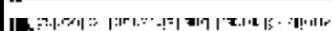


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THE BENEFITS PLANNER

KEYS TO EFFECTIVE BENEFITS PLANNING, ASSISTANCE AND OUTREACH

Seeking Waiver of a Social Security or SSI Overpayment

A Practical Guide for Advocates and Beneficiaries

Many beneficiaries of Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) have received that dreaded "Notice of Overpayment." This is the Social Security Administration (SSA) notice that states that one or more monthly payments received in the past either should not have been paid or should have been paid in a lower amount. For the individual who has gone to work despite a continuing disability, this notice may be viewed as a real set back to their long-term goal of financial independence.

The best advice for beneficiaries who work is always to do everything they can to avoid overpayments. By doing things like timely reporting changes in earnings and other income to SSA, the number of work-related overpayments should be reduced drastically (see box, p.167). Unfortunately, even when the individual

timely reports income or changes in income, sometimes SSA does not make a timely decision concerning either a reduction in benefits or an outright termination in benefits. This is where the right to appeal (i.e., file for reconsideration) or seek a waiver comes into play.

We last addressed overpayments in the Winter 2001-02 issue of this newsletter. In that issue, we went through both appealing the fact of the overpayment through the reconsideration process and seeking a waiver of SSA's right to collect the overpayment. This issue will focus exclusively on how to obtain the waiver. We hope that both beneficiaries and the agency personnel who work with them can use this newsletter as a guide to completing the Request for Waiver form (form SSA-632-BK) to maximize chances of having the waiver approved.

FOR TECHNICAL ASSISTANCE IN NEW YORK STATE CALL

1-888-224-3272

OR CONTACT US BY EMAIL: nywisc@nls.org

This publication is sponsored in part by the New York State Developmental Disabilities Planning Council and is a collaborative publication of Cornell University's Employment and Disability Institute and Neighborhood Legal Services, Inc. (NLS) of Buffalo, NY. The editors and primary authors are James R. Sheldon, Jr. of NLS and Edwin J. López-Soto of Cornell University.

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Sources of Overpayments

An overpayment can result from a seemingly endless variety of events. Most SSI overpayments are caused by excess unearned income, excess earned income, or excess resources. Many other factors can also affect the right to a check or affect the SSI payment rate that applies. For example, a person who is out of the country for 30 consecutive days will be ineligible for SSI. Similarly, a person who goes into a public institution for more than a full calendar month will also be ineligible. If an individual goes into a treatment facility for a full calendar month and Medicaid pays for at least 50 percent of the care, the SSI payment will be limited to \$35 per month. An individual who shares an apartment or house, and ceases to contribute to the household expenses, may face up to a one third reduction in the amount of SSI that is due. When the individual continues to receive the same SSI check, despite these changes in circumstances, it is likely that he or she will be overpaid.

A very common overpayment occurs when an SSDI beneficiary continues to receive benefits while performing substantial gainful activity (SGA), i.e., by earning more than \$860 gross per month in 2006 (or \$1,450 if legally blind) during the extended period of eligibility (EPE) or following the EPE. Compared to work-related SSI overpayments, the SSDI monthly overpayment amounts tend to be much higher. This is because these SSDI overpayments will almost always be equal to the full monthly check. So, for example, an SSDI beneficiary who performed SGA as their EPE began and continued to do so throughout their entire 36-month EPE will face a 33-month overpayment if they continued to receive SSDI throughout that period. If this individual received a \$700 per month SSDI check during these 33 months, he or she would face an overpayment of more than \$23,000. Sometimes overpayments like this occur, despite timely reporting of wages, because SSA's staff fails to timely determine continuing SSDI eligibility during and after the EPE.

Requesting a Waiver

The beneficiary can file the waiver request in one of two ways, by drafting a letter or by using SSA's Request for Waiver form. To avoid confusion, the beneficiary or advocate should use SSA's Request for Waiver form, SSA-632-BK, available on SSA's website at www.socialsecurity.gov/online/forms.html#other. The written request can either be

When to Call Our Toll-Free Technical Assistance Line

Our State Work Incentives Support Center offers a statewide, toll-free number to call for information and technical assistance on a wide range of issues involving benefits and work. The staff of Neighborhood Legal Services is available to take calls concerning any of the topics you see discussed in these newsletters. For example, if a caller seeks information about any of the information discussed in this article, you can call us at 1-888-224-3272 for more information on these issues.

mailed to the address specified on SSA's notice or it can be hand delivered to an SSA office. Many advocates routinely send these important documents by certified mail, return receipt requested, so that they can prove that the request was filed within any time limits established to allow for continuing benefits pending a decision on the waiver request. The official SSA form will eventually have to be completed in all cases as it asks a series of questions that go to the criteria that must be established to obtain a waiver.

Requests for waiver typically will be supported by the underlying facts. In many cases, the beneficiary or the beneficiary's attorney or advocate will need to submit additional documents to support their case. For example, in the case of a waiver request, which seeks to establish that the beneficiary was without fault in causing the overpayment, the individual or advocate may wish to submit copies of a series of SSA notices which support the beneficiary's contentions.

No time limits for requesting a waiver. Since a request for waiver is not, technically, an appeal there is no time limit for requesting the waiver. However, if the beneficiary seeks continued benefits pending a decision on the waiver, the beneficiary must act promptly to preserve that right, following the time limits that appear on the notice. *See, e.g.,* Social Security Program Operations Manual (POMS) GN 02201.009, .011 D (applies to both SSI and SSDI), providing that benefits will not be reduced to recover an overpayment until an initial determination on the waiver request is made, if the waiver is requested within 30 days of the notice. Similarly, if the waiver request is filed more than 30 days after the notice, any action to recover the overpayment will cease until the initial determination is made.

This opportunity to file the Request for Waiver at any time, with no time limit, is very important. For example, an individual may face a \$10,000 overpayment that was not his or her fault. However, since the individual is now working and able to repay a monthly amount out of their SSDI or SSI check, they do not seek a waiver. On the other hand, if 18 months down the road the individual is laid off and can no longer afford to repay the overpayment, the Request for Waiver form can be filed at that time.

NOTE: Although the focus of this article is on obtaining waivers of SSA's right to collect an overpayment, the beneficiary or advocate should routinely consider appealing (i.e., filing a reconsideration) in any case in which it appears that the overpayment determination or the amount of the overpayment found by SSA may be incorrect. A reconsideration must be filed within 60 days of receipt of the notice of overpayment. By contrast, if seeking a waiver the individual is typically conceding that all or part of the overpayment is correct but contends that he or she meets the criteria for SSA to waive its right to collect the overpayment.

Establishing the Right to a Waiver

The SSI and SSDI programs follow the same two-part test for granting a waiver. The beneficiary must satisfy part one and one of part two's three alternatives. Unless the waiver is for less than \$500 and the beneficiary can make use of the "administrative waiver" provisions (see p.170, below), this is the criteria that must be met.

Part One: Was the Beneficiary Without Fault?

When an individual first qualifies for benefits and periodically thereafter, SSA provides written notices that detail the beneficiary's obligation to report changes in income, living arrangements, marital status, and other things that may affect continuing eligibility. A good general rule to follow is that monthly income should be reported to SSA within 10 days of the last paycheck received each month, unless SSA has agreed upon less frequent reporting. If the beneficiary has timely reported wages and other income, he or she should be able to establish they were without fault unless the beneficiary knew or should have known that the checks they received were more than they were entitled to.

Even if the beneficiary timely and accurately reported wages, unearned income or other events af-

Taking Steps to Avoid Work-Related Overpayments

SSI and SSDI beneficiaries who are working can take several steps to minimize the chances of receiving an overpayment:

- Consult a benefits specialist at one of the regional Benefits Planning, Assistance and Outreach (BPAO) projects, whose job it is to counsel beneficiaries on how work affects benefits. See box on p.171 for contact information on the BPAO project closest to you. The benefits specialist can help you understand and plan for the impact of work on benefits.
- Timely report to SSA when you go to work, when wages increase, or when your wages decrease.
- Keep good records: of what you earn and when you earn it; of "impairment related work expenses"; of anything that might be evidence that wages are subsidized.
- An SSI beneficiary should error on the side of providing high wages estimates. By doing so, the individual will be slightly underpaid SSI benefits in most months, offsetting the occasional overpayment caused by extra work hours.

fecting eligibility, the individual can still be at fault if they knew or had reason to believe that the SSI or SSDI checks received were either not due or were for more than were due. For example, some beneficiaries may know the rules governing work and benefits very well. If they continued to receive the same SSI check after a significant increase in wages, or continued to receive an SSDI check despite performing SGA throughout the extended period of eligibility, SSA may decide the individual was not without fault because they had reason to know that they were not entitled to the checks they received.

On the other hand, a majority of beneficiaries have, historically, had very limited knowledge of how work affected benefits. Many advocates have successfully asserted to SSA's decision makers that the rules for determining SGA, the trial work period, the extended period of eligibility, impairment related work expenses and subsidies are so complex that very few beneficiaries can be expected to know how they operate. Faced with a series of complex rules that even the best SSA Claims Representative struggles with, many SSA staff have been very willing to find the beneficiary without fault so long as the in-

Resources for Advocates

If you work in an advocacy position or as an attorney, you will need resources that go into much more detail than this newsletter. We recommend the following resources to support your work on overpayments and a wide-range of issues related to benefits and work:

- Cornell University's Employment and Disability Institute's "Policy and Practice Brief" series. To find links to the more than 25 policy and practice briefs, you can go directly to Cornell's website, www.ilr.cornell.edu/edi/s-PPBriefs.cfm, or can you use the links on the Neighborhood Legal Services website, www.nls.org/policypracticebriefs.htm.
A very extensive article on overpayments, titled *Dealing With Post Entitlement Issues*, can be found at www.ilr.cornell.edu/edi/publications/PPBriefs/PP_5.txt or www.ilr.cornell.edu/edi/publications/PPBriefs/PP_5.pdf.
- *Benefits Management for Working People With Disabilities: An Advocate's Manual* (Empire Justice Center 2004 & 2006 Supp.). This 193-page, 12 chapter reference book, with an 11-page supplement, is considered by many to be the definitive resource on the subject of benefits and work. Each chapter (including a 23-page chapter on overpayments) contains extensive citations to relevant laws, regulations, policies, and selected case law. To obtain information about ordering the manual, contact the Empire Justice Center at 585-454-4060.

dividual timely reported his or her wages.

When evaluating without fault in a case in which the individual failed to report earnings, SSA must consider all the circumstances, including the individual's disability (e.g., did they not understand the notice because of a low IQ or a visual impairment?), age, education (e.g., is the individual functionally illiterate?), and comprehension of reporting requirements. Often, a supporting statement from a counselor, case manager, or relative will be helpful in supporting the beneficiary's assertion of without fault.

Part Two: Three Alternative Tests

Having established that the beneficiary is without fault in part one, the individual must now satisfy one of three alternative tests in part two to have the waiver request granted.

Alternative 1: Would recovery cause an undue hardship? Current SSI recipients automatically meet this test. On the Request for Waiver form, once the questions related to fault are completed, the SSI recipient is not expected to complete the questions about household income and expenses as an SSI recipient is presumed to be incapable of repaying the overpayment without undue hardship.

For persons not on SSI, i.e., recipients of SSDI only, SSA presumes recovery of the overpayment will cause an undue hardship if the person uses substantially all of his or her income to meet "ordinary

and necessary living expenses," and if resources are less than \$3,000 for an individual or \$5,000 for a couple, with \$600 added for each additional dependent. Whether a person meets this test will be determined by how they answer the Request for Waiver form's series of questions to establish income, expenses, and resources available to repay the overpayment.

Detailing expenses of the beneficiary. The Request for Waiver form contains the following categories of expense: rent or mortgage, food, utilities, other heating/cooking fuel, clothing, credit card payments (minimum monthly payment), property taxes, other taxes or fees (trash, water, sewage), insurance (health, renters, car), medical-dental (amounts not paid by insurance), car operation/maintenance, other transportation, charity-church donations, loan-credit-lay-away payments, and support for someone not in the household. Additionally, the form provides for "any expense not shown above" and a place for "Expense Remarks." See form SSA-632-BK, part 20.

Although the listed categories seem to be exhaustive, most beneficiaries who complete the expenses section of the Request for Waiver form tend to leave out many additional expenses. For example, the following expenses are often not included when the beneficiary completes the form:

- a snow-removal or lawn service (if the disability precludes either activity)
- non-food grocery items (e.g., cleaning products, toiletries)
- over-the-counter medications or vitamins (if prescribed by a physician)
- haircuts
- a daily newspaper
- modest amounts for birthday and holiday gifts
- modest amounts for entertainment
- household maintenance for homeowners
- co-payments for doctor or therapy visits
- occasional dry cleaning
- occasional long distance charges to retain family relationships
- cable T.V.

One reason that these and other expenses get left off the completed Request for Waiver form is because they are not listed as categories of expenses. However, these are nearly all “ordinary and necessary” expenses. Some may debate whether cable T.V. is a legitimate expense, but many individuals with disabilities report that it is one of their only forms of entertainment.

Even those expenses that are not incurred every month (e.g., a haircut, gifts, vehicle maintenance, clothing) should be calculated based on a yearly estimate divided by 12 to come up with a monthly amount. So, for example, six haircuts at \$14 apiece would be \$84 for the year or \$7 per month. Combined birthday and Christmas gifts of \$120 per year would be \$10 per month. If personal finances do not allow the person to purchase replacement clothing, get regular haircuts, or buy gifts for family, for example, those facts could be explained in the “Expense Remarks” section of the form.

Alternative 2: Would recovery be against equity and good conscience? Recovery will be waived for any individual who is without fault and for whom recovery would be “against equity and good conscience.” If an individual has lost valuable rights or changed his or her position for the worse as a result of reliance upon the overpaid funds, then SSA will waive recovery of the overpayment. To prevail on this ground, the individual should describe ways in which he or she either declined additional income

(such as refusing a job promotion) or spent money, or otherwise became obligated to spend money due to a reasonable belief that incorrect payments were correct. For example, SSA should be able to find recovery against equity and good conscience if an individual leased a more expensive apartment believing that an incorrect benefit rate was correct.

SSA has also instructed its staff to find recovery against equity and good conscience and waive any SSI overpayment caused by excess resources of \$50

Medicaid Updates for 2006

The Medically Needy Program. You can use the chart below to find Medicaid’s monthly income and resource levels for individuals with disabilities. This is sometimes referred to as the medically needy or spend down program.

# in Family	Income Limit	Resource Limit
1	\$692	\$4,150
2	\$900	\$5,400

Keep in mind that an individual with countable income that is higher than the income limit amount can establish Medicaid eligibility with a spend down.

The Medicaid Buy-In Program. This program, officially called the “Medicaid Buy-In for Working Persons with Disabilities” (MBI-WPD) program, began in July 2003 and allows for Medicaid eligibility at much higher levels of income if the individual has a disability and is working at least part time. The following shows the 2006 Medicaid buy-in eligibility threshold for eligibility (under 250 percent of the federal poverty level or FPL) and premium-free eligibility (under 150 percent of FPL) for a one-person household.

Income Limit (250% of FPL)	Income Limit (150% of FPL)	Resource Limit
\$2,042	\$1,225	\$10,000

Keep in mind that these are “countable income” figures, i.e., after applying SSI-related disregards. Since more than half of gross earned income will be excluded using the SSI rules, an individual with only wages could earn in excess of \$50,000 per year and still remain eligible under the buy-in.

Even though the Medicaid agency is authorized to charge a monthly premium for incomes between 150 and 250 percent of the federal poverty level, as this newsletter goes to press the agency has still not started collecting premiums.

or less. Similarly, SSA has instructed its staff to waive the remainder of any SSI overpayment, resulting from excess resources, once SSA has first recouped the amount of money that exceeded the resource limit.

Example. Jerry, who receives \$690 per month in SSI benefits, maintained a bank account of \$2,500 (i.e., \$500 more than the SSI resource limit for an individual) for 10 consecutive months. SSA learns of this and notifies Jerry that the excess resources made him ineligible during these 10 months and that he has been overpaid \$6,900 (10 x \$690). SSA also notifies Jerry that they will begin collecting \$69.90 from his monthly SSI check (i.e., the maximum 10 percent allowed from an SSI check).

Jerry may wish to seek a waiver if he believes he was without fault (e.g., if he did not understand the SSI resource rules). If Jerry either chooses not to file a waiver request or seeks a waiver and it is denied, SSA will be limited to a total recovery of \$500 (the amount he was over the resource limit) rather than the \$6,900 figure.

Finally, it should be pointed out that the evaluation of equity and good conscience does not take into account the individual's finances. Thus, it may provide a

crucial ground for obtaining waiver of overpayments in cases where the overpaid individual has income or resources too high to ever permit the individual to establish that recovery would create an undue hardship.

Alternative 3: Would recovery impede the effective and efficient administration of the SSI program due to the small amount involved? Recovery will be waived for any individual who is without fault if recovery would impede the efficient and effective administration of the SSI program in that the amount of the overpayment is less than the average cost of attempting to recover it. The availability of waiver on this ground depends on the amount of the alleged overpayment. For example, if the overpayment is between \$1 and \$30, SSA will send a notice only under certain very rare conditions. If notice is sent and the individual requests a waiver, SSA will grant it automatically.

In other cases, for both SSI and SSDI, if the overpayment is less than \$500 and the individual requests waiver and reconsideration, SSA will presume "without fault" and will grant the waiver. In addition if the overpayment is less than \$500 and the recipient requests only reconsideration, SSA will treat the request for reconsideration as a request for waiver and

Forms, Other Resources Available on SSA's Website

The Social Security Administration's website, www.socialsecurity.gov (the SSA home page), has a wealth of information available to beneficiaries, advocates, and others who must work on SSI and SSDI issues. Here are just a few links that readers should find helpful:

- **Forms.** From SSA's homepage, under "resources" (currently on right side of page), click on "forms." To find the forms for Request for Waiver (SSA-632-BK) or Request for Reconsideration (SSA-561-U2), scroll down to "other forms" and select the appropriate form. Generally, the form will come up in a PDF format, appearing just like the form you would get in SSA's offices. The forms can be printed for the beneficiary's use.
- **Publications.** From that same "resources" section of SSA's home page, you can click on "publications." This takes you to another screen (or "page") where you'll have a wealth of publications to choose from. If you must regularly deal with questions about Social Security and SSI, you may want to check out the "Social Security Handbook," a great resource for your everyday questions.
- **Regulations and policy.** At the "resources" section of the home page, you'll find a link for "our program rules." By clicking on this link, you'll be taken to a page with links to the regulations, the Program Operations Manual Systems (POMS), and the Social Security Handbook, among other things.
- **Representing claimants.** Although you can get there through links on the home page for "attorneys, representatives, and health professionals," most of us who are heavily involved with SSI and SSDI will just remember www.socialsecurity.gov/representation. Among other things, this will give you a direct link to the POMS manual where you can look for the policies that SSA staff rely on daily. On the POMS site, you can even use the search function to find relevant policies.
- **The Work Site.** At www.socialsecurity.gov/work, you will find links to a variety of resources that will be helpful if you work with beneficiaries who are working or planning to work, including information about work incentives and the availability of Benefits Planning, Assistance and Outreach (BPAO) projects throughout the state and country.

will waive recovery of the overpayment. NOTE: This nearly automatic waiver of overpayments of less than \$500 is often referred to as an “administrative waiver.” Keep in mind that these waivers are not automatic and SSA will begin collecting the overpayment from current benefits if the beneficiary takes no action in response to the notice.

The Right to Appeal if the Request for Waiver is Denied

SSA considers any decision on the Request for Waiver to be an “initial decision.” Thus, if the Request for Waiver is either denied or denied in part, the beneficiary has the right to appeal this decision by filing a Request for Reconsideration.

Like all appeals, the Request for Reconsideration must be filed within 60 days of receipt of the decision denying the Request for Waiver. If the decision on the Request for Reconsideration also denies the waiver request, the beneficiary now has a right to request a hearing before an administrative law judge. Subsequent appeals would be to the Social Security Appeals Council and the U.S. District Court.

At each of these appeals levels the same 60 day time limit for requesting the appeal applies. Also, at each appeal level, the criteria for granting the waiver will be the same, i.e., the beneficiary must satisfy the two-part criteria that is discussed above.

Conclusion

One of our colleagues recently stated, in a planning meeting, that every beneficiary who goes to work will face at least one overpayment. While this may be an exaggeration, it is probably only a slight one. A very significant number of beneficiaries who work will face overpayments. Even though the majority of those overpayment determinations may be correct, a great number of them are not the fault of the beneficiary. With SSI, that alone would be enough to establish the right to a waiver. With SSDI, the beneficiary will also need to show that they cannot afford to repay the overpayment (in most cases) to have the waiver request granted.

Unfortunately, many beneficiaries struggle to repay overpayments when waivers would probably be available to them. This may be because they do not understand the waiver process or how to properly complete the Request for Waiver form. With the help of our readers, we hope that many more beneficiaries will be able to take advantage of this waiver process.

Call 1-888-224-3272, toll free, for Statewide Technical Assistance.

Benefits Planning, Assistance & Outreach Projects in New York

The following are the Benefits Planning, Assistance and Outreach (BPA&O) projects serving New York State and the contact persons for each office. The BPA&Os are funded by the Social Security Administration and are available to inform SSI and SSDI beneficiaries of the work incentives available to them and how going to work will affect their SSI, SSDI, Medicaid, or Medicare benefits.

Resource Center for Independent Living	Connie Angelini	315-797-4642	401-409 Columbia Street, P.O. Box 210, Utica, NY 13503-0210
Research Foundation for Mental Hygiene (“Brooklyn Works”)	Olga Ivnitsky	718-256-5631	8620 18th Avenue, 1st Floor Brooklyn, NY 11214
Neighborhood Legal Services of Buffalo, Inc.	Krista McDonald	716-847-0650	295 Main Street, Room 495, Buffalo, NY 14203
Abilities, Inc., National Center for Disability Services	Leslie Monsen	516-465-1522	201 I.U. Willets Road, Albertson, NY 11507
Barrier Free Living, Inc.	Angela Caula	212-677-6668	270 East Second Street, New York, NY 10009
Independent Living, Inc.	Ian Weinstein	845-565-1162	5 Washington Terrace, Newburgh, NY 12550

The NY State Work Incentives Support Center will provide statewide services, including: training through traditional means and through use of the latest technology for distance learning; a toll-free technical assistance line, 1-888-224-3272 (English and Spanish); and a quarterly newsletter, The Benefits Planner. To subscribe to the Center's listserv, send your name and email address to tpg3@cornell.edu. To request a print copy of this newsletter, contact the toll-free number above.



Welcome to *The Benefits Planner*, a Quarterly Newsletter of the NY State Work Incentives Support Center

This newsletter will provide valuable information on how work for persons with disabilities affects government benefits, with an emphasis on the Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) work incentives. Each newsletter will contribute to an ongoing dialogue on topics related to benefits and work. Back issues will appear on the Cornell University website, www.ilr.cornell.edu/edi/BenefitsPlanners.cfm and on the Social Security section of the Neighborhood Legal Services website, www.nls.org.

If you have special needs and would like *The Benefits Planner* sent in a special format, would like our Spanish version or would like the newsletter delivered by email, please call our toll-free technical assistance line, 1-888-224-3272.

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