

May 17, 1999
L-99-6

TO: Nancy Z. Marks
Chief of Calculation Analysis and Systems
Through: Director of Policy and Systems

FROM: Steven A. Bartholow
General Counsel

SUBJECT: Administrative Finality and Vested Dual Benefit Audit Cases

This is in reply to your memorandum of April 1, 1999, regarding the handling of cases where vested dual benefits were never paid or were underpaid. You inquire concerning the handling of cases where the employee is deceased and an accrual would be payable to his or her widow(er), and it is more than four years since the award of the widow(er)'s annuity. You ask whether the award of the widow(er)'s annuity should be reopened for reduction (attributable to the employee's vested dual benefit).

Part 261 of the RRB's regulations provides for reopening of a decision which is more than four years old only in limited, specified circumstances, none of which applies to the cases you describe. Accordingly, absent action by the Board pursuant to section 261.11, as described below, widow(er)s' annuities should not be reopened in these cases.

We note that the result in the case of the widow(er)s' annuities is independent of the treatment of the payment of any accrued vested dual benefits which were due the employees. These cases fall into two categories. The first is where there was a failure to pay the vested dual benefit at the time of the award of the employee annuity. In this case the initial certification could be reopened pursuant to section 261.2(c)(7), which provides that a decision which is wholly or partially unfavorable may be reopened at any time to correct a clerical error or an error that appears on the face of the evidence that was considered when the decision was made. Secondly, it would appear that in the case of an employee who was entitled to, but not paid, a vested dual benefit at some time after his or her annuity beginning date, that failure to pay did not constitute a decision which needs to be reopened; in those cases, the vested dual benefit would be awarded at the present time without reopening.

Although, as noted above, the general reopening rules set forth a part 261 do not authorize reopening of the widow(er)s annuities, under the authority provided the three-member Board in section 261.11, the three-member Board may determine to reopen or not reopen claims that otherwise would be reopened or not reopened under part 261. Under this provision, the Board could direct that the widow(ers)' annuities be reopened as a condition for receiving any accrual of vested dual benefits. Widow(er)s could be given the option of pursuing payment of the Vested Dual Benefit accrual.

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Nancy Z. Marks
Chief of Calculation Analysis and Systems

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April 16, 1999

Tom –

Marks does not ask about reopening the employee annuities – so I don't think we have to address that.

MCL

TO : Bob Bergeron
Assistant to Labor Member

FROM : Steven A. Bartholow
General Counsel

SUBJECT: Legal Opinion L-99-6

This is in response to your memorandum dated July 22, 1999, in which you request clarification of advice provided in Legal Opinion L-99-6. In that opinion we noted that in the case of an employee who became entitled to a vested dual benefit after the initial award of his annuity, but was not paid the benefit at that time, the failure to pay did not constitute a decision which is subject to Part 261. Consequently, the employee may be paid the vested dual benefit at any time without regard to the reopening regulations.

You now inquire as to whether the payment may be retroactive to date of entitlement to the vested dual benefit. The answer is yes. In such a case the award of the vested dual benefit is treated as an initial award of benefits payable from the first month of entitlement.

cc: Director of Policy and Systems
Chief of Calculation Analysis and Systems