



SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA-2012-0046]

Social Security Acquiescence Ruling (AR) 12-X(8); Petersen v. Astrue, 633 F.3d 633 (8th Cir. 2011); Whether a National Guard Technician Who Worked in Noncovered Employment is Exempt from the Windfall Elimination Provision (WEP)—Title II of the Social Security Act

AGENCY: Social Security Administration.

ACTION: Notice of Social Security Acquiescence Ruling.

SUMMARY: We are publishing this Social Security Acquiescence Ruling (AR) in accordance with 20 CFR 402.35(b)(2).

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Robert Crowe, Office of the General Counsel, Office of Program Law, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235-6401, (410) 965-3155, or TTY 410-966-5609, for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

SUPPLEMENTARY INFORMATION

An AR explains how we will apply a holding in a decision of a United States Court of Appeals that we determine conflicts with our interpretation of a provision of the Social Security Act (the Act) or regulations when the Government has decided not to seek further review of that decision or is unsuccessful on further review.

We will apply the holding of the Court of Appeals' decision as explained in this AR to all determinations or decisions at all levels of administrative review within the Eighth Circuit. We will apply this AR to all determinations or decisions made on or after [INSERT THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If we made a determination or decision to apply the WEP to your retirement or disability benefits between February 3, 2011, the date of the Court of Appeals' decision, and [INSERT THE DATE OF PUBLICATION IN THE FEDERAL REGISTER], the effective date of this AR, you may request that we apply the AR to the prior determination or decision. You must show, pursuant to 20 CFR 404.985(b)(2), that applying the AR could change our prior determination or decision in your case.

In addition, when we received this precedential Court of Appeals' decision and determined that an AR might be required, we began to identify those persons within the circuit who might be subject to readjudication if we subsequently issued an AR. Because we have determined that an AR is required and are publishing this AR, we will send a notice to those individuals we have identified. In the notice, we will provide information about the AR and their right to request readjudication under the AR. However, affected individuals do not need to

receive a notice in order to request that we apply this AR to our prior determination or decision, as provided in 20 CFR 404.985(b)(2).

If we later rescind this AR as obsolete, we will publish a notice in the Federal Register to that effect, as provided in 20 CFR 404.985(e). If we decide to relitigate the issue covered by this AR, as provided by 20 CFR 404.985(c), we will publish a notice in the Federal Register stating that we will apply our interpretation of the Act or regulations involved and explaining why we have decided to relitigate the issue.

(Catalog of Federal Domestic Assistance, Program Nos. 96.001 Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.004 Social Security—Survivors Insurance)

Dated: August 21, 2012

Michael J. Astrue,
Commissioner of Social Security.

ACQUIESCENCE RULING 12-X(8)

Petersen v. Astrue, 633 F.3d 633 (8th Cir. 2011): Whether a National Guard Technician Who Worked in Noncovered Employment is Exempt from the Windfall Elimination Provision (WEP)—Title II of the Social Security Act

ISSUE: Whether a National Guard technician who worked in noncovered employment under the Civil Service Retirement System (CSRS) is subject to the WEP.

STATUTORY AND REGULATORY CITATION: Section 215(a)(7)(A)(III) of the Social Security Act, 42 U.S.C. 415(a)(7)(A); 20 C.F.R. 404.213(e)(9).

CIRCUIT: Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota).

APPLICABILITY OF RULING: This ruling applies to determinations or decisions, at all levels of administrative review, i.e., initial, reconsideration, administrative law judge (ALJ) hearing, and Appeals Council.

DESCRIPTION OF CASE: Mr. Petersen was a technician with the National Guard from 1972 to 2000. The National Guard Technician Act of 1968, Pub. L. No. 90-486, codified at 32 U.S.C.

709, made technicians with the National Guard civil service employees of the United States Government. Some technicians, like Mr. Petersen, have “dual status” because they are not only civilian employees but also military members of the National Guard. Mr. Petersen received a civilian pension from the CSRS for his work as a National Guard technician. His work as a technician was not covered by Social Security, and Social Security taxes were not withheld from his pay. Thus, his CSRS pension is based wholly on noncovered civil service work.

Mr. Petersen applied for Social Security retirement benefits in 2006. Social Security found that he was entitled to benefits but informed Mr. Petersen that his benefit amount would be reduced in accordance with the WEP. The agency denied his request for reconsideration. He requested a hearing by an ALJ, and the ALJ found that Mr. Petersen’s benefits should not be reduced because of the WEP. The Appeals Council then reviewed the ALJ’s decision on its own motion and subsequently issued a decision finding that Mr. Petersen’s benefits were subject to reduction under the WEP. The Appeals Council’s decision was the agency’s final decision.

Mr. Petersen requested judicial review of the agency’s final decision in accordance with 42 U.S.C. 405(g). On February 23, 2009, the district court issued a decision finding that his benefits were not subject to the WEP because 42 U.S.C. 415(a)(7)(A)(III) exempts from the WEP those retirement payments based on service as a member of a uniformed service. The district court found that Mr. Petersen’s National Guard technician service qualified him for this exception. The Government appealed the district court’s decision to the United States Court of Appeals for the Eighth Circuit.

HOLDING:

The Court of Appeals noted that “dual status” National Guard technicians must maintain military membership in the National Guard and are also required to wear their uniform, even when performing civilian technician work. The Eighth Circuit held that, as a result of “these unique National Guard technician requirements imposed upon him, Petersen performed his work ‘as a member of’ the Nebraska Air National Guard.” Consequently, the Eighth Circuit found that Mr. Petersen qualified for the exception to the WEP for work performed “as a member of the uniformed services.”

STATEMENT AS TO HOW PETERSEN DIFFERS FROM THE AGENCY’S POLICY:

The WEP is a modified formula for calculating the retirement or disability benefits of a person who receives a pension from noncovered work (i.e., work that is not defined as employment for Social Security purposes and where Social Security taxes were not deducted from the employee’s pay). The WEP applies to persons who attain age 62 or become eligible for disability benefits after 1985 and who first become eligible for a monthly payment (such as a civil service pension) after 1985 “which is based in whole or in part upon his or her earnings for service which did not constitute ‘employment’ as defined in” 42 U.S.C. 410. 42 U.S.C. 415(a)(7)(A)(III). The WEP applies to persons with noncovered employment in the CSRS which includes the civilian employment of a “dual status” National Guard technician. A formula is used to compute the person’s primary insurance amount (PIA), which then is used to compute the amount of the person’s Social Security benefits. 42 U.S.C. 415(a)(7)(B); 20 C.F.R. 404.213(c). The formula results in a lower Social Security benefit.

Congress amended the WEP in 1994 in Pub. L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994 (the Independence Act). Section 308 of the Independence Act, codified at 42 U.S.C. 415(a)(7)(A)(III), created a new exemption from the WEP, which applies to “a payment based wholly on service as a member of a uniformed service” as defined in 42 U.S.C. 410(m). We interpret the uniformed services exception to the WEP to mean that only monthly payments based on military service are exempt from the WEP. Under this interpretation, monthly payments that are based on noncovered civilian public employment, including that of National Guard technicians who work under the CSRS, are not exempt from the WEP. Moreover, the effect of the uniformed services exception to the WEP and the regulatory provision found at 20 C.F.R. 404.213(e)(9) is to exempt from the WEP only military retirement pay based on reserve inactive duty training (IDT). Other kinds of military duty, such as active duty, already were not subject to the WEP because they have been covered employment since 1956. The WEP does not apply to noncovered work before 1957.

The legislative history of the uniformed services exception to the WEP explains that the purpose of the exception was to exempt military retired pay, based on noncovered IDT military duty, from application of the WEP. The exception was not intended to exempt any pension based on civilian work from application of the WEP. The Court of Appeals declined to consider the legislative history of the uniformed services exception because it found there was no ambiguity to the uniformed services exception.

EXPLANATION OF HOW SSA WILL APPLY THE PETERSEN DECISION WITHIN THE CIRCUIT:

Social Security old-age or disability applicants and beneficiaries who receive a CSRS pension based on noncovered work as dual status National Guard technicians, and who are permanent legal residents of a State within the Eighth Circuit, should have their Social Security benefits computed using the normal PIA, rather than the WEP PIA described in 42 U.S.C. 415(a)(7) of the Act. A decisionmaker should not apply this AR to an applicant or beneficiary who is not a permanent legal resident of a State within the Eighth Circuit at the time of making the determination or decision to apply the WEP. Before we determine that the WEP does not apply, we must have evidence that an applicant's or beneficiary's CSRS pension is based on service as a dual status civilian technician with the National Guard.

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