



Legal Opinion L-2005-06
March 25, 2005

U.S. Railroad Retirement Board
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TO: Marie Leeson
Chief of Calculation Analysis and Systems
Through: Ronald Russo
Director of Policy and Systems

FROM : Steven A. Bartholow
General Counsel

SUBJECT: Cancellation of an Application by an Employee Annuitant
where a Partition Payee is Involved

This is in reply to your request for advice regarding the recovery of overpayments resulting from the cancellation of an employee's application. Specifically, you inquire as to the recovery of payments made to a partition payee where the employee annuitant cancels his application.

Background

In a Judgment for Dissolution of Marriage entered on March 25, 1996, the employee's former spouse was awarded a hundred percent of the divisible portion of his annuity, when that annuity became payable. The employee filed an application for an annuity in October 1999 and the former spouse was awarded the divisible portion of his annuity. He subsequently withdrew the application and refunded the portion of his annuity paid to him. The portion of his annuity paid to the former spouse was never recovered or refunded. The employee again filed an application in April of 2000, but withdrew that application before any payments were made. He filed a third application in October 2000 and a total of \$3,714.40 was paid to him and the former spouse before his third cancellation request was processed. The employee was advised in a letter dated February 26, 2001 that he must refund all annuity payments made, though the amount to be refunded as stated in the letter erroneously excluded the amounts paid to his former spouse. The employee refunded the portion of the annuity paid directly to him. In a letter dated May 17, 2002, the employee was advised that he must also refund \$1,600.40, representing the portion of his annuity paid to his former spouse. This overpayment amount remains outstanding.¹

Discussion

The provisions governing the cancellation of applications filed for benefits under the Railroad Retirement Act are found in subpart D of the Board's regulations and provide, in part, as follows:

217.26 How to cancel an application. An application may be cancelled under the following conditions:

- (a) Before an annuity is awarded. The application may be cancelled if –
- (1) The applicant files a written request with the Board at a place described in § 217.15 asking that the application be cancelled or stating that he or she wants to withdraw the application;
 - (2) The claimant is alive on the date the written request is filed or the claimant is deceased and the rights of no person other than the person requesting the cancellation will be adversely affected; and
 - (3) the applicant files the written request on or before the date the annuity is awarded.

¹ The employee filed a fourth application in April of 2004. His annuity entitlement is currently in suspense, as he has again returned to work in the railroad industry.



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- (b) After an annuity is awarded. The application may be cancelled if –
- (1) The conditions in paragraph (a)(1) and (2) of this section are met;
 - (2) Any other person who would lose benefits because of the cancellation consents to the cancellation in writing; and
 - (3) All annuity payments already made based on the application being cancelled are repaid or will be recovered. 20 CFR 217.26.

The regulations further provide that, when a person cancels an application, the effect is the same as though an application was never filed. (20 CFR 217.27).

Your inquiry presents four questions, two of which relate to the application of section 217.26(b)(2) quoted above and two of which relate to the liability of overpayments arising from the cancellation of an application. The questions and my responses are provided below. Although the following discussion focuses on cases involving partition payees, the advice would also apply to cases involving garnishment recipients.

Question 1: Is a partition payee considered to be a “person who would lose benefits because of the cancellation” as referenced in [section] 217.26(b)(2) or are the benefits paid to the third party really considered to be owned or associated with the entitlement of the RR annuitant and not the third party?

Answer: A partition payee is not a person who would “lose benefits” because of the cancellation of an application, as that phrase is used in section 217.26(b)(2) of the agency’s regulations.

Generally speaking, when the term “benefits” is used in discussions related to the Railroad Retirement Act (RRA), the term is used to refer to entitlement under the RRA or perhaps the Social Security Act. A partition payee is a spouse or former spouse of an employee annuitant, who has been awarded by a state court, a portion of the employee’s monthly annuity as property. Consequently, the monthly payment the partition payee receives from the Railroad Retirement Board (RRB) is a property award, not an annuity payment or “benefit” under the RRA. Therefore, although payments to a partition payee terminate upon the cancellation of an employee’s annuity application, the partition payee will not “lose benefits” due to the cancellation, as that phrase is used in agency regulations.

The above interpretation is consistent with statutory history and the history of the RRB’s regulations regarding the cancellation of an application. It was not until 1983 that section 14 of the RRA was amended to allow for partition payments. The regulations governing the cancellation of applications were relocated to section 217.26 in 1982, from section 210. At that time, the above–quoted provision in section 217.26(b)(2) was already included in the regulations. Therefore, it is obvious that the phrase “any other person who would lose benefits” was not originally intended to include partition payees.

The scope of the application of the phrase “any other person who would lose benefits” in section 217.26(b)(2) could be broadened to include partition payees. If such action were taken, then partition payees would be required to acquiesce to an employee annuitant’s request to cancel an application. After weighing the rights of employees against the rights of partition payees, I do not believe it is appropriate to allow partition payees to prevent employee annuitants from canceling annuity applications. It must be recognized that many times, where partition payments are at issue, an acrimonious relationship exists between the parties. Where indeed such a relationship does exist, it is unlikely that the third party would consent to the cancellation regardless of the circumstances, thereby preventing the employee from being able to exercise his or her right to cancel an application.

Question 2: Does a partition payee need to consent to a request for cancellation by an annuitant after payments have been awarded?



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Answer: No. As explained in the answer to question 1, although payments to a partition payee terminate upon the cancellation of an application, such a payee is not a person who would lose "benefits" as that term is used in the regulations. Therefore, a partition payee need not consent to a request for cancellation.

Question 3: Is the employee or partition payee responsible for repayment of the amounts paid to the partition payee when the employee annuitant seeks to cancel his or her application?

Answer: The regulations provide that, after an annuity is awarded, an application may be cancelled if all annuity payments already made based on the application being cancelled are repaid or will be recovered. 20 CFR 217.26. As it is the employee who wishes to cancel the application, it is the employee who must satisfy all of the requirements for cancellation of an application. The cancellation request should not be honored unless the employee agrees to repay all payments made, including payments made to third parties.

Question 4: In the case of a cancellation, if the annuitant is liable for repayment of amounts paid to the partition payee, is it ever permissible to waive repayment of the moneys paid to the partition payee?

Answer: No. As noted above, the regulations provide that the effect of a cancellation is the same as though an application was never filed. See 20 CFR § 217.27. Under such circumstances, due process rights do not attach. Therefore, waiver of recovery of the payments made is not permissible. The cancellation request must be denied unless all annuity payments made are repaid by the employee annuitant or recovered from annuities due the employee. If recovery from annuities due the employee is the method by which refund is made, it should be noted that only that portion of the monthly annuity due the employee may be used to offset the amount to be repaid. That portion of the monthly annuity due the partition payee is indeed, payable to the partition payee.