



WHITMAN-WALKER CLINIC

LEGAL SERVICES PROGRAM

PROCEDURES FOR HANDLING SOCIAL SECURITY DISABILITY CASES INVOLVING OVERPAYMENTS¹

This document sets forth the process and timeline for handling Social Security cases involving an alleged overpayment made to a client. The Whitman-Walker Legal Services Program (WWC-LSP) wants to provide as much guidance and support as possible to help volunteers accepting these cases. The following document sets forth important information and timelines to remain aware of, as well as useful tips for working on overpayment cases. However, this document is only a general overview of the major issues.

BACKGROUND

Many Social Security cases involve overpayments. An overpayment occurs whenever the Social Security Administration (SSA) determines that a beneficiary has received a payment in excess of the amount due the beneficiary. SSA routinely recognizes an overpayment many months, or even years, after the excess payment has been made to the beneficiary. Overpayments can occur when a beneficiary receives a check for a period when he or she was in fact ineligible for any benefits, or when the beneficiary is entitled to benefits but receives a check that is in excess of the correct amount. A check can be incorrect for any number of reasons, including: the client may have had earnings for the relevant benefit period that, if taken into consideration, should have reduced the benefit amount; the client's check may have been subject to deductions that were not applied; or the client's family situation, living arrangement, or available resources may have changed.

Beneficiaries are required to repay overpayments to the SSA unless they qualify for a waiver, as described below, or successfully challenge the fact or amount of an overpayment by filing a Request for Reconsideration, as described below. The requirement to repay the SSA applies even when the SSA itself is at fault for the overpayment, unless the client can prove that he or she was without fault, and that the other requirements for a waiver or successful appeal apply. Because overpayments can continue for many months and amount to thousands of dollars, these cases can be overwhelming to the client.

¹ The guide was written primarily by Erin Loubier, Senior Managing Attorney, Whitman-Walker Clinic, with substantial assistance from Elizabeth Harrison Hadley, Senior Volunteer Attorney.

CLIENT CONTACT

It is important to contact the client as soon as possible after receiving an overpayment case from WWC-LSP. Ideally the first client meeting should occur within a week of the volunteer's accepting the case. If this is not possible, contact should be made during the first week and an appointment scheduled for as soon thereafter as possible. The volunteer should ask the client to bring to the meeting all correspondence with the SSA regarding the overpayment issue. Any tax returns, pay stubs, earnings statements, or bank records from the relevant time period are also extremely helpful.

The volunteer should question the client extensively about his or her work history and periods of disability. Overpayment cases often occur because the client returned to work without notifying the Social Security Administration. Sometimes a client will have worked during the period between filing for disability benefits and waiting for a decision. In other cases, a client will have worked intermittently, entering and exiting the workforce on one or more occasions for relatively brief periods. Because the Social Security does not receive the individual's tax records from the Internal Revenue Service until months or years after the time period they cover, a beneficiary can often accumulate a considerable overpayment before the SSA notifies him or her. Therefore, it is important to obtain as much information from the client as possible about the period in question. It is helpful to get the names and addresses of any employers to verify the claimant's memory and check the earnings record provided by the SSA.

At the first meeting, the client should sign an Appointment of Representative (Form SSA-1696) and the fee agreement. The attorney should submit the Appointment of Representative form to the SSA immediately, along with a brief cover letter stating that the attorney will be filing additional forms within 10 days. Because overpayment cases can be complicated, the volunteer may need additional time to study the client's documents and the SSA file before determining how to proceed. The legal options are discussed briefly in the next section.

- **Practitioner's Tip:** Always file documents at the Social Security Office that issued the Notice of Overpayment to the client. Do not deal with another office, even if it is more convenient to do so. Dealing with more than one office will create confusion about where the file is located and who is handling the case. It will also impede establishing a good working relationship with the responsible office.
- **Practitioner's Tip:** Always file by certified mail, return receipt requested, or in person and obtain date-stamped copies of all documents filed. It is not unusual for the SSA to lose files and documents. Proof of receipt is well worth the effort and may prove critical for preserving a client's appeal rights.
- **Practitioner's Tip:** When working with SSA, it is important to keep careful records of all conversations, including the name and telephone number of the SSA employee, and detailed copies of everything sent.

LEGAL ISSUES

After meeting with the client and evaluating any documents provided by the client, the attorney must determine:

- Was the client actually overpaid?
- Did the SSA correctly calculate the overpayment amount?
- Is the client entitled to waiver of recovery of the overpayment?

To answer these questions, the volunteer may need to contact the appropriate Social Security Office and arrange to view the client's file. But first the attorney will want to become familiar with the relevant regulations and evaluate the client's options.

The regulations for Social Security Disability Insurance (SSDI) overpayment cases are found at 20 C.F.R. §§ 404.501 - .545. The regulations for Supplemental Security Income (SSI) overpayment cases are found at 20 C.F.R. §§ 416.535 - .590.

Two types of appeal are available in overpayment cases:

- (1) Request for Waiver; and/or
- (2) Request for Reconsideration.

A beneficiary may file for either or both, depending on the circumstances.

REQUEST FOR RECONSIDERATION

A Request for Reconsideration should be filed unless there is absolutely no doubt that there was an overpayment of the exact amount that SSA seeks to collect. The request should be initiated by sending the Request for Reconsideration (form SSA-561-U2) to SSA with a detailed cover letter. The cover letter should include an explanation of why the overpayment notice is incorrect, the correct eligibility information, and any due process objections. Due process objections may include problems with the notice given by SSA to the claimant, such as failure to include some of the required information. The cover letter should also formally request to see the SSA file, and request details of the overpayment.

The Request for Reconsideration must be filed within 60 days of the date of notice. The only exceptions to this rule are that a Request for Reconsideration may be filed after the 60-day filing period if the client can demonstrate that he or she is filing the request within 60 days of receipt of the notice, or if the client can show that there is "good cause" that justifies the delay in filing.

Although the deadline for filing the Request for Reconsideration is 60 days after receipt of the Notice of Overpayment, it is far preferable to file within 30 days. If either a

Request for Reconsideration or a Request for Waiver is filed within 30 days of the notice, the SSA will not adjust the claimant's continuing payments until the request is resolved.

- **Practitioner's Tip:** Always challenge an overpayment by filing a Request for Reconsideration unless there is no doubt that the client was in fact overpaid in the exact amount specified by the SSA.
- **Practitioner's Tip:** Always file a Request for Reconsideration within 30 days, even if the detailed letter brief must be submitted later. Also, do not delay filing the Request for Reconsideration while determining whether the facts justify a Request for Waiver. (See below.)

REQUEST FOR WAIVER

In requesting a waiver of the overpayment, the beneficiary is not disputing the fact or amount of the overpayment. Instead the client is asking to be relieved of the obligation to repay the SSA.

A Request for Waiver can be filed at any time, even after the amount has been repaid. The appropriate form is "Request for Waiver of Overpayment Recovery or Change in Repayment Rate" (SSA-632-BK). A waiver request may be filed instead of a Request for Reconsideration, or in addition to a Request for Reconsideration. Once a Request for Waiver is pending, the SSA must stop making any adjustment to the beneficiary's check and must also reimburse the beneficiary for any amount withheld from the check issued in the month the waiver request was filed.

To be granted a waiver, the beneficiary must:

- Prove that he or she is without fault; **and**
- Show that SSA's recovery of the overpayment would either:
 - Defeat the purpose of Title II or Title XVI of the Social Security Act; **or**
 - Be against equity and good conscience.

Fault. The individual must be "without fault" for the overpayment in order for the SSA to waive recovery. Even if the SSA was at fault in making the overpayment, it will not waive reimbursement if the beneficiary was also at fault. The SSA grants waivers only if it determines the claimant to be without fault. The SSA uses slightly different standards for evaluating fault for SSDI and SSI beneficiaries.

Social Security Disability Insurance. In deciding whether the individual is at fault, the SSA considers *all relevant circumstances*, including the individual's age; intelligence; whether the individual has any physical, mental, educational, or linguistic limitations; and the individual's knowledge and understanding regarding the reporting requirements.² The SSA will consider the capacity of the individual to understand that he or she is being overpaid, as well as the complexity of the circumstances.³ The individual will be deemed at fault if the facts show that the overpayment resulted from any of the following:

- an incorrect statement made by the individual which he knew or should have known to be incorrect;
- failure to furnish information which he knew or should have known to be material; or
- acceptance of (failure to return) a payment, which he either knew or could have been expected to know, was incorrect.⁴

In an **SSDI** deduction overpayment case, the SSA will also consider the degree of care the individual took to notify the SSA of any changed circumstances that might affect his or her deductions. An individual will be considered at fault if the SSA finds that he or she did not act in good faith or did not exercise a high degree of care in bringing information regarding his or her circumstances to the SSA's attention. **20 CFR § 404.511.**

Supplemental Security Income. In evaluating fault for SSI overpayments, the SSA considers the individual's:

- Understanding of the reporting requirements;
- agreement to report events;
- knowledge of events that should have been reported;
- efforts to comply with the reporting requirements;
- opportunities to comply with the reporting requirements;
- understanding of the obligation to return excess money; and

² 20 C.F.R. § 404.507 (2004) (regarding SSDI); 20 C.F.R. § 416.552 (2004) (regarding SSI).

³ 20 C.F.R. § 404.511(a) (2004).

⁴ 20 C.F.R. § 404.507 (2004) (regarding SSDI); 20 C.F.R. § 416.552 (2004) (regarding SSI).

- ability to comply with the requirements, including age, comprehension, memory, and physical and mental conditions.

The SSA also considers the effect that any physical, mental, educational, or linguistic limitations might have on the individual's ability to comprehend and follow the requirements. 20 CFR § 416.522. An SSI beneficiary will be held at fault if any of the same three circumstances listed above for SSDI beneficiaries (making an incorrect statement, failure to furnish information, acceptance of an incorrect payment) apply to the SSI beneficiary. 20 CFR § 416.552.

It is important to note that individuals other than the recipient of the benefits can be held liable by the SSA for the overpayment. These individuals include, in addition to the eligible individual: the eligible spouse; other persons receiving benefits on the earnings record of the overpaid person (SSDI only); the estate of a deceased individual or spouse; an alien's sponsor (SSI only); or a representative payee.⁵

Defeat the Purposes of the Title II and Title XVI Programs. The SSA will not pursue recovery of overpayments in either SSDI or SSI cases if recovery would deprive a person of income required for ordinary and necessary living expenses.⁶ These living expenses include fixed living expenses, i.e., food and clothing, rent, mortgage payments, utilities, maintenance, insurance, and taxes. They also include medical expenses, expenses for the support of legal dependents, and miscellaneous expenses reasonably necessary for the individual's standard of living.⁷

In **SSI** cases, the SSA will consider all the income of SSI recipients to be necessary for ordinary living expenses if their monthly income does not exceed the applicable federal monthly SSI benefit rate, plus any applicable exclusion, plus any applicable state supplementary payment.⁸

Against Equity and Good Conscience. The SSA will waive adjustment or recovery of an overpayment whenever an individual has changed his position for the worse or relinquished a valuable right in reliance on the overpayments from the SSA.⁹ Examples include people who rent a more expensive apartment or send their child to college in reliance on the overpayment money, or people who forego income from another source in reliance on the incorrect benefit. Individuals living separately from the beneficiary who did not receive the overpayment are not responsible for the overpayment.¹⁰

⁵ POMS GN 02205.001 & SI 02201.020 B.1

⁶ 20 C.F.R. § 404.508 (2004) (regarding SSDI); 20 C.F.R. § 416.553 (2004) (regarding SSI).

⁷ 20 C.F.R. § 404.508 (2004) (regarding SSDI); 20 C.F.R. § 416.553 (2004) (regarding SSI).

⁸ 20 C.F.R. § 416.553 (2004).

⁹ 20 C.F.R. § 404.509 (2004) (regarding SSDI); 20 C.F.R. § 416.554 (2004) (regarding SSI).

¹⁰ 20 C.F.R. § 404.509 (2004) (regarding SSDI); 20 C.F.R. § 416.554 (2004) (regarding SSI).

ESTABLISHING CONTACT WITH THE SOCIAL SECURITY ADMINISTRATION

After filing the Appointment of Representative, Request for Reconsideration, and/or Request for Waiver, along with a cover letter, at the appropriate office of the Social Security Administration, the attorney should follow up by phone call to determine whether the documents have been received and to schedule an appointment to review the client's files. Sometimes, as noted above, it will be necessary to examine the client's SSA file before determining whether to file the Request for Reconsideration and/or Request for Waiver. In such cases, if an appointment to review the SSA file cannot be obtained within 30 days of the date of the Notice of Overpayment, the volunteer should file the Request for Reconsideration within 30 days, along with a general cover letter that challenges the fact and amount of overpayment and that informs the SSA of the volunteer's intention to submit a more detailed letter brief later.

EXAMINING THE CLIENT'S RECORDS

The volunteer should examine the client's file at the relevant SSA office as soon as an appointment can be scheduled. While the concept of an overpayment is simple – the SSA alleges that the client has received more money in benefits than he or she was entitled to receive—the reasons for overpayments and the calculation of the exact amount is often complicated. This is because the Social Security does not operate in “real time;” it often makes eligibility decisions long after the client has filed for disability benefits. Therefore the information on which the decision is based can be outdated. By the time the SSA becomes aware of new information, such as a change in the beneficiary's work status, the SSA may have issued numerous checks that may or may not be accurate. By reviewing the file, the attorney can track the decision process used by the SSA and compare the agency's actions with the client's actual circumstances at a given time. The attorney can also obtain new information that may explain the SSA's decision or put into question the client's version of events.

WRITING THE LETTER BRIEF

After reviewing any documents provided by the client, and the client's file at the relevant SSA office, the volunteer should write a letter brief stating the reasons for the client's Request for Reconsideration and/or Request for Waiver of Overpayment. The letter brief should be structured as follows:

1. Overview of the Case: This is a brief statement naming the client, his or her Social Security Number and date of birth, and stating that this is a Request for Reconsideration of the SSA's Notice of Overpayment and/or Request for Waiver of Overpayment.

2. Procedural History of the Case: Give the date of Notice of Overpayment. Then provide a brief summary of the client's history, including:

- date the client first applied for disability benefits;
- date the client was found eligible for SSDI or first received SSI;
- dates defining any relevant retroactive period for SSDI; and/or
- dates of any relevant work period(s).

3. Calculation of Client's Benefits: Referencing the dates set forth in the procedural history, the volunteer should attempt to calculate the benefits to which the client is entitled.

- **Practitioner's Tip:** Use the benefit amounts listed in Chapter 11, "Resources," to determine whether the overpayment amount has been correctly calculated.
- **Practitioner's Tip:** If a claimant has returned to work while receiving SSA payments, the representative will need to calculate whether an overpayment has occurred.

4. Analysis and Argument: If the attorney is filing a Request for Reconsideration, he or she should argue, using the facts developed in the procedural history and calculation of benefits, that the fact or amount of the alleged overpayment is wrong.

If the volunteer has filed a Request for Waiver, he or she must establish why the client is without fault. In addition the volunteer must explain why requiring the overpayment would either defeat the purpose of Title II (SSDI) or Title XVI (SSI) of providing the client with the means to cover necessary living expenses, or in the alternative, would be against equity and good conscience because of the client's detrimental reliance on the incorrect overpayment. In addition, for an overpayment involving SSDI, the volunteer must show that the client made a reasonable effort to inform the SSA of any change in his or her circumstances, or, if the client did not inform the SSA, that there were reasonable reasons for not doing so.

5. Summary and Conclusion: Conclude the letter brief with a short statement summarizing why the fact or amount of the overpayment is incorrect, and, if appropriate, why a waiver of overpayment should be granted. Always include contact information and offer to provide the SSA with any additional information needed to decide the case.

FOLLOWING UP WITH THE SOCIAL SECURITY ADMINISTRATION

It is not unusual for the SSA to take months to decide an overpayment case. The attorney should contact the relevant office at least monthly to check on the status of the case. If the staff person assigned the case cannot be reached by phone, the attorney should send faxes to confirm that an effort has been made to reach the staffer. The

attorney should also contact the supervisor if more than three months pass with no response from the SSA.

AFTER THE DECISION IS RECEIVED

Favorable decision: The attorney should make sure that the client is officially notified by the SSA and that the SSA closes the case.

Unfavorable decision: If the client receives a denial of a Request for Reconsideration, he or she has 60 days to appeal the decision by requesting a hearing before an Administrative Law Judge (ALJ). The attorney should make sure that the client has been notified of the decision and that he or she understands what it means. The attorney should discuss with the client his or her chances of prevailing in an appeal and help the client decide whether to file an appeal.

Appeals of Requests for Reconsideration have a strict time limit, so within two days of counseling the client about whether to appeal, the attorney should notify WWC-LSP about whether he or she will represent the client on appeal. The attorney should submit a closing form on the Request for Reconsideration and indicate whether he or she will keep the case for appeal.

If the volunteer chooses not to continue handling the case, he or she should return two complete copies of the file to WWC-LSP immediately. The volunteer should also include a brief cover memorandum assessing the strengths and weaknesses of the case. This must be done promptly so that WWC-LSP can evaluate whether to reassign the case and ensure that the appeal is timely filed. If the client wishes to pursue an appeal, the volunteer should counsel the client to call WWC-LSP immediately.

If the Request for Waiver is denied, the client may also file for appeal within 60 days. In addition, the client may file for further waiver requests on the same overpayment if his or her financial situation has worsened and recovery of the overpayment may now defeat the purpose of the benefit.

ADJUSTMENT OR RECOVERY OF OVERPAYMENT

If the client decides not to appeal an adverse decision, the volunteer should help the client work out the details of a repayment plan

The SSA may either withhold all payments to the overpaid individual until the amount of the overpayment is recouped, or may adjust monthly payments to recoup a portion per month of the overpayment. The SSA will adjust monthly payments rather than withhold the entire amount when at least part of the monthly payment is required for ordinary and necessary living expenses.

With **SSDI**, the SSA will also withhold or adjust the monthly payments of individuals who receive derivative benefits (for instance, the spouse or child of a disabled individual) based on the same earnings as the overpaid claimant.¹¹

For a claimant who is continuing to receive **SSI** benefits, the SSA will withhold whichever is less: the total amount of the monthly SSI benefit or ten percent of the recipient's total income (countable income plus SSI benefit amount).¹²

Compromise Payment: The SSA may be willing to accept a compromise payment for less than the amount due, if the individual is no longer receiving benefits and meets other criteria. The SSA may accept a compromise payment, or may opt to suspend or terminate collection, if the overpaid individual or his estate does not have the present or prospective ability to pay the full amount of the claim within a reasonable time. The SSA may also elect to not seek full recovery if the cost of collection is likely to exceed the amount of recovery.¹³

The SSA will not accept compromise payment, suspend, or terminate collection if the overpaid individual is alive and the overpayment resulted from fraud, a false claim, or misrepresentation.¹⁴ If the overpaid individual is deceased, the SSA will not compromise, suspend or terminate collection, if the amount is over \$5,000 and there is evidence of fraud, a false claim, or misrepresentation.¹⁵

Note that compromise payments are accepted at the SSA's discretion.

- **Practitioner's Tip:** Overpayments may be discharged in bankruptcy.¹⁶
- **Practitioner's Tip:** If the overpayment allegation is upheld, the representative should be sure to request that the SSA recoup by withholding a low amount from monthly benefits, rather than by withholding the entire benefit.

¹¹ 20 C.F.R. § 404.502(a)(2) (2004). Note that SSA does not have a comparable statute for SSI.

¹² 20 C.F.R. § 416.571 (2004).

¹³ 20 C.F.R. § 404.515 (2004) (regarding SSDI); 20 C.F.R. § 416.555 (2004) (regarding SSI).

¹⁴ 20 C.F.R. § 404.515 (2004) (regarding SSDI); 20 C.F.R. § 416.556 & § 416.571 (2004) (regarding SSI).

¹⁵ 20 C.F.R. § 404.515 (2004). Note that this statute applies to SSDI and there is not a comparable statute for SSI.

¹⁶ *In re Neavear*, 674 F.2d 1201 (7th Cir. 1982).