

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROBERT J. DOYLE, SR.	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 03-cv-264
JO ANNE BARNHART,	:	
Commissioner of Social Security	:	

MEMORANDUM

Baylson, J.

March 28, 2005

I. Introduction

Presently before this Court are cross-motions for summary judgment regarding Plaintiff's old-age or retirement insurance benefits ("RIB") and whether they are subject to the "Windfall Elimination" provisions ("WEP") under Section 215(a)(7) of the Social Security Act, 42 U.S.C. § 401, *et seq.* ("the Act").

Petitioner, Robert J. Doyle, filed a *pro se* Complaint in this Court against Jo Anne Barnhart, the Commissioner of Social Security, on January 21, 2003. The case was referred to Magistrate Judge Charles B. Smith ("the Magistrate Judge") on August 24, 2004. On September 28, 2004 the Magistrate Judge issued a Report and Recommendation ("R&R") pursuant to 28 U.S.C. § 636(b)(1)(c) suggesting that this Court deny the Defendant's Motion for Summary Judgment and grant the Plaintiff's Motion for Summary Judgment to the extent that the March 4, 2000 notice be rescinded and Plaintiff's benefits be restored to their original amount, plus any cost of living adjustments due. On October 13, 2004, Defendant filed objections to the R&R. Plaintiff did not file a Response to the objections. Upon independent and thorough consideration of the administrative record and all filings in this Court, Defendant's objections are overruled and the recommendations by the Magistrate Judge are accepted.

II. Background and Procedural History

A summary of the pertinent background facts and procedural history follows.

- October 26, 1995
Plaintiff filed an application for old-age insurance benefits indicating that upon retirement he would also be collecting a civil service annuity from the Office of Personnel Management and that his military service from January 1951 through January 1954 was used to compute the civil service annuity. Administrative Record (“R”) at 175-76.
- November 13, 1995
The Commissioner of Social Security informed Plaintiff by letter that he would receive benefits beginning in January 1996, the first month that he would earn less than \$680. (R. at 107-09).
- December 9, 1995
Plaintiff stopped working.
- March 4, 2000
The Commissioner sent Plaintiff a “Notice of Change in Benefits Form,” informing him that he had been overpaid \$1,064. The notice also informed Plaintiff of his right to request reconsideration within 60 days and his right to request waiver. The notice stated that if he requested reconsideration or waiver within 30 days, the overpayment would not be collected until the case was reviewed. (R. 71-74).
- May 8, 2000
Plaintiff filed a request for reconsideration (sixty-five days after receiving the notice) stating that he had thirty years of substantial earnings and claimed that the windfall provision did not apply to him. (R. 75).
- April 2, 2001
Field Office Manager, Terry G. Parson, sent Plaintiff a letter requesting additional information to process Plaintiff’s request for waiver. (R. 77). Plaintiff replied by stating that he had never requested waiver. (R. 79). Plaintiff explained that he did not think he was subject to the “windfall provisions” because of his thirty years of employment and further stated that the March 4, 2000 letter did not explain why there was an overpayment and that he still had not received an explanation. He indicated that he had written a letter to Congressman Weldon’s office and on July 3, 2000, the Social Security Administration sent a letter to the Congressman’s attention explaining that Plaintiff had 28 years of covered

employment and that his military service could not be credited as coverage under Social Security because it was used to determine his pension from the Office of Personnel Management. (R. 76).

- April 18, 2001
Social Security issued a Notice of Reconsideration explaining that the determination had been reconsidered by a separate staff and they had agreed with the original decision. It further instructed that Plaintiff had 60 days to request a hearing. (R. 80). Attached to the notice was a detailed Reconsideration Determination, which fully explained that Plaintiff's primary insurance amount ("PIA") used for determining his benefit calculation was subject to the alternate calculation of the Windfall Elimination Provisions ("WEP") because he was receiving a pension including non-covered employment. It also explained that his military service could not count in the number of years used in determining his benefits because it had been counted towards determining his pension. The determination included a detailed explanation of the calculation of Plaintiff's benefits and affirmed the original decision. (R. 82-86).
- July 15, 2002
Upon Plaintiff's request, a hearing was held before Administrative Law Judge ("ALJ"), William Redd. Plaintiff, not represented by counsel, testified on his own behalf and his son also appeared. (R. 26-70).
- September 26, 2002
The ALJ issued a written decision, finding that Plaintiff's PIA should have originally been calculated using the alternate WEP, contained in 20 C.F.R. § 404.213 and that Plaintiff's military service could not be counted towards his old-age benefits because it was used in the determination of his federal pension. (R. 8-12). However, the ALJ found that because the "initial determination" of Plaintiff's benefits was made on November 13, 1995, and the action taken to reduce his benefit amount was taken on February 29, 2000, with the notice dated March 4, 2000, such action reducing Plaintiff's benefits was precluded by the Social Security regulations at 20 C.F.R. § 404.988. (R. 11). The ALJ found that there was no fraud on the part of Plaintiff and that Social Security, pursuant to its own regulations, was precluded from changing Plaintiff's benefit amount since more than four years had elapsed since the initial determination. (R. 11).
- November 25, 2002
Plaintiff sent a letter to the Appeals Council, requesting review of the ALJ's decision. (R. 135-136).

- September 24, 2003
 The Appeals Council granted Plaintiff's request for review. In that letter, the Appeals Council informed Plaintiff that absent new and material evidence and/or pertinent legal argument, it concurred with and was prepared to adopt the ALJ's finding that Plaintiff's benefits should have been calculated using the WEP, but did not concur with the ALJ's finding that Social Security was prohibited from changing Plaintiff's benefits because his determination was no longer subject to reopening. Specifically, the Appeals Council explained that it was prepared to find that the initial determination of November 13, 1995, was not an initial determination of whether his benefits were subject to the windfall elimination provision, because at the time the determination was made Plaintiff was still working for the federal government and was therefore not receiving his pension. They were prepared to find that it was not a reopening because the initial determination as to the WEP was made on March 4, 2000 and that his benefits were subject to the provision from January 1996 forward. The Appeals Council further stated that Plaintiff's request for reimbursement of his expenses would be denied because there is no legal authority for such reimbursement. (R. 180-182). The letter informed Plaintiff that he had 30 days to submit additional information or to request an opportunity to present oral argument. (R. 181-182).

- November 7, 2003
 The Appeals Council issued its decision, finding that the calculation of his benefits was subject to the WEP, that the initial determination did not occur until March 4, 2000, and denying his request for reimbursement of costs. (R. 131-133).

- January 21, 2003
 Plaintiff commenced the present action.

- September 28, 2004
 The Magistrate Judge issued a Report and Recommendation ("R&R").

- October 13, 2004
 Defendant filed objections to the R&R.

III. Standard of Review

The Social Security Act provides for judicial review of any "final decision of the Commissioner of Social Security." 42 U.S.C. § 405(g). The district court may enter a judgment

“affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” Id. However the Commissioner’s findings “as to any fact, if supported by substantial evidence, shall be conclusive.” Id. (emphasis added).

Accordingly, this Court’s scope of review is “limited to determining whether the Commissioner applied the correct legal standards and whether the record, as a whole, contains substantial evidence to support the Commissioner’s findings of fact.” Schwartz v. Halter, 134 F.Supp.2d 640, 647 (E. D. Pa. 2001).

Substantial evidence has been defined as “more than a mere scintilla” or “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971). Although a reviewing court has a duty to review the evidence in its totality, Schonewolf v. Callahan, 972 F. Supp. 277, 284 (D.N.J. 1997) (quoting Daring v. Heckler, 727 F.2d 64, 70 (3d Cir. 1984)), the substantial evidence standard “is deferential and includes deference to inferences drawn from the facts if they, in turn, are supported by substantial evidence.” Schaudeck v. Commissioner of S.S.A., 181 F.3d 429, 431 (3d Cir. 1999). The ALJ’s findings of law, however, are subject to plenary review. See Wright v. Sullivan, 900 F.2d at 678; Podedworny v. Harris, 745 F.2d 210, 221 n.8 (3d Cir. 1984).

IV. Summary of Magistrate Judge’s Report and Recommendation

The Magistrate Judge concluded in his R&R that the calculation of Plaintiff’s primary insurance amount (“PIA”) used to calculate his benefits should have been determined using the alternate WEP. (R&R at 6-7). This conclusion is based on section 215(a)(7) of the Social Security Act, 42 U.S.C. § 415(a)(7), and the regulations interpreting the Act at 20 C.F.R. 404.213

(2004). Based on the statute and regulations, the calculation of old-age insurance benefits or retirement insurance benefits for a claimant who is entitled to a pension based upon employment not covered by Social Security may be subject to an alternate formula, known as the Windfall Elimination Provision (“WEP”). When applicable, a claimant is subject to the alternate formula if he became eligible for benefits after 1985 and also became eligible for a monthly periodic payment based in whole or in part upon earnings for non-covered employment after 1985. 42 U.S.C. § 415(a)(7)(A); 20 C.F.R. § 404.213(a)(1), (3).

In this case, Plaintiff stated in his application for benefits that he would be eligible for a pension from the Office of Personnel Management beginning in January 1996. This pension includes military employment which was not covered by Social Security. He first became eligible at age 62 for both Social Security RIB and his pension from the Office of Personnel Management, based on earnings not covered by Social Security, on December 7, 1995. (R. at 9). As a result, this court agrees with the Magistrate Judge that the calculation of Plaintiff’s PIA used to calculate his benefits should have been determined using the alternate WEP.

The Magistrate Judge also concluded that the Plaintiff is not entitled to military wage credits for his post-World War II service. (R&R at 8-9). The Magistrate Judge correctly pointed out that according to 20 C.F.R. § 404.1342, wage credits cannot be given for military service if another federal benefit, other than one paid by the Veteran’s Administration, is based in part on the active service. (R&R at 8). Plaintiff stated in his application for benefits that his three years of military service were used to calculate his pension from the Office of Personnel Management. Therefore, since none of the exceptions in 20 C.F.R. § 404.1343 apply to Plaintiff, he is not entitled to military wage credits for this service. Plaintiff’s service, which was prior to 1957

cannot be counted as covered employment so as to exempt the calculation of his old age retirement benefits from calculation under the WEP. See 20 C.F.R. § 404.1301(a) (explaining that military wages were not covered on a contributory basis under Social Security until 1957).

Further, the Magistrate Judge agreed that the Plaintiff did not receive proper notice of the explanation of overpayment. However, Judge Smith determined that this was not grounds for reversing the decision because Plaintiff was not deprived of any remedies that would otherwise have been available to him. (R&R at 9-10). This court agrees that the delayed explanation provided to Plaintiff in April 2001, over a year after he received the notice of overpayment in March 2000, was insufficient. However, the Magistrate Judge correctly noted that Plaintiff was not denied any remedy in this matter. As a result, Plaintiff was not harmed by the insufficient notice and it is not grounds for reversal.¹

Finally, the Magistrate Judge concluded that the Social Security Administration was precluded from reopening Plaintiff's application for benefits and therefore Plaintiff's benefits could not be adjusted and any overpayment can not be recouped. (R&R at 11-13). This conclusion was based on 20 C.F.R. § 404.988, which limits the situations when a case can be reopened.² The Magistrate Judge found no fraud or fault on Plaintiff's part to justify a

¹The Magistrate Judge also correctly points out that because Plaintiff did not file a request for waiver, he is not entitled to a hearing prior to recoupment of any overpayment. (R&R at 10). In addition, the Magistrate Judge notes that while the Social Security Administration adjusted the amount of Plaintiff's benefit to \$746.00 by using the alternate WEP, it did not start to recoup any overpayment at that time. (R&R at 10-11).

² 20 C.F.R. 404.988 states, in relevant part:
§ 404.988 Conditions for reopening.
A determination, revised determination, decision, or revised decision
may be reopened --

(a) Within 12 months of the date of the notice of the

reopening. (R&R at 12).

The court is not persuaded by Defendant's argument that the recomputation of benefits did not constitute a reopening, but rather, a subsequent independent initial determination because there was no question about whether Plaintiff was entitled to RIB. (Def's Objections at 2-3). Therefore, Defendant argues that the recomputation in 2000 applying the alternate WEP was proper. Defendant relies primarily on 20 C.F.R. 404.902 (d), which states that "initial determinations include, but are not limited to, determinations about – a recomputation of your benefit."

A complete review of 20 C.F.R. 404.902 reveals that an "initial determination" simply means that the determination is "subject to administrative and judicial review." Therefore, both the original computation of benefits and the recomputation of benefits would logically be considered initial determinations because they are subject to such review.³ At the same time, under 20 C.F.R. 404.987-989, the recomputation may also be considered a "reopening" because the case must be reopened and reassessed for any recomputation to occur. If this were not true,

initial determination, for any reason;

(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case; or

(c) At any time if --

(1) It was obtained by fraud or similar fault (see § 416.1488(c) of this chapter for factors which we take into account in determining fraud or similar fault).

³ 20 C.F.R. 404.902(c) also indicates that "the amount of your benefit" is an initial determination. Therefore, the original computation of Plaintiff's benefits would be considered an initial determination under the statute.

20 C.F.R. 404.987-989 would be rendered virtually meaningless. Specifically, 20 C.F.R. 404.988(b) clearly states that a determination may be reopened within four years only upon the finding of good cause, as defined in § 404.989. Good cause for reopening a determination includes a “clerical error in the computation or recomputation of benefits was made.”⁴ 20 C.F.R. 404.989(2). These provisions would have no meaning if a recomputation was not considered a “reopening.”

The Magistrate Judge correctly noted that at the time of Plaintiff’s application, Plaintiff was still employed by the government and was therefore not yet receiving his pension. However, the Administration was aware of the fact that he would be receiving the pension the very first month that he would be entitled to Social Security benefits. There was therefore no need to calculate Plaintiff’s benefits without using the WEP.⁵ According to the factual findings made by the ALJ, the Field Office processed the case with a diary for January 1996, assuming that the processing center would correct the computation. (R. at 11). This was however, not done until February 29, 2000, with the notice dated March 4, 2000, more than four years after the initial determination of Plaintiff’s benefits and after the Administration was informed that he would be receiving the pension.

Even though the SSA did not calculate Plaintiff’s RIB using the WEP when it made its initial determination of his benefits, that determination of the amount of Plaintiff’s benefits was still an initial determination that is final according to regulations. 20 C.F.R. § § 404.902 (c),

⁴ Failing to compute Plaintiff’s benefits using the alternate WEP could be considered a clerical error, which would have allowed the SSA to reopen Plaintiff’s case within four years to recompute his benefits. However, the SSA did not discover their error within the allotted four years.

⁵ If this was a clerical error, it would have allowed the SSA to reopen the case within four years due to good cause.

404.905. The recalculation, which was more than four years later, was clearly a “reopening” within the meaning of the Act and since it was in no way the result of fraud or the fault of Plaintiff was not permitted. Accordingly, this court agrees with the Magistrate Judge that pursuant to 20 C.F.R. § 404.988, the Social Security Administration was precluded from reopening Plaintiff’s application to reduce Plaintiff’s benefits and there is therefore no overpayment to be recouped.

IV. Conclusion

Even though Plaintiff’s primary insurance amount used to calculate his benefits should have been determined using the alternate WEP, the Social Security Administration was precluded from reopening Plaintiff’s case to recalculate his benefits on March 4, 2000 because over four years had elapsed since the initial determination of benefits. Accordingly, the Magistrate Judge’s Report and Recommendation will be approved and adopted. Plaintiff’s motion for summary judgment will be granted to the extent that the March 4, 2000 letter should be rescinded and his benefits be restored to their original amount plus any COL adjustments due. As a result, there is no overpayment to be collected from Plaintiff. Further, there is no legal basis for Plaintiff’s request for reimbursement of his costs and therefore this request must be denied.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROBERT J. DOYLE, SR.	:	CIVIL ACTION
	:	
v.	:	
	:	
JO ANNE BARNHART,	:	NO. 03-264

ORDER

AND NOW, this 28th day of March, 2005, upon careful and independent consideration of the pleadings and record herein, and after review of the Report and Recommendation of the United States Magistrate Judge Charles B. Smith pursuant to 28 U.S.C. § 636(b)(1)(c), it is hereby

ORDERED

1. The Report and Recommendation (Doc. No. 27) is APPROVED and ADOPTED;
2. The Defendant's objections to the Report and Recommendation are OVERRULED;
3. The Defendant's Motion for Summary Judgment (Doc. No. 25) is DENIED;
4. The Plaintiff's Motion for Summary Judgment (Doc. No. 17) is GRANTED, in part, to the extent that the March 4, 2000 notice be rescinded and Plaintiff's benefits be restored to their original amount, plus any cost of living adjustments due; and is otherwise denied.
5. Judgment is entered in favor of Plaintiff and against Defendant for the relief as stated in Paragraph 3 above.
6. The Clerk is directed to close this case.

BY THE COURT:

s/Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.