by offset against other benefits for the same days. That is, unemployment benefits to which the claimant was not entitled can be recovered by offset against sickness benefits or sickness benefits can be recovered by offset against unemployment benefits.

2116.04 Separation allowance disqualification

If it is found that benefits have been paid for days in a disqualification period established because of an employee's receipt of a separation allowance, the question of reopening the determination allowing benefits must be considered. The time limits set forth in this article are, of course, applicable. It may generally be assumed that payment of benefits was not induced by fraud or other fault of the claimant if the claim or claims were made before the separation allowance was paid. It may be considered, without investigation, that claims were made before the allowance was paid if the last day for which benefits were paid is no more than two weeks after the reported date of separation from service. In other cases, information should be obtained from the claimant or the employer as to:

- (a) the date on which the claimant signed a paper accepting the separation allowance,
- (b) the date stated in the paper as the date of separation from service, and
- (c) the date on which the separation allowance was paid.

Appendices

Regulations Part 349 Supersedes Board Order 61-146

Effective November 6, 2000.

Board Order 61-146

1. **Ruling With Respect To Reopening Determinations Of Claims For Benefits Under The Railroad Unemployment Insurance Act And Delegation Of Authority To Reopen Such Determinations In Certain Cases**

The reopening of determinations of claims for benefits under the Railroad Unemployment Insurance Act shall be governed by the following provisions:

- A. Authority to reopen claims under the provisions of this order, subject to the limitations in C below, is hereby delegated to the director of unemployment and sickness insurance, to the regional directors, and to such employees, grades GS-7 and over, as are selected by the director of unemployment and sickness insurance and the regional directors respectively.
- B. The opinion and conclusions of the general counsel, contained in his memorandum of August 16, 1939 (L-39-527), on reopening by the Board of final decisions on claims for benefits under Railroad Retirement Act, shall, to the extent that they are applicable, govern reopening of determinations made upon the Railroad Unemployment Insurance Act. The applications of these conclusions as set forth in the general counsel's memorandums of March 18, 1942 (L-42-177) and October 4, 1945 (L-45-650) is hereby continued in effect.
- C. No reopening shall extend to:
 - (1) Any issue settled by the decision of a referee or other reviewing body, or of the Board; or
 - (2) Any issue not affected by circumstances constituting grounds for reopening under the specific provisions of this order.
- D. When a determination is reopened, a new determination shall be made affirming, modifying, or reversing the previous determination.
- E. A determination allowing a claim in whole or in part shall be reopened for reduction or cancellation of the allowance upon a finding that the determination:
 - (1) Was made on the basis of a clear and obvious mistake of fact;
 - (2) Was based on evidence, as of the date of determination, which did not reasonably support the determination;
 - (3) Was made on the basis of a clear and obvious mistake of law; or
 - (4) Was, even though made on the basis of reasonable evidence and law, induced by fraud or other fault of the claimant.
- F. If reopening results in the reduction or cancellation of the allowance of claimed days of unemployment or sickness in a registration period, the amount by which benefits were increased by including such days as

days of unemployment or sickness in the registration period shall be recoverable by the Board, unless recovery is waived under section 2(d) of the Act.

- G. If a claim is reopened upon a finding that section 4(a-1)(i) of the Act is applicable with respect to the registration period, the amount by which benefits were increased by including any of the seventy-five days beginning with the first day of the registration period as days of unemployment or sickness in any registration period shall be recoverable, and claims with respect to registration periods including such days shall be reopened.
- H. Under no other circumstances may a determination allowing a claim in whole or in part be reopened for reduction or cancellation.
- I. A determination denying a claim for benefits in whole or in part shall be reopened for an allowance or an increase of the allowance upon a finding that the denial:
 - (1) Was made on the basis of a clear and obvious mistake of fact;
 - (2) Was based on evidence, as of the date of determination, which did not reasonably support the determination; or
 - (3) Was made on the basis of a clear and obvious mistake of law.
- J. A determination denying a claim for benefits in whole or in part may be reopened when new and material evidence is submitted provided there is no conflicting evidence or a previous conflict is satisfactorily explained.

