When Did I Get My Windfall and Why Is the Social Security Administration Trying to Take It Away?

A History of How and Why the Windfall Elimination Provision Came Into Being

By Roger D. Moore, Esq., Omaha, NE

In 1968, Congress adopted the National Guard Technicians Act of 1968, which made National Guard technicians a special, dual status federal "civilian" employee (one of a number of carefully crafted government titles). The intent of Congress in enacting the Act was to ensure that appropriately qualified persons were employed in National Guard technician positions to provide support for active military personnel, which was viewed as vital to the nation's military strength.

In 1983, Congress amended the Social Security Act when it passed the "Social Security Act Amendments of 1983." The intent of this amendment was to eliminate the unintended perceived benefits windfall that occurred when workers who split their career between covered employment (required to pay Social Security taxes) and non-covered employment (exempt from Social Security taxes). 42 U.S.C. § 415. Federal employment prior to 1984 was exempt from Social Security taxes because federal employees contributed to the federal civil service pension which was "designed to take the place both of social security and a private pension plan for workers who remain in [federal] employment throughout their careers." *See* H.R.Rep. No. 98-25, at 22 (1983), *reprinted in* 1983 U.S.C.C.A.N. 219, 240.

One of the amendments of the 1983 Act provided that individuals who receive a pension from work not covered by the Social Security Act (i.e. federal civilian employees) would have their retirement benefits calculated under an alternative method called the "Windfall Elimination Provision" or "WEP." The alternate method of calculation has the effect of reducing the individual's Social Security retirement benefit to account for what were perceived as relatively lesser contributions to the Social Security Trust Fund. Congress' concern was that individuals who paid into the Social Security retirement system as private civilians and who also earned a military pension during their lives would end up with a higher total monthly benefit than those who worked exclusively either as a civilian or military employee. Congress was seemingly less concerned if the result was a lower retirement benefit, which it acknowledged was also possible.

The language of the statute remained substantially unchanged until 1994, when Congress passed the "Social Security Independence and Improvements Act." That Act added language to the WEP which excluded certain classes of individuals from application of the WEP. Specifically, it excluded "payments based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A). The term "member of a uniformed service" is defined as "any person appointed, enlisted, or inducted in a component of the Army, Navy, Air Force, Marine Corps, or Coast Guard (including a reserve component)." Of course, "reserve component" includes the National Guard element of each branch of service.

So what does all this legal mumbo-jumbo mean? The SSA has taken the position that pensions earned by dual status civilian technicians are **not** "payment(s) based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A). The SSA tried to draw a distinction between the civilian pension earned for the Monday through Friday work and the military pension earned for weekend and active duty work. In a recent case, *Petersen v. Astrue*, Case No. 4:08CV3178 (D.Neb. Feb. 23, 2009), we successfully argued to the U.S. District Court in Nebraska that the dual nature of the employment of National Guard technicians renders **both** pensions "based wholly on service as a member of a uniformed service" regardless of what entity pays the pension. This is because the military pension would not have been earned if being a member of the reserve component were not a requirement of the "civilian" job.

Federal courts have repeatedly and consistently held that National Guard technicians' employment is "irreducibly military" in nature. *Willis v. Roche*, 256 Fed. Appx. 534, 536-37 (3rd Cir. 2007). In light of the inextricably dual nature of employment, we argued it was not proper to separate a civil service pension from the financially separate military pension any more than you can separate the requirement to join the reserve military component

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from the civilian aspects of the job. Additionally, there are "dual status employees" who are **not** required to be members of the reserve component of the military branch they work for. If Congress really intended these positions to be civilian in nature, as the SSA suggested, it could have eliminated the required membership in the reserve component as a condition of employment.

In addition to the decision in *Petersen*, a federal district court in Missouri ruled against the SSA on this issue due to a number of factors. *Price v. Barnhart*, Case No. 03-0005-CV-C-WAK (W.D.Mo. Jan. 5, 2004). Some of the factors considered by those courts are that these dual status employees were required to be members of the National Guard as a condition of their employment, were required to wear a military uniform appropriate for their grade and component of the Armed Forces at all times, and were required to maintain military physical fitness qualifications. 10 U.S.C. § 10216(a) and 32 U.S.C. § 709(b). At oral argument in *Petersen*, the U.S. Attorney admitted this issue could affect tens of thousands of retirees.

The Eighth Circuit Court of Appeals subsequently affirmed the favorable determination in the Nebraska case. 633 F.3d 633 (8th Cir. 2011). This affirmance was not appealed by the SSA. The earlier *Price* case was not appealed by the SSA beyond the district court. Following the decisions in *Petersen*, all WEP cases in Nebraska which I handle have been or are in the process of being approved. It is not clear if the SSA is approving all WEP cases on a nationwide basis or not, which may give rise to the need for a class action in the event the SSA continues to deny these claims in other states.

If a client contacts you about a notice from the SSA indicating that they feel the WEP applies to them please feel free to contact me. This is a very complex issue that most claimants will not understand and, as a result, will probably not appeal. In fact, I have several clients who failed to appeal the initial determination. It remains unclear whether the SSA will pay these individuals their past due benefits in light of the Eighth Circuit's favorable decision in *Petersen*. A special thank you to Robert A. Lynch, Esq., Springfield, MO. He did much of the initial research to bring this issue to light in the *Price* case detailed above. Mr. Lynch was extremely helpful in providing his legal research and briefs when these issues surfaced in Nebraska.

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PRACTICE TIP

Vocational Expert Testimony

By Eric Schnaufer, Esq., Evanston, IL

A representative has a right to challenge a vocational expert's testimony through cross-examination. A representative may obtain claimant-favorable testimony from a vocational expert during cross-examination. When a representative obtains such testimony, the representative should ensure that it is clear and unambiguous. If the testimony is unclear and/or ambiguous, an ALJ may decline to rely upon it to find the claimant disabled and reliance on that testimony at the Appeals Council or in court may be unpersuasive. A representative should assume that any lack of clarity and any ambiguity in a vocational expert's testimony will be construed against the claimant to support a finding of non-disability at the ALJ level, to deny review at the Appeals Council level, and/or to justify affirmance in court.

A vocational expert's claimant-favorable testimony may be unclear or ambiguous in myriad ways. I address two.

First, it may be unclear whether claimant-favorable testimony pertains only to one of the multiple jobs a vocational expert identified. When a representative proves that there is a defect in the vocational expert's identification of one job, the representative should obtain explicit testimony from the vocational expert that, as warranted, the defect applies to any other job the vocational expert identified. The representative should obtain that explicit clarification even if the representative believes that it is obvious that the defect applies not only to the one job, but also to the other jobs identified.

Second, a vocational expert's testimony about the impact of a particular limitation may be ambiguous. For example, a vocational expert may testify that a particular restriction "may" or "might" limit the performance of a job, leaving the record ambiguous whether the restriction does or does not prevent the performance of the job or is consistent with the performance of the job in some but not all work environments. The representative should obtain from the vocational expert a statement that the restriction prevents the performance of the job or, at a minimum, that the vocational expert does not know