

RE: **WEP**

It has come to my attention after receiving additional information that I was denied relief from the pension offset penalty incorrectly. I now have additional information for my appeal to be looked at.

Social Security RS00605.366 Pension Development bulletin dated 10/31/2013 states Claimant alleges eligibility to pension before 1986.

- Verify that the claimant was eligible for the non-covered pension before 1986, before applying the eligibility before 1986 exemption. (RS00605.364) I was eligible July 1, 1981.

Windfall Elimination Program does not affect workers eligible for a pension before 1986, under an early-out option if the worker meets all requirements for the pension other than having actually file. Attach is a decision from The U.S. Court of Appeals, Eleventh Circuit 02-12623 April 16, 2013 stating the WEP applies only if the applicant first become eligible after 1985 for a monthly payment.

- USC 415(a)(7){A} Individuals who become eligible prior to 1986 are not subject to the WEP

Attached are.

- Social Security bulletin RS00605.366 pension development TN 52 (08-13)
- Social Security Exceptions to WEP
- US Court of Appeals, Eleventh Circuit #0212623 Decided April 16, 2003
- Letter from State of NJ saying I was eligible on July 1, 1981
- Two letters from two persons who are receiving relief from WEP. There are more but these are the only two to would provide me their documentation.

Your Name

Address

Phone #

Email

Exceptions to WEP | Office of Budget, Finance, Quality, and Management

Exceptions to WEP

I.

Federal workers who were newly covered under Social Security on January 1, 1984.

People employed on 1/1/1984 by a nonprofit organization that was mandatorily covered under Social Security for the first time on that date.

Workers who have 30 or more years of coverage under Social Security.

People whose only pension is based solely on railroad employment.

People whose only employment not covered by Social Security was before 1957 MS is covered under Social Security

beginning in 1957, so most people who receive only military pensions will not be affected by the modified formulas.

their only employment not covered by Social Security occurred before 1957.

WEP does not affect workers eligible for a pension before 1986 under an early-out option if the worker meets all requirements for the pension other than having actually filed. (If the worker alleges an early offer prior to 1986, s/he must provide statement from the appropriate personnel office naming that individual and establishing that an offer was made; the statement must clearly state that the worker could have received a pension payment 12/85 or earlier.)

Military reservists • Elective 1/95, pensions for military reservists, when the pension is based in part on non-covered

reserve duty before 1988 but after 1956, are no longer subject to WEP.

Effective 1/95, certain Totalization benefits may be exempt.

A monthly periodic payment to a minister based on service as a minister is not considered a pension.

NOTE: While actual WC payments under Federal or State Law are not subject to WEP, a pension payment which is simply "like" or "in lieu of" WC is not exempt from WEP.

United States Court of Appeals, Eleventh Circuit.

Ralph STROUP, Plaintiff-Appellant, v. Jo Anne B. BARNHART, Social Security
Commissioner, Defendant-Appellee.

No. 02-12623.

Decided: April 16, 2003

Before TJOFLAT, ANDERSON and CUDAHY, Circuit Judges. • William Earl Home, Jr.,
Jacksonville, FL, for Plaintiff-Appellant.

Richard Blake, Mary Ann Sloan, Douglas Wilson, Dennis R. Williams, Atlanta, GA, for Defendant-
Appellee.

Former Police officer Ralph Stroup appeals a district court decision upholding the Social Security Administration's calculation of his disability benefits under the windfall elimination provision of the Social Security Act, 42 U.S.C. § 415(a)(7). Finding the Commissioner's construction of the windfall elimination provision reasonable we affirm the decision of the district court.

I.

Ralph Stroup began working for the Kokomo, Indiana, Police Department (KPD) in January 1966. Under Indiana law and the KPD pension plan, he later qualified for retirement with pension benefits after completing twenty years of service. According to the City of Kokomo and the KPD, Stroup met this service requirement on December 31, 1985, upon completion of a shift ending at 4 p.m., Stroup did not immediately retire; he remained employed with the KPD until March 1988, and continued to work elsewhere until 1998. In 1996 and in 1998, Stroup applied for Social Security disability benefits on the basis of his osteoarthritis and other ailments. The Social Security Administration (SSA) found him eligible for disability benefits as of January 1, 1996.

The present dispute has to do with the calculation of those benefits. It turns out that December 31, 1985, was legally a very consequential time to qualify for retirement. Two years earlier, Congress had enacted the windfall elimination provision (WEP) to Social Security to eliminate the unintended "double dipping" that accrued to workers who split their careers between employment taxed for Social Security benefits ("covered") and employment exempt from Social Security taxes ("noncovered"). The SSA determines a beneficiary's primary insurance amount (the figure on which the amount of actual benefits is partially based) from his "eligible" average monthly earnings. 42 U.S.C. § 415- Prior to the enactment of the WEP, this calculation was completed without regard to whether the individual's wages were covered or noncovered. As a result, an individual who had worked for both covered and noncovered wages in the course of his employment history would receive both full Social Security benefits and whatever pension benefits were provided by his noncovered employment. The WEP, as codified at 42 U.S.C. § 41s(a)(7), provides that the primary insurance amount for such individuals be computed using a modified formula. However, the WEP applies only if the applicant "first becomes eligible>le after 1985 for a monthly periodic payment. • 42 U.S.C. § 415(a)(7)(A). Individuals who become prior to 1986 are not subject to the WEP.

Stroup completed his required twenty years of service on the last day of 1985. The SSA determined that the WEP was applicable, significantly reducing (by as much as 40-60%, according to Stroup) his Social Security disability payments. This determination was upheld upon reconsideration by the SSA and also by an Administrative Law Judge (ALJ). The ALJ reasoned that, since Stroup worked through December 31, 1985, he could not have been eligible to reach a pension until January 1, 1986-after 1985. Stroup appealed this decision to federal district court, where a magistrate judge affirmed the ALJ's decision. Stroup appeals, arguing that he should not be subject to the WEP.

If anything, the Commissioner *has* provided much evidence of the SSA's consistency in its interpretation and application of the WEP, further validating deference. For example, the SSA's Program Operations Manual System (POMS) states that for claimants to be free from the WEP under an early-out retirement provision, they "must provide evidence* that they "could have received a pension payment for December 1985 or earlier. POMS 00 3696.D3 (emphasis added). While the POMS does not have the force of law, it can be persuasive. *Bubnis v. Apfel*, 150 F.3d 177, 181(2nd au998); *Davis v. Sec'y of Health and Human Servs.*, 867 P.2d 336, 340 (6th Cir.1989); *Evelyn v. Schweiker*, 685 F.2d 351, 352 n. 5 (9th Cir.1982). The Commissioner's interpretation is also consistent with Congressional understanding of the WEP as evinced in a conference report discussing a modification of the statute. See H.R. Conf Rep. No. 100-1104 (1988), reprinted in 1988 U.S.C.C.A.N. 5048, 5322 (describing "the first month the individual is eligible for both . pension and social security " as "the first month he or she could receive both benefits if he or she applied for them-the month of 'concurrent eligibility' ").

Finally, we note that our holding today is in harmony with other courts that have addressed the interpretation of the WEP. See *Johnson v. Sullivan*, 777 F.Supp. 741, 744 (W.D.Wis.1991) ("Accordingly, an individual who turns 62 in December. is 'eligible' for. benefits in January."); see also *Das*, 17 F.3d at 1254 (citing the above conference report and holding that *Das* was subject to the WEP because, although his pension plan vested prior to 1986, he could not have received benefits before 1986 since he turned 62 in 1988).

III.

For the foregoing reasons, the judgment of **the** district court *is* AFFIRMED.

FOOTNOTES

1. A City of Kokomo letter actually states that Stroup became eligible on December 31, 1986, but the Commissioner concedes that this must have been a clerical error.
2. Stroup in his briefs also asked us to remand the case so that a complete review of his earnings record can be conducted. However, any concerns about the accuracy or completeness of his earnings record must be presented first to the SSA through its administrative appeals process. Stroup has not received a "final decision" from the SSA with respect to his earnings record that is subject to judicial review. See *Sims v. Apfel*, 530 U.S.103, 106-07, 120 S.Ct. 2080, 147 L.Ed.2d So (2000); *Crayton v. Callahan*, 120 F-3d 1217, 1220 (11th Cir.1997). Stroup should, therefore, raise these concerns with the SSA. Stroup does not challenge the constitutionality of fthe WEP. We note that other courts have considered and affirmed the constitutionality of the provision. See *Rudykoff v. Apfel*, 193 F.3d S79 (2d Cir.1999); *Das v. Dep't of Health and Human Services* 17 F.3d1250, 1255-56 (9th Cir.1994).
3. 42 U.S.C. § 405:(a) Rules and regulations; procedures. The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to cany out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and tile method of taking and furnishing the same in order to establish the right to benefits hereunder.

4. In contrast, a person becomes "entitled" to benefits once he or she has actually stopped working and applied. See 20 C.F.R. 404.203.

5. These other factors include "the thoroughness evident in [tile agency action's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." • *Skidmore v. Swift & Co.*, 323 U.S. at 140, 65 S.Ct. 161.

6. The relevant part of this document, entitled "Claims Folder/Material Transmittal", states: We need to look at tile date they were eligible to receive the pension as opposed to the date they were eligible to retire, as they are not necessarily tile same. If he was not eligible to retire until COB on 12/31/85, it would seem highly unlikely that he would be eligible to the pension prior to 1/1/86. The pension plan would need to provide that he could receive a pension for at least one day of December 1985 for the exemption to the met. There's not much in writing about this. An old NEWS item from 11/27/85 that I kept a copy of stated: "Those eligible for either a Social Security benefit or a non-covered pension prior to 1986 are exempt from WEP. This means that a Civil Service retiree with 30 years of service who attains age 55 on December 15, 1985, is first eligible for a pension for tile month of Januairy 1986. Therefore WEP applies." • This is similar to your situation in that even though the eligibility requirements for retirement were met in 12/85, pension eligibility (probably) did not exist until 1/86. (The word "probably" was apparently added with a pen (under a caret) after the document was typed and printed.)

CUDAHY, Circuit Judge:

II.

Questions of statutory interpretation are reviewed de novo. *United States v. Alborola-Rodriguez*, 153 F.3d 1269, 1271 (11th Cir.1998). However, if we find the statute in question to be ambiguous, we must accord proper deference to the interpretation adopted by the agency to which Congress has delegated the administration of the statute. See *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Ninth Circuit has noted that the key relevant clause in the WEP, "who first becomes eligible after 1985 for a monthly periodic payment," is on its face ambiguous. *Das v. Dep't of Health and Human Servs.*, 17 F.3d 1250, 1253-54 (9th Cir.1994). We agree. Standing alone, the statutory language could be interpreted to support either Stroup's or the Commissioner's position in this case. The statute, however, does not stand alone. Acting pursuant to its broad statutory authority, 42 U.S.C. § 405(a), the SSA issued a regulation specifying what is meant by "eligibility": "We consider you to first become eligible for a monthly pension in the first month for which you met all requirements for the pension except that you were working or had not yet applied." 20 C.P.R. § 404.213(a)(3) (emphasis added).•

According to the statute, for Stroup not to be subject to the WEP, he must have become "eligible" for his pension before 1986-i.e., in December 1985. Under the definition of eligibility provided by the regulation, he clearly had not. The first month for which he met all the requirements was January 1986. To discern the operation of the critical word "for," • consider two alternatives. Had Stroup completed twenty years of service by November 30, he would have met all the requirements for his pension for the entire month of December.

The result would be less clear had Stroup completed his twenty years of service in mid-December. In that situation, Stroup would have met all the requirements for his pension for part of the month of December, and arguably would still have become eligible before 1986 (since the regulation does not explicitly state that eligibility begins only in the first full month). Because here Stroup worked through December 31, the opposite result is indicated: He did not become eligible until January 1986. Had the regulation read, instead, that a person becomes eligible in the month in which he or she meets all requirements for a pension, Stroup would have had a stronger case.

Stroup argues that the § 404.213(a)(3) definition of eligibility denies the statute's plain meaning. But, as we noted, the statute is ambiguous and has no plain meaning. Thus, we must determine the degree of deference to give the SSA regulation under **Mead**. The proper level of deference depends on the circumstances of each case, including the presence of congressionally delegated agency authority, the form of the agency action and, for those situations not clearly meriting Chevron deference, the factors laid out in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).; *Mead*, 533 U.S. at 227-35, 121 S.Ct. 2164. Here, the SSA argues that *its* regulation is due Chevron deference, meaning that it should be upheld as long as it is reasonable and not contrary to clear congressional intent. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. Stroup agrees that "considerable weight should normally be accorded" to the SSA's statutory constructions. Appellant's Opening Br. at 10. The Supreme Court recently considered, in *Barnhart v. Walton*, 535 U.S. 212, 217-22, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002), the degree of deference due to a statutory interpretation by the SSA in the form of a regulation formally promulgated pursuant to 42 U.S.C. § 405(a). The Court concluded that "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that Chevron provide[d]," for that case, "the appropriate legal lens." *Walton*, 535 U.S. at 222, 122 S.Ct. 1265. Especially in the absence of any argument to the contrary, we believe that these same factors, including especially the undeniably interstitial nature of the question at hand, dictate that Chevron should also apply to the case before us.

Stroup provides no persuasive argument that the regulation is unreasonable. We start by noting, in disagreement with Stroup, that the language of the statute does not preclude the interpretation given it by the Commissioner. See *Wahoo*, 535 U.S. at 218, 122 S.Ct. 1265. Stroup's other arguments also fail to rebut Chevron's presumption that the SSA's interpretation of the statute should be controlling. Stroup argues that the Commissioner should follow the mandate of 20 C.F.R. § 404.213(a)(3), which requires the SSA to "consider all applicable service used by the pension-paying agency," and defer to the KPD's belief that Stroup became "eligible to retire" after his shift on December 31. The Commissioner is considering all applicable service, but does not have to accept KPD's statement as a valid legal conclusion when the SSA has its own definition of "eligibility" that is controlling here. Stroup also points to intra-agency documentation showing that the SSA was not always certain that the WEP applied to Stroup. District Ct. Tr. at 40. First, upon review of the document, we do not believe it evinces any "struggle" in the SSA's interpretation and application of the WEP, as Stroup has characterized it. Second, a temporary, nonpublic uncertainty (here, an acknowledgment that there is "not much in writing" on point and the use of the qualifier "probably") can hardly bind the Commissioner in this proceeding. At most, inconsistency in an agency's position is one factor in determining how much deference is owed, *Mead*, 533 U.S. at 228, 121 S.Ct. 2164 and we believe that Chevron deference is owed here. Finally, we note that the document's reasoning and conclusion is entirely consistent with respect to Stroup's situation. The only arguable inconsistency in the document is an internal one, and relates to whether a person qualifying for retirement in mid-December 1985 would be subject to the WEP, a question not before us.

Social Security

The Official Website of the U.S. Social Security

Administration Official Social Security Website

Program Operations Manual System (POMS)

Effective Dates: 10/31/2013 – Present

TN 52 (08-13)

RS 00605.366 Pensions Development

A. Field Office (FO) Initial Claims Development

1. Claimant entitled to a pension.

For a claimant who is first eligible for a non-covered pension after 1985, and either become entitled at the time of filing an application for retirement or disability benefits or will become entitled to the pension within the life of the application, do the following:

- a. Document information about the pension in the applicable Modernized Claims System (MCS) screens or obtain an SSA-150, Modified Benefit Formula Questionnaire, or an SSA-308, Modified Benefit Formula Questionnaire - Foreign Pension. See exhibits of SSA-150 and SSA-308 in RS 00605.390 and RS 00605.392, respectively.
- b. Determine the gross amount of the pension in the first month of concurrent entitlement to both, the pension and the Social Security benefit. The amount of the pension is the amount **before** any deductions for:
 - c. Survivor annuities.
 - d. Allotments;
 - e. Health insurance;
 - f. Credit splitting (see RS 00605.372D.2.); or
 - g. Assignment of pension (see RS 00605.372D.2.).
- c. Verify the pension amount, if required. See RS 00605.366(in this section).
- d. Before adjudication, obtain evidence as described in RS 00605.366D in this section.

When the alleged pension amount is low enough for the WEP guarantee to apply, the claimant must provide verification of the pension amount. For types of evidence of pension amount, see RS 00605.366D in this section. The verification of the pension amount must include the following:

- the amount of the pension in the first month the claimant is concurrently entitled to the pension and the Social Security benefit; and
- the dates of employment (if the pension is based on both covered and non-covered) that the pension is based; and
- the dates of non-covered employment after 1956 included in the pension.

3. Claimant alleges eligibility to pension before 1986

Verify that the claimant was eligible for the non-covered pension before 1986, before applying the eligibility before 1986 exemption. For information about determining eligibility,

see [RS 00605.364](#).

D. Evidence Of Pension Amount, Pension Entitlement Month, Employment Dates, And Eligibility Date Before 1986

The claimant is responsible for securing evidence. Acceptable evidence includes award letters and other correspondence from the pension-paying agency or the employer. The following is a list of other types of evidence the claimant may provide to verify information.

1. Pay-slips

- a. Use pay-slips with a service computation date to determine dates of employment for the WEP guarantee computation.
- b. Do not use pay-slips to derive an eligibility date alleged to be prior to 1986.

2. Verbal or written evidence from pension-paying agency

- a. The FO or PC can verify pension information by telephone and annotate as appropriate on the Shared Processes Evidence (EVID) screens, or document the file with a Report of Contact (RPOC).

E: WEP

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- Verify that the claimant was eligible for the non-covered pension before 1986, before applying the eligibility before 1986 exemption.(RS00605.364) I was eligible July 1, 1981.

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- Social Security Exceptions to WEP,
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- Letter from State of NJ saying I was eligible on July 1, 1981,
- Two letters from two persons who are receiving relief from WEP. There are more but these are the only two who would provide me their documentation.

Sincerely,



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF STATE POLICE
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Lt. Governor

MATTHEW J. PLATKIN
Acting Attorney General

COLONEL PATRICK J. CALLAHAN
Superintendent

To whom it may concern:

_____ was employed by the New Jersey State Police from June 26, 1971 until his retirement on April 1, 1997 after twenty-six years of service.

_____ was eligible for a deferred retirement on July 1, 1981.

If you have any questions, please contact _____, (609) 882-2000 extension 2620.

Sincerely,

Personnel Assistant
NJSP Human Resources



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