

May 15, 1997
L-97-23

TO : John L. Thoresdale
Director of Policy and Systems

FROM : Steven A. Bartholow
Deputy General Counsel

SUBJECT : Recovery of Debts from Lump Sum Death Payments

This is in reply to your inquiry regarding the administrative offset of lump sum death payments (LSDPs) provided for by section 6(b)(2) of the Railroad Retirement Act (A1974 Act@)(45 U.S.C. ' 231e(b)(2)). You noted that Legal Opinion 45-217 held that an LSDP need only become Aduel@ upon death of the employee, rather than Apayable,@ prior to offset against erroneous overpayments, but that the 1974 Act has since restricted payment of an LSDP only to a Aliving in same household@ widow(er). Accordingly, you have requested advice as to whether: (1) the distinction between survivor benefits Aduel@ and Apayable@ as described in L-45-217 is still valid, and (2) if the distinction is still valid, whether a 1974 Act LSDP may still be considered Aduel@ if there is no living in same household widow(er).

Section 10(a) of the 1974 Act is substantially identical to section 9(a) of the Railroad Retirement Act of 1937 (A1937 Act@) as cited in L-45-217, providing for recovery of erroneous overpayments by administrative offset, as follows:

If the individual to whom more than the correct amount has been paid dies before recovery is completed, recovery may be made by set off or adjustments, under regulations prescribed by the Board, in subsequent payments due, under this Act, or the Railroad Unemployment Insurance Act, to the estate of such individual or to any person on the basis of the compensation, wages, or self-employment income of such individual.

Following principles of statutory construction, L-45-217 enunciated a valid distinction between payments under the statute to which an individual is Aentitled,@ and those payments which are merely considered Aduel@ to a survivor or the estate of a deceased employee. Principally, the opinion notes that section 9(a) of the 1937 Act required that an employee become Aentitled@ to a payment prior to offset against erroneous payments, but that offset may commence against payments Aduel@ a survivor or an employee's estate.

L-45-217 reached its holding, however, by distinguishing the terms *Due* and *Payable*, when the term *Payable* does not appear in any of the relevant statutory or regulatory provisions. Rather, section 9(a) of the 1937 Act and section 10(a) of the 1974 Act provide for the offset of payments *Due* as opposed to payments to which an individual is *Entitled*. Accordingly, I am of the opinion that the term *Due* is most accurately understood in view of the relationship between the regulatory and statutory authority for a type of payment and a person's status as either *Eligible* or *Entitled* to receive such payment.

The Board is authorized to pay only those benefits defined by statute to those persons who are eligible for a benefit and who establish their entitlement by filing an application for payment. Under the Board's regulations at 20 CFR 234.2, a person is *Eligible* for a lump-sum payment if he or she meets the statutory requirements for payment of an annuity or a lump-sum, but has not yet filed an application. A person is *Entitled* to a lump-sum payment if he or she meets the statutory requirements for an annuity or a lump-sum payment, but has filed an application for such payment. A lump sum payment thus becomes *Due* when there exists a person who meets the statutory requirements for payment of that benefit. It is thus my opinion that 1974 Act LSDPs are not *Due*, and thus may not be offset to credit an erroneous overpayment, when there is no one who meets the statutory requirements for payment of the benefit, in this case, a living-in-same household widow(er).

This reasoning is consistent with treatment of other lump-sum payments under the 1974 Act. Statutory authority clearly exists for determining that an employee's estate is ultimately eligible for other types of lump-sum payments, and thus, such payments may be considered *Due* to the estate and may be offset pursuant to section 10(a), even when survivors do not exist or are unknown, and even when no application has been filed. Further, the estate of a deceased employee may be *Eligible* for a lump-sum payment even in the absence of formal estate probate or administration (see, for instance, 20 CFR 234.15(b)). In the case of annuities accrued but unpaid at death, sections 6(a)(1)-(3) of the 1974 Act do not provide for distribution of such payments to an employee's estate. However, the unpaid annuities were due prior to the employee's death and may, in my view, be offset to reduce the outstanding overpayment.

I recommend that any change regarding the offset of 1974 Act LSDPs be implemented prospectively from the date of this opinion.