

language is merely to reduce confusion for the reader.

In 648.2, a change has been made to the language of the definition for "scup pot or trap" in the proposed rule. The words "used in" have been inserted to emphasize that the vent size requirements and other gear restrictions implemented for the directed scup pot fishery would pertain only to pots used in that fishery. In addition, a definition for "under construction" has been added to the regulatory text.

Under NOAA Administrative Order 205-11, 7.01, dated December 17, 1990, the Under Secretary for Oceans and Atmosphere has delegated, to the Assistant Administrator for Fisheries, NOAA, the authority to sign material for publication in the Federal Register.

Classification

The Regional Administrator has determined that this final rule is necessary for the conservation and management of the scup fishery and that it is consistent with the Magnuson Act and other applicable law.

This action has been determined to be not significant for purposes of E.O. 12866.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA). This collection-of-information requirement has been approved by OMB. The requirement to mark traps and pots has been approved under OMB Control Number 0648-0305. The marking of traps and pots is estimated to take 1 minute per trap or pot.

The estimated response time includes the time needed for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding burden estimates, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS and OMB (see ADDRESSES).

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. The reasons were discussed in the proposed rule

published in the Federal Register on August 26, 1996 (61 FR 43725). No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not prepared.

List of Subjects

50 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: October 25, 1996.

Nancy Foster,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

For the reasons set out in the preamble, 15 CFR chapter IX and 50 CFR chapter VI are amended as follows:

15 CFR CHAPTER IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENT UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. In § 902.1, in paragraph (b), the table is amended by adding, in numerical order, the following entry is added to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648-)
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50 CFR

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§ 648.123 -0305

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50 CFR CHAPTER VI

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

3. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

4. In § 648.2, the definitions for "Scup pot or trap" and "Under construction" are added in alphabetical order to read as follows:

§ 648.2 Definitions.

* * * * *

Scup pot or trap means a pot or trap used in catching and retaining scup.

* * * * *

Under construction means that the keel had been laid or the vessel was under written agreement for construction or the vessel was under written contract for purchase.

* * * * *

5. In § 648.4, paragraph (a)(6)(i)(A)(3) is added to read as follows:

§ 648.4 Vessel Permits.

(a) * * *

(6) * * *

(i) * * *

(A) * * *

(3) The vessel was under construction for, or was being rerigged for, use in the directed fishery for scup on January 26, 1993, provided the vessel landed scup for sale by January 26, 1994.

* * * * *

6. In § 648.14, paragraph (k)(12) is added to read as follows:

§ 648.14 Prohibitions.

* * * * *

(k) * * *

(12) Use a scup trap or pot that is not marked in accordance with § 648.123(b)(3).

* * * * *

7. In § 648.123, paragraph (b)(3) is added to read as follows:

§ 648.123 Gear restrictions.

* * * * *

(b) * * *

(3) *Pot and trap identification.* Pots or traps used in fishing for scup must be marked with a code of identification that may be the number assigned by the Regional Director and/or the identification marking as required by the vessel's home port state.

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[FR Doc. 96-27903 Filed 10-28-96; 9:18 am]

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 410

RIN 0960-AD99

Overpayment Appeal and Waiver Rights

AGENCY: Social Security Administration (SSA).

ACTION: Final rules.

SUMMARY: In these final regulations we address the rights of individuals regarding overpayment and waiver

determinations in the Social Security and Black Lung benefits programs by stating policy established as a result of a series of court decisions, beginning with the 1974 court decision in *Buffington, et al. v. Weinberger* and including the Supreme Court decision in *Califano v. Yamasaki*. The effect of these final regulations is to codify these additional rights for overpaid individuals established in these court decisions.

EFFECTIVE DATE: These final rules are effective December 2, 1996.

FOR FURTHER INFORMATION CONTACT: Lois Berg, Legal Assistant, 3-B-1 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965-1713 for information about these rules. For information on eligibility or claiming benefits, call our national toll-free number, 1-800-772-1213.

SUPPLEMENTARY INFORMATION:

Background

Section 204(b) of the Social Security Act (the Act) provides that the Commissioner of Social Security (the Commissioner) shall not recover an old-age, survivors, and disability insurance (OASDI) overpayment from any individual who is without fault in causing the overpayment if recovery from that individual would "defeat the purpose" of title II of the Act or be "against equity and good conscience." Sections 205(a) and 702(a)(5) of the Act authorize the issuance of regulations regarding our overpayment recovery policies.

Sections 411(b) and 426(a) of the Black Lung Benefits Act (30 U.S.C. 921(b) and 936(a)), authorize the Commissioner to issue regulations to administer the provisions of the Black Lung benefits program. The provisions for recovery of an overpayment from an individual under the Black Lung benefits program (Part B) regulations generally parallel the regulations of the OASDI programs.

On October 22, 1974, the U.S. District Court for the Western District of Washington in *Buffington, et al. v. Weinberger*, No. 734-73C2, stopped SSA from recovering overpaid Social Security benefits without first giving each member of the plaintiff class adequate written notice of the overpayment determination and the right to a pre-recoupment hearing.

The court ordered that the written notice must include:

1. A statement of the alleged overpayment, an explanation of the basis for the overpayment and SSA's proposed action to recover the overpayment;

2. A statement of the individual's right to a pre-recoupment hearing;

3. Instructions and forms for requesting a pre-recoupment hearing;

4. An explanation that if the individual did not request a pre-recoupment hearing within 30 days of the date of mailing of the overpayment notice, it would be presumed that the individual waived his/her right to the hearing and recovery of the alleged overpayment would begin;

5. A statement of any other administrative relief available (i.e., reconsideration of the fact and/or amount of overpayment and waiver of recovery of the overpayment); and

6. A statement that an SSA office would help the individual complete and submit forms for appeal or waiver requests.

The court also ordered the following:

1. SSA had to restore all benefits withheld from the named plaintiffs pending an opportunity for a pre-recoupment hearing.

2. Each individual had to be given the opportunity to examine his/her claims file at least 5 days prior to the date of the pre-recoupment hearing.

3. The pre-recoupment hearing had to be conducted by an SSA employee who had no prior knowledge of the events leading to the overpayment determination and the decision to recover the overpayment.

4. At the hearing, the individual had to be given the opportunity to:

- Appear personally, testify, and cross-examine any witnesses;
- Be represented by an attorney or other representative; and
- Submit documents for consideration at the hearing.

The court did not require that a transcript be made of the hearing.

5. After the hearing, SSA had to issue a written decision to the individual (and his/her representative, if any) specifying the findings of fact and conclusions in support of the decision and advising of the individual's right to appeal the decision.

In accordance with the court order, SSA began to issue overpayment notices containing all of the aforementioned information and to offer pre-recoupment hearings to all class members.

On June 20, 1979, the Supreme Court held in *Califano v. Yamasaki*, 442 U.S. 682 (1979), that individuals who file a written request for waiver are entitled to the opportunity for a pre-recoupment oral hearing, but those who request only reconsideration are not so entitled. Thereafter, SSA applied revised overpayment notice and pre-recoupment hearing procedures to all individuals determined to be overpaid

under the title II or Black Lung benefit programs. On July 31, 1981, the *Buffington* court required SSA to schedule pre-recoupment hearings automatically for individuals whose request for waiver of overpayment recovery could not be approved after initial paper review. On February 10, 1983, the *Buffington* court approved procedures developed by SSA in response to the 1981 decree whereby pre-recoupment hearings would be scheduled automatically but ordered SSA to schedule the hearings through a written notice to the claimant. The scheduling letter had to contain the date, time and place of the hearing; the procedure for reviewing the claims file before the hearing; the procedure for seeking a change in the scheduled date, time, and/or place; and all other information necessary to fully inform the claimant about the pre-recoupment hearing. SSA began to automatically schedule pre-recoupment hearings in writing in April 1983. The court also retained jurisdiction over the matter and prohibited any changes in the overpayment procedures it had approved without prior notification of plaintiffs' counsel and prior approval from the court.

In its order of October 19, 1987, the *Buffington* court approved SSA's plan to transfer waiver decisionmaking authority for Retirement and Survivors Insurance overpayments from the processing centers to the field offices. SSA implemented this change in July 1988.

On April 13, 1994, the *Buffington* court approved a stipulation modifying the court's injunction in this matter. Under the stipulation, plaintiffs agreed to withdraw counsel notification and court approval requirements for future changes to SSA overpayment policies. In return, SSA agreed to promulgate a Social Security Ruling (SSR) and then final regulations embodying the overpayment requirements set forth in *Yamasaki*, above. SSA published the SSR on July 11, 1994 (59 FR 35378), published proposed regulations on June 2, 1995 (60 FR 28767), and is now publishing final regulations to fulfill its commitments under the stipulation.

Current Regulations

Our current regulations do not address the adequate notice, face-to-face oral hearing, or appeal step issues noted above. However, SSA has been complying with the court orders described above through program instructions approved by the *Buffington* court.

Regulations Changes

We are restating in regulations the policies enunciated in the court decisions and established in our program instructions. The final regulations provide that when an overpayment is discovered, we notify the individual immediately. The notice includes:

1. The overpayment amount and how and when it occurred;

2. A request for full, immediate refund, unless the overpayment can be withheld from the next month's benefit;

3. The proposed adjustment of benefits if refund is not received within 30 days after the date of the notice and adjustment of benefits is available;

4. An explanation of the availability of a different rate of withholding when full withholding is proposed, installment payments when refund is requested and adjustment is not currently available, and/or cross-program recovery when refund is requested and the individual is receiving another type of payment from SSA (language about cross-program recovery is not included in notices sent to individuals in jurisdictions where this recovery option is not available; currently, cross-program recovery is not available to residents of New York and Pennsylvania);

5. An explanation of the right to request waiver of adjustment or recovery and the automatic scheduling of a file review and pre-recoupment hearing (commonly referred to as a personal conference) if a request for waiver cannot be approved after initial paper review;

6. An explanation of the right to request reconsideration of the fact and/or amount of the overpayment determination;

7. Instructions about the availability of forms for requesting reconsideration and waiver;

8. An explanation that if the individual does not request waiver or reconsideration within 30 days of the date of the overpayment notice, adjustment or recovery of the overpayment will begin;

9. A statement that an SSA office will help the individual complete and submit forms for appeal or waiver requests; and

10. A statement that the individual should notify SSA promptly if reconsideration, waiver, a lesser rate of withholding, repayment by installments or cross-program adjustment is wanted.

Form SSA-3105 (Important Information About Your Appeal and Waiver Rights) is included with each overpayment notice. The SSA-3105

further explains the pre-recoupment review process and contains a tear-off form which the individual may complete and return to SSA if he/she wants reconsideration and/or waiver.

The final regulations also provide that to ensure meaningful opportunity to contest the correctness of an overpayment determination and/or establish entitlement to waiver, the date on which full refund is due and, if appropriate, the date on which adjustment will begin must be at least 30 days after the date of the overpayment notice. If the individual responds within 30 days after the date of the overpayment notice, SSA must take action to ensure that benefit payments are not interrupted. Any time waiver is requested, SSA stops adjustment or recovery.

When waiver is requested, the individual gives SSA information (usually on Form SSA-632-BK (Request for Waiver of Overpayment Recovery or Change in Repayment Rate)) to support his/her contention that he/she is without fault in causing the overpayment and that recovery would either cause financial hardship or be inequitable. That information, along with supporting documentation, is reviewed to determine if waiver can be approved.

If waiver cannot be approved after this review, the individual is notified in writing and given the dates, times and place of the file review and personal conference; the procedure for reviewing the claims file prior to the personal conference; the procedure for seeking a change in the scheduled dates, times, and/or place; and all other information necessary to fully inform the individual about the personal conference. The file review is always scheduled at least 5 days before the personal conference.

At the file review, the individual and the individual's representative have the right to review the claims file and applicable law and regulations with the decisionmaker or another SSA representative who is prepared to answer questions. We will provide copies of material related to the overpayment and/or waiver from the claims file or pertinent sections of the law or regulations that are requested by the individual or the individual's representative.

Although the individual may be represented at the personal conference, he/she must also be present. This requirement is consistent with the Supreme Court's reasoning in *Califano v. Yamasaki*. In *Yamasaki*, the court concluded that written review could not satisfy SSA's obligation to make an accurate waiver determination because

an evaluation of fault requires an evaluation of all pertinent circumstances, such as the recipient's intelligence, and physical and mental condition. The court said, "We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case." Id. at 698.

SSA will provide suitable private space for the personal conference. However, if the individual cannot come to the conference site for a legitimate reason (e.g., he/she is incapacitated), SSA personnel will travel as far as necessary to conduct the conference.

At the personal conference, the individual is given the opportunity to:

1. Appear personally, testify, cross-examine any witnesses, and make arguments;

2. Be represented by an attorney or other representative, although the individual must be present at the conference; and

3. Submit documents for consideration by the decisionmaker.

At the personal conference, the decisionmaker:

1. Tells the individual that the decisionmaker was not previously involved in the issue under review, that the waiver decision is solely the decisionmaker's, and that the waiver decision is based only on the evidence or information presented or reviewed at the conference;

2. Ascertains the role and identity of everyone present;

3. Indicates whether or not the individual reviewed the claims file;

4. Explains the provisions of law and regulations applicable to the issue;

5. Briefly summarizes the evidence already on file which will be considered;

6. Ascertains from the individual whether the information presented is correct and whether he/she fully understands it;

7. Allows the individual and the individual's representative, if any, to present the individual's case;

8. Secures updated financial information and verification, if necessary;

9. Allows each witness to present information and allows the individual and the individual's representative to question each witness;

10. Ascertains whether there is any further evidence to be presented;

11. Reminds the individual of any evidence promised by the individual which has not been presented;

12. Lets the individual and the individual's representative, if any, present any proposed summary or closing statement;

13. Explains that a decision will be made and the individual will be notified in writing; and

14. Explains further appeal rights in the event the decision is adverse to the individual.

SSA issues a written decision to the individual (and his/her representative, if any) specifying the findings of fact and conclusions in support of the decision to approve or deny waiver and advising of the individual's right to appeal the decision. If waiver is denied, adjustment or recovery of the overpayment begins even if the individual appeals.

If it appears that the waiver cannot be approved, and the individual declines a personal conference or fails to appear for a second scheduled personal conference, a decision regarding the waiver will be made based on the written evidence of record. Reconsideration is then the next step in the appeals process.

The final regulations also state that although a personal conference decision on the waiver issue is an initial determination, when an individual is appealing an initial determination of waiver denial based on a personal conference, the first appeal step is an administrative law judge (ALJ) hearing, bypassing the reconsideration which generally follows initial determinations. We provide that the appeal goes directly to an ALJ hearing in this situation because a reconsideration is a review of the written evidence and would be less comprehensive in scope than the preceding personal conference. However, where an individual is appealing an initial determination of waiver denial based solely on a review of the written evidence rather than a personal conference (i.e., the individual chose to forego the personal conference) the first appeal step is a reconsideration.

Additionally, an individual may concurrently appeal the substantive determination that the overpayment occurred and request waiver of recovery of the overpayment. The final regulations provide that when the substantive determination is upheld on reconsideration and the waiver is denied, even if it is denied solely on the basis of a review of the written evidence, the next step in the appeal process for both determinations is an ALJ hearing.

In addition to revising the regulations to codify the policy established in these court decisions, we are also removing references to title XVIII from §§ 404.502a and 404.506. These references address Medicare overpayment situations, which fall within the purview of the Health Care

Financing Administration (HCFA). Before HCFA became a separate agency, SSA was responsible for both the Social Security cash benefit program and the Medicare program. Consequently, HCFA has historically relied on many of SSA's regulations that addressed similar situations under titles II and XVIII of the Act. The recoupment of overpayments has been one of these situations. However, because differences in the two programs have increased, HCFA has determined that modifications to the rules are necessary. As a result, HCFA is in the process of promulgating its own regulations with regard to Medicare overpayments. In the meantime, on September 19, 1996 (61 FR 63404), HCFA published a final rule that incorporated the substantive content of 20 CFR 404.502a and 404.506 into 42 CFR 405.357 and 404.358, respectively. Therefore, we are removing the references to title XVIII from the regulations text of these final regulations.

Comments on Notice of Proposed Rulemaking (NPRM)

On June 2, 1995, we published proposed rules in the Federal Register at 60 FR 28767 with a 60-day comment period. We received three letters with comments. Following are summaries of those comments and our responses to them.

Comment: The final rules should also make comparable changes to the title XVI overpayment/waiver regulations.

Response: Many title XVI overpayment/waiver policies are the same as those in title II. As a result of the comments, we will begin a separate NPRM to make conforming changes to the title XVI regulations where the procedures are already the same. We will also evaluate the need for any additional changes in the title XVI overpayment/waiver procedures. If we determine additional changes are needed, we will address them in the separate NPRM.

Comment: Additional improvements not specifically addressed in the *Buffington* court order should be made to SSA's overpayment notices, and these changes should be codified in the final rules.

Response: All of the notice requirements ordered by the court in *Buffington* are addressed in the final rules. In addition, SSA has an ongoing initiative to improve the quality of our notices, and our goal is to examine and revise overpayment notices as necessary to meet changing public needs. As part of this initiative, we solicited comments from advocacy groups and made interim improvements to the language. The

National Senior Citizens Law Center and the Legal Services for the Elderly, who were two of the commenters on the proposed rules, were among those groups whose comments were used to improve the notices. However, as a result of the longstanding court injunction in *Buffington* which said we could not change overpayment/waiver policy without court approval, the changes were never implemented. Now that the injunction has been modified, we have focus-tested the revised language and plan for further improvements.

As we work on the notices improvement initiative, we will thoroughly consider all comments concerning the overpayment notices that we received on the NPRM. However, any changes we adopt as a result of these comments will be in the actual notices or in our operating instructions, rather than in regulations. It is not appropriate for the regulations to prescribe individual notice content at the level of specificity advocated in the comments. Including in the regulations overly restrictive provisions on notice content would eliminate our flexibility in addressing other public concerns about the notices.

Comment: The regulations should explain circumstances where the personal conference can address whether an overpayment exists, as contrasted with whether the overpayment can be waived.

Response: The regulations do not impose restrictions on matters that can be addressed at a personal conference. If SSA employees have any confusion on this point, clarification through program instructions would be a more appropriate remedy.

Comment: If the claimant does not clearly indicate which option he or she wishes to pursue, it will be presumed that the claimant wishes to challenge the overpayment.

Response: Adopting this comment could disadvantage the claimant. If the presumption is that only the fact of overpayment is being challenged (i.e., a request for reconsideration of the overpayment determination), recovery efforts stop until a reconsideration determination is made. If the determination is unfavorable to the claimant, recovery efforts resume, even if the person appeals that determination. When only reconsideration is requested, there is no right to a personal conference with recovery delayed until the determination is made. That right only attaches to a waiver request.

Comment: The regulations should state that SSA will refund all withheld benefits if waiver is approved.

Response: SSA policy is to pay any improperly withheld benefits if waiver is approved. However, this does not mean full repayment is proper every time waiver is approved. For example, waiver may be denied because, although the person was without fault in causing the overpayment, recovery would not cause financial hardship. Recovery begins. Subsequently, the person's financial situation changes for the worse and waiver is again requested. Waiver is approved effective with the date we determine the financial situation changed. Monies withheld before that date were withheld properly and will not be repaid. SSA policy also requires stopping recovery as of the month waiver is requested. If SSA does not stop recovery timely, any money withheld as of the date of the waiver request will be paid back.

Comment: The regulations should provide for the record of the personal conference to be made available to the claimant.

Response: As stated in §§ 404.506(d) and 410.561a(d), the claimant has the right to review the claims file before the personal conference. However, no transcript is made of the personal conference, and no court has required one. The person is given a written record in the form of the waiver determination. The new regulations at §§ 404.506(g) and 410.561a(g) provide that the written decision will include findings of fact and conclusions in support of the decision. Current program instructions explain that this determination will specify all the evidence considered and the rationale for the determination reached. This rationale must include any rebuttal of the person's arguments. We believe the regulations, as drafted, along with these program instructions provide sufficient safeguards while retaining adequate agency flexibility.

Comment: The regulations should explain that any adjustment or recovery that occurs before issuance of the notice of overpayment, or after a claimant requests waiver or appeals the overpayment notice, will be refunded promptly to the claimant.

Response: SSA does not begin overpayment adjustment or recovery efforts until at least 30 days after the overpayment notice is sent. However, we do have the right to refigure the overpayment amount before we issue the overpayment notice. This policy was upheld in the Supreme Court decision in *Everhart, et al. v. Sullivan*, 494 U.S. 83 (1990). If, through error, benefits are improperly withheld, SSA policy is to pay the benefits. To reemphasize this policy to all field employees who deal

with the overpayment and waiver processes, we will be sure that program instructions clearly state that the money should be paid promptly. However, we do not believe that it is appropriate to put this in the regulations.

Comment: The regulations should mention the right of claimants to subpoena witnesses at a personal conference or, if they need to, escalate a matter to the administrative hearing level.

Response: Claimants may have witnesses testify at the personal conference. If it becomes necessary to subpoena witnesses, SSA procedures provide for escalating the matter to an ALJ hearing. We are not changing the regulations to reflect this at this time because we are looking into the feasibility of giving subpoena power to the personal conference decisionmaker in the field office.

Comment: The regulations should mention SSA's policy to permit a claimant to request waiver and appeal of the overpayment concurrently or in any sequence.

Response: The commenter indicated that the policy should be stated in the regulations because "many agency employees appear to believe that it is necessary for an overpayment appeal to be fully resolved before any request for waiver can be processed or adjudicated." We do not agree that "many agency employees" are confused about this policy, which is currently in program instructions (section GN 02201.011 of the Program Operations Manual System (POMS)). However, we will reemphasize this policy to all field employees who deal with the overpayment and waiver processes the next time we issue this chapter of the POMS or sooner, if necessary.

The following comments concern matters outside the scope of, and therefore are not addressed in, these final regulations.

1. The regulations should clarify the relationship between the 30-day rule, 60-day rule, and 10-day rule concerning overpayments.

2. The regulations should mention the claimants' right to receive notice of the opportunity to decline cross-program recovery. (We note, however, that this principle is already established at 20 C.F.R. 416.570.)

3. The regulations should explain how representative payees will be treated.

4. The regulations should explain claimants' rights with respect to underpayments and netted overpayments.

For the reasons discussed above, we have not changed the text of the

proposed rules to reflect the public comments. We have, however, revised the introductory paragraph in § 410.561, as shown in the proposed rules, to add a phrase which is currently in that section of the regulations and which was inadvertently omitted from the proposed rules. Section 410.561 will then agree with § 404.502a, which is a corresponding section of the regulations. With this one exception, we are publishing the proposed regulations unchanged as final regulations.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these final regulations do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, they were not subject to OMB review.

Paperwork Reduction Act of 1980

These final regulations impose no new reporting or recordkeeping requirements which are subject to review by OMB.

Regulatory Flexibility Act

We certify that these final regulations will not have a significant economic impact on a substantial number of small entities because they affect only individuals. Therefore, a regulatory flexibility analysis as provided in Public Law 96-354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance: Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.003, Social Security—Special Benefits for Persons Aged 72 and Over; 96.004, Social Security—Survivors Insurance; and 96.005, Special Benefits for Disabled Coal Miners)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Death benefits; Old-Age, Survivors, and Disability Insurance; Reporting and recordkeeping requirements.

20 CFR Part 410

Administrative practice and procedure; Black lung benefits; Death benefits; Disability benefits; Miners; Reporting and recordkeeping requirements.

Dated: October 8, 1996.

Shirley S. Chater,

Commissioner of Social Security.

For the reasons set out in the preamble, parts 404 and 410 of chapter

III of title 20 of the Code of Federal Regulations are amended as follows.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950—)

Subpart F—[Amended]

1. The authority citation for subpart F of part 404 continues to read as follows:

Authority: Secs. 204(a)–(d), 205(a), and 702(a)(5) of the Social Security Act (42 U.S.C. 404(a)–(d), 405(a), and 902(a)(5)); 31 U.S.C. 3720A.

2. Section 404.502a is revised to read as follows:

§ 404.502a Notice of right to waiver consideration.

Whenever an initial determination is made that more than the correct amount of payment has been made, and we seek adjustment or recovery of the overpayment, the individual from whom we are seeking adjustment or recovery is immediately notified. The notice includes:

(a) The overpayment amount and how and when it occurred;

(b) A request for full, immediate refund, unless the overpayment can be withheld from the next month's benefit;

(c) The proposed adjustment of benefits if refund is not received within 30 days after the date of the notice and adjustment of benefits is available;

(d) An explanation of the availability of a different rate of withholding when full withholding is proposed, installment payments when refund is requested and adjustment is not currently available, and/or cross-program recovery when refund is requested and the individual is receiving another type of payment from SSA (language about cross-program recovery is not included in notices sent to individuals in jurisdictions where this recovery option is not available);

(e) An explanation of the right to request waiver of adjustment or recovery and the automatic scheduling of a file review and pre-recoupment hearing (commonly referred to as a personal conference) if a request for waiver cannot be approved after initial paper review;

(f) An explanation of the right to request reconsideration of the fact and/or amount of the overpayment determination;

(g) Instructions about the availability of forms for requesting reconsideration and waiver;

(h) An explanation that if the individual does not request waiver or reconsideration within 30 days of the date of the overpayment notice,

adjustment or recovery of the overpayment will begin;

(i) A statement that an SSA office will help the individual complete and submit forms for appeal or waiver requests; and

(j) A statement that the individual receiving the notice should notify SSA promptly if reconsideration, waiver, a lesser rate of withholding, repayment by installments or cross-program adjustment is wanted.

3. Section 404.506 is revised to read as follows:

§ 404.506 When waiver may be applied and how to process the request.

(a) Section 204(b) of the Act provides that there shall be no adjustment or recovery in any case where an overpayment under title II has been made to an individual who is without fault if adjustment or recovery would either defeat the purpose of title II of the Act, or be against equity and good conscience.

(b) If an individual requests waiver of adjustment or recovery of a title II overpayment within 30 days after receiving a notice of overpayment that contains the information in § 404.502a, no adjustment or recovery action will be taken until after the initial waiver determination is made. If the individual requests waiver more than 30 days after receiving the notice of overpayment, SSA will stop any adjustment or recovery actions until after the initial waiver determination is made.

(c) When waiver is requested, the individual gives SSA information to support his/her contention that he/she is without fault in causing the overpayment (see § 404.507) and that adjustment or recovery would either defeat the purpose of title II of the Act (see § 404.508) or be against equity and good conscience (see § 404.509). That information, along with supporting documentation, is reviewed to determine if waiver can be approved. If waiver cannot be approved after this review, the individual is notified in writing and given the dates, times and place of the file review and personal conference; the procedure for reviewing the claims file prior to the personal conference; the procedure for seeking a change in the scheduled dates, times, and/or place; and all other information necessary to fully inform the individual about the personal conference. The file review is always scheduled at least 5 days before the personal conference.

(d) At the file review, the individual and the individual's representative have the right to review the claims file and applicable law and regulations with the decisionmaker or another SSA

representative who is prepared to answer questions. We will provide copies of material related to the overpayment and/or waiver from the claims file or pertinent sections of the law or regulations that are requested by the individual or the individual's representative.

(e) At the personal conference, the individual is given the opportunity to:

(1) Appear personally, testify, cross-examine any witnesses, and make arguments;

(2) Be represented by an attorney or other representative (see § 404.1700), although the individual must be present at the conference; and

(3) Submit documents for consideration by the decisionmaker.

(f) At the personal conference, the decisionmaker:

(1) Tells the individual that the decisionmaker was not previously involved in the issue under review, that the waiver decision is solely the decisionmaker's, and that the waiver decision is based only on the evidence or information presented or reviewed at the conference;

(2) Ascertains the role and identity of everyone present;

(3) Indicates whether or not the individual reviewed the claims file;

(4) Explains the provisions of law and regulations applicable to the issue;

(5) Briefly summarizes the evidence already in file which will be considered;

(6) Ascertains from the individual whether the information presented is correct and whether he/she fully understands it;

(7) Allows the individual and the individual's representative, if any, to present the individual's case;

(8) Secures updated financial information and verification, if necessary;

(9) Allows each witness to present information and allows the individual and the individual's representative to question each witness;

(10) Ascertains whether there is any further evidence to be presented;

(11) Reminds the individual of any evidence promised by the individual which has not been presented;

(12) Lets the individual and the individual's representative, if any, present any proposed summary or closing statement;

(13) Explains that a decision will be made and the individual will be notified in writing; and

(14) Explains repayment options and further appeal rights in the event the decision is adverse to the individual.

(g) SSA issues a written decision to the individual (and his/her representative, if any) specifying the

findings of fact and conclusions in support of the decision to approve or deny waiver and advising of the individual's right to appeal the decision. If waiver is denied, adjustment or recovery of the overpayment begins even if the individual appeals.

(h) If it appears that the waiver cannot be approved, and the individual declines a personal conference or fails to appear for a second scheduled personal conference, a decision regarding the waiver will be made based on the written evidence of record. Reconsideration is then the next step in the appeals process (but see § 404.930(a)(7)).

Subpart J—[Amended]

4. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 205(a), (b), (d)–(h), and (j), 221, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 405(a), (b), (d)–(h), and (j), 421, 425, and 902(a)(5)); 31 U.S.C. 3720A; sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e) and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note).

5. Section 404.907 is revised to read as follows:

§ 404.907 Reconsideration—general.

If you are dissatisfied with the initial determination, reconsideration is the first step in the administrative review process that we provide, except that we provide the opportunity for a hearing before an administrative law judge as the first step for those situations described in § 404.930(a)(6) and (a)(7), where you appeal an initial determination denying your request for waiver of adjustment or recovery of an overpayment (see § 404.506). If you are dissatisfied with our reconsidered determination, you may request a hearing before an administrative law judge.

6. Section 404.930 is amended by removing the word “or” at the end of (a)(4) and the period at the end of (a)(5) and adding a semicolon in its place and adding (a)(6) and (a)(7) as follows:

§ 404.930 Availability of a hearing before an administrative law judge.

(a) * * *

(6) An initial determination denying waiver of adjustment or recovery of an overpayment based on a personal conference (see § 404.506); or

(7) An initial determination denying waiver of adjustment or recovery of an overpayment based on a review of the written evidence of record (see § 404.506), and the determination was made concurrent with, or subsequent to, our reconsideration determination

regarding the underlying overpayment but before an administrative law judge holds a hearing.

* * * * *

PART 410—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, TITLE IV—BLACK LUNG BENEFITS (1969–)

Subpart E—[Amended]

7. The authority citation for subpart E of part 410 is revised to read as follows:

Authority: Secs. 411(a), 412(a) and (b), 413(b), 426(a), and 508 of the Federal Coal Mine Health and Safety Act of 1977, as amended (30 U.S.C. 921(a), 922(a) and (b), 923(b), 936(a), and 957).

Section 410.565 also issued under 31 U.S.C. 952.

8. Section 410.561 is revised to read as follows:

§ 410.561 Notice of right to waiver consideration.

Whenever an initial determination is made that more than the correct amount of payment has been made, and we seek adjustment or recovery of the overpayment, the individual from whom we are seeking adjustment or recovery is immediately notified. The notice includes:

(a) The overpayment amount and how and when it occurred;

(b) A request for full, immediate refund, unless the overpayment can be withheld from the next month's benefit;

(c) The proposed adjustment of benefits if refund is not received within 30 days after the date of the notice and adjustment of benefits is available;

(d) An explanation of the availability of a different rate of withholding when full withholding is proposed, installment payments when refund is requested and adjustment is not currently available, and/or cross-program recovery when refund is requested and the individual is receiving another type of payment from SSA (language about cross-program recovery is not included in notices sent to individuals in jurisdictions where this recovery option is not available);

(e) An explanation of the right to request waiver of adjustment or recovery and the automatic scheduling of a file review and pre-recoupment hearing (commonly referred to as a personal conference) if a request for waiver cannot be approved after initial paper review;

(f) An explanation of the right to request reconsideration of the fact and/or amount of the overpayment determination;

(g) Instructions about the availability of forms for requesting reconsideration and waiver;

(h) An explanation that if the individual does not request waiver or reconsideration within 30 days of the date of the overpayment notice, adjustment or recovery of the overpayment will begin;

(i) A statement that an SSA office will help the individual complete and submit forms for appeal or waiver requests; and

(j) A statement that the individual receiving the notice should notify SSA promptly if reconsideration, waiver, a lesser rate of withholding, repayment by installments or cross-program adjustment is wanted.

9. Section 410.561a is revised to read as follows:

§ 410.561a When waiver may be applied and how to process the request.

(a) There shall be no adjustment or recovery in any case where an overpayment under part B of title IV of the Act has been made to an individual who is without fault if adjustment or recovery would either defeat the purpose of title IV of the Act, or be against equity and good conscience.

(b) If an individual requests waiver of adjustment or recovery of an overpayment made under Part B of title IV within 30 days after receiving a notice of overpayment that contains the information in § 410.561, no adjustment or recovery action will be taken until after the initial waiver determination is made. If the individual requests waiver more than 30 days after receiving the notice of overpayment, SSA will stop any adjustment or recovery actions until after the initial waiver determination is made.

(c) When waiver is requested, the individual gives SSA information to support his/her contention that he/she is without fault in causing the overpayment (see § 410.561b), and that adjustment or recovery would either defeat the purposes of this subpart (see § 410.561c) or be against equity and good conscience (see § 410.561d). That information, along with supporting documentation, is reviewed to determine if waiver can be approved. If waiver cannot be approved after this review, the individual is notified in writing and given the dates, times and place of the file review and personal conference; the procedure for reviewing the claims file prior to the personal conference; the procedure for seeking a change in the scheduled dates, times, and/or place; and all other information necessary to fully inform the individual about the personal conference. The file

review is always scheduled at least 5 days before the personal conference.

(d) At the file review, the individual and the individual's representative have the right to review the claims file and applicable law and regulations with the decisionmaker or another SSA representative who is prepared to answer questions. We will provide copies of material related to the overpayment and/or waiver from the claims file or pertinent sections of the law or regulations that are requested by the individual or the individual's representative.

(e) At the personal conference, the individual is given the opportunity to:

(1) Appear personally, testify, cross-examine any witnesses, and make arguments;

(2) Be represented by an attorney or other representative (see § 410.684), although the individual must be present at the conference; and

(3) Submit documents for consideration by the decisionmaker.

(f) At the personal conference, the decisionmaker:

(1) Tells the individual that the decisionmaker was not previously involved in the issue under review, that the waiver decision is solely the decisionmaker's, and that the waiver decision is based only on the evidence or information presented or reviewed at the conference;

(2) Ascertains the role and identity of everyone present;

(3) Indicates whether or not the individual reviewed the claims file;

(4) Explains the provisions of law and regulations applicable to the issue;

(5) Briefly summarizes the evidence already in file which will be considered;

(6) Ascertains from the individual whether the information presented is correct and whether he/she fully understands it;

(7) Allows the individual and the individual's representative, if any, to present the individual's case;

(8) Secures updated financial information and verification, if necessary;

(9) Allows each witness to present information and allows the individual and the individual's representative to question each witness;

(10) Ascertains whether there is any further evidence to be presented;

(11) Reminds the individual of any evidence promised by the individual which has not been presented;

(12) Lets the individual and the individual's representative, if any, present any proposed summary or closing statement;

(13) Explains that a decision will be made and the individual will be notified in writing; and

(14) Explains repayment options and further appeal rights in the event the decision is adverse to the individual.

(g) SSA issues a written decision to the individual (and his/her representative, if any) specifying the findings of fact and conclusions in support of the decision to approve or deny waiver and advising of the individual's right to appeal the decision. If waiver is denied, adjustment or recovery of the overpayment begins even if the individual appeals.

(h) If it appears that the waiver cannot be approved, and the individual declines a personal conference or fails to appear for a second scheduled personal conference, a decision regarding the waiver will be made based on the written evidence of record. Reconsideration is then the next step in the appeals process (but see § 410.630(c)).

Subpart F—[Amended]

10. The authority citation for subpart F of part 410 is revised to read as follows:

Authority: Secs. 413(b), 426(a), 507, and 508 of the Federal Coal Mine Health and Safety Act of 1977, as amended (30 U.S.C. 923(b), 936(a), 956, and 957).

11. Section 410.623 is revised to read as follows:

§ 410.623 Reconsideration; right to reconsideration.

(a) We shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 410.624, by or for the party to the initial determination (see § 410.610). We shall also reconsider an initial determination if a written request for reconsideration is filed, as provided in § 410.624, by an individual as a widow, child, parent, brother, sister, or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to benefits may be prejudiced by such determination.

(b) Reconsideration is the first step in the administrative review process that we provide for an individual dissatisfied with the initial determination, except that we provide the opportunity for a hearing before an administrative law judge as the first step for those situations described in § 410.630(b) and (c), where an individual appeals an initial determination denying waiver of adjustment or recovery of an overpayment (see § 410.561a).

12. Section 410.630 is revised to read as follows:

§ 410.630 Hearing; right to hearing.

An individual referred to in §§ 410.632 or 410.633 who has filed a written request for a hearing under the provisions in § 410.631 has a right to a hearing if:

(a) An initial determination and reconsideration of the determination have been made by the Social Security Administration concerning a matter designated in § 410.610;

(b) An initial determination denying waiver of adjustment or recovery of an overpayment based on a personal conference has been made by the Social Security Administration (see § 410.561a); or

(c) An initial determination denying waiver of adjustment or recovery of an overpayment based on a review of the written evidence of record has been made by the Social Security Administration (see § 410.561a) and the determination was made concurrent with, or subsequent to, our reconsideration determination regarding the underlying overpayment but before an administrative law judge holds a hearing.

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20 CFR Part 416

[Regulations No. 16]

RIN 0960-AD90

Evidence of Lawful Admission for Permanent Residence in the United States (U.S.)

AGENCY: Social Security Administration (SSA).

ACTION: Final rule.

SUMMARY: This final regulation sets forth the type of documentation required for an alien to establish the status of lawfully admitted for permanent residence for eligibility purposes under the Supplemental Security Income (SSI) program. The Immigration and Naturalization Service (INS), the Agency responsible for determining alien status and issuing documents certifying alien status in the U.S., changed its policy with regard to what constitutes definitive evidence of lawful permanent resident alien status. In this final SSI regulation, we are removing references to specific INS form numbers and substituting a general reference to an Alien Registration Receipt Card issued under current INS regulations. Thus, SSA's regulations will be broad enough not only to be consistent with the new INS policy, but also to accommodate future INS regulatory changes regarding