



New York Makes Work Pay

Developing a path to employment for New Yorkers with disabilities

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Policy to Practice Brief #6

Overpayments and the Return to Work

A Practical Guide for Benefits Planners and Advocates

James R. Sheldon, Jr., J.D.
Neighborhood Legal Services

Raymond A. Cebula, III, J.D.
Employment and Disability Institute

About Policy-to-Practice Briefs

This document is one of a series of policy-to-practice briefs published as part of the New York Makes Work Pay Project, a Comprehensive Employment Services Medicaid Infrastructure Grant funded by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) to the New York State Office of Mental Health (OMH) and its management partners the Blatt Institute at Syracuse University and the Employment and Disability Institute (EDI) at Cornell University. The New York Makes Work Pay Initiative is currently funded for calendar years 2009 and 2010 and will provide an array of services to individuals with disabilities and the agencies and advocates that serve them, helping to remove obstacles to work and pave the way to self-supporting employment.¹

This brief is based, in part, on a similar document last updated by the authors in 2003 and originally published by the Work Incentives Support Center in the Employment and Disability Institute at Cornell. Materials were reviewed for accuracy by the Social Security Administration (SSA), Office of Employment Support Programs. However, the thoughts and opinions expressed in these materials are those of the authors and do not necessarily reflect the viewpoints or official policy positions of the SSA, CMS, or OMH. The information, materials and technical assistance are intended solely as information guidance and are neither a determination of legal rights or responsibilities, nor binding on any agency implementation and/or administrative responsibilities.

This publication is based on federal Social Security and Supplemental Security Income (SSI) laws, regulations and policy. However, unlike earlier versions, the current version is specifically targeted to New Yorkers with disabilities and, as such, will use New York's SSI rates in all its examples. Also, as relevant, we will specifically mention New York agencies by name and reference any New York-specific supports which may be able to assist New Yorkers with disabilities achieve their work goals when used in combination with SSI's Plan for Achieving Self Support. Notwithstanding this focus on New York, this publication will include extensive references to SSI policy and will be a valuable reference throughout the nation.

¹ A detailed description of the New York Makes Work Pay Project and its services can be found at <http://www.NYMakesWorkPay.org>

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I. Introduction

Supplemental Security Income (SSI)² and Social Security Disability Insurance (SSDI) beneficiaries who work face a complex maze of rules governing how that work will affect their benefits. These rules may have an impact on both their current and future eligibility for SSI and SSDI benefits. Since these rules are so complex, and will differ depending on whether the individual receives SSI, SSDI or a combination of both, beneficiaries who work are often uncertain about whether they are being paid properly. Many beneficiaries must simply assume that the Social Security Administration (SSA) has paid them properly in response to timely reporting of wages.

As most advocates know, a high percentage of SSI and SSDI beneficiaries who work will face an overpayment of benefits at some time.³ An overpayment case will arise whenever SSA asserts that an individual received a benefit payment that he or she was not legally entitled to receive. While many of these alleged overpayments are small and their recovery by SSA can be avoided by a timely request for waiver,⁴ many will amount to thousands of dollars.

As explained in more detail below, the best way to avoid an SSI overpayment (or underpayment) is to report any of the following events quickly: changes in earned or unearned income; changes in resources which result in non-excluded resources exceeding SSI's \$2,000 limit (\$3,000 for a federally married couple);⁵ marriage or divorce; and changes in living arrangements. SSDI beneficiaries should also report any changes in earned income in a timely manner. Regular communication with SSA's staff, especially when it appears that improper payments are coming to a beneficiary, may also help minimize the chances of an overpayment or the amount of any overpayment that does occur. The other advantage of this timely communication and reporting is that it ensures that the beneficiary will have a reasonable expectation of what income to plan on for the immediate future. See Section V (B) below for a discussion of reporting requirements.

When SSA informs an individual of an alleged overpayment, he or she has four choices. First, the individual may agree that they were overpaid, determine that it is not worth pursuing a waiver, and agree to pay the money back. Second, the individual can use the SSA appeals system to challenge the overpayment determination. Third, the individual

² A listing of the abbreviations and acronyms used in this article appears in Appendix-A at the end of this article.

³ SSI recipients, in particular, may face an underpayment of benefits as well. This would most likely occur when a reduction in wages was either not timely reported to SSA or not timely input into SSI's data system.

⁴ As discussed more fully below, upon application by a beneficiary SSA may administratively waive any overpayment of \$1000 or less without meeting all of the traditional criteria for a waiver.

⁵ In order for the resource limit for a married couple to apply to an SSI claim, the marriage must be recognized by the federal government. Currently same-sex marriages (MA & CT) and civil unions are not recognized by the federal government.

can agree with all or part of the overpayment determination and seek a waiver of SSA's right to recover the overpayment. Fourth, facing the need to repay an overpayment through a reduction to the SSI or SSDI check, the individual may seek to negotiate a lower monthly amount of repayment.

This article will describe:

- how overpayments occur;
- SSA's notice requirements when they advise recipients of alleged overpayments;
- how the beneficiary or advocate submits a request for reconsideration or waiver;
- how to avoid overpayments through timely reporting of income and other events;
- tips for evaluating the merits of a potential request for reconsideration or waiver; and
- how to establish the right to a waiver where "without fault" and "hardship" must be shown.

II. Sources of Overpayments

An overpayment of SSI or SSDI benefits can result from a seemingly endless variety of events as well as placing extreme stress upon the beneficiary and potential hamper the return to work effort. This section will focus on some of the most common reasons for overpayments, with an emphasis on those overpayments that are associated with work activity.

A. SSI Overpayments

1. Excess income.

This overpayment could be attributed to unearned income. For example, some adult SSI beneficiaries will qualify for SSDI benefits known as Childhood Disability Benefits (most often referred to as CDB and formerly referred to as Disabled Adult Child or DAC benefits) upon the disability, retirement, or death of a parent. This may occur, for example, when the SSI recipient has a disability, such as mental retardation, that existed before the individual was 22 years old. The receipt of this new SSDI check will result in a reduction in the amount of the SSI check or, in some cases, will eliminate SSI eligibility. A beneficiary who continues to receive the same SSI check, in these circumstances, will probably face an overpayment.⁶

⁶ An individual currently receiving CBD benefits may see those benefits increase when certain events occur. For example, CDB benefits may increase upon the death of a parent who was collecting SSDI or Social Security retirement benefits.

This overpayment could also result from increased earned income from employment. The SSI program will disregard the first \$65 of gross wages (or \$85 if there is no unearned income) in calculating the monthly SSI check. After that, the SSI check will be reduced by \$1 for every additional \$2 in monthly gross wages. This means that if the wages of a working SSI beneficiary increase by \$200, his or her monthly SSI check should go down by \$100.⁷ A beneficiary who continues to receive the same SSI check, in these circumstances, will probably face an overpayment.

2. Excess resources.

A very common overpayment occurs when SSA determines that SSI benefits were paid to an individual during a period when they possessed excess resources, i.e., non-excluded resources in excess of the SSI program's \$2,000 limit (\$3,000 for a federally married couple).⁸ For example, if the person possessed \$2,300 in a bank account for a five-year period, SSA may seek recovery of an overpayment based on the amount of SSI benefits paid during each month of the five-year period. In a situation like the one described — an overpayment of thousands of dollars caused by the beneficiary having \$300 over the resource limit — SSA should be able to waive the recovery of the overpayment if the beneficiary did not realize the bank account was above the resource limit. In these circumstances, recovery would be “against equity and good conscience.”⁹

3. Other factors that may cause an SSI overpayment.

Many factors or changes in circumstances can affect an individual's right to an SSI check or affect the SSI payment rate that applies to them. For example, a person who is out of the country for 30 consecutive days will be ineligible for SSI.¹⁰ Similarly, a person who goes into a public institution for a full calendar month will be ineligible for SSI. If an individual goes into a medical treatment facility for a full calendar month and Medicaid pays for at least 50 percent of the care, the SSI payment will be limited to \$30 per month.¹¹ An individual who shares an apartment or house with others, and ceases to contribute to the household expenses, may face up to a one third reduction in the amount of SSI payment that is due.¹² When the individual continues to receive the same SSI check, despite these changes in circumstances, it is likely that he or she will be overpaid.

⁷ Always be sure to use a proper SSI calculation worksheet when providing a beneficiary with an estimate as to the impact of income (earned and unearned) upon monthly SSI payments. SSI is an “exact science” and all allowable deductions and exclusions MUST be taken in the proper order.

⁸ See 20 C.F.R. § 416.1210, for a listing of resources that are exempt and not counted against the \$2,000 limit.

⁹ SSA Program Operation Manual System (POMS) SI 02260.025 D. See Section VIII, below.

¹⁰ See 20 C.F.R. § 416.215.

¹¹ See *Id.* §§ 416.211 (residents of a public institution); 416.212 (continuation of full benefits in certain cases of medical confinement).

¹² See *id.* §§ 416.1130 – .1148 for SSI's rules governing in-kind support and maintenance.

B. SSDI Overpayments: Performing Substantial Gainful Activity After a Trial Work Period

Substantial gainful activity (SGA) is defined, for the year of 2009, as gross monthly earnings \$980 or more.¹³ The SSDI beneficiary is allowed a nine-month trial work period (TWP) during which the individual can collect a full paycheck and an SSDI check, even if their earnings are above the SGA level.¹⁴ Following the ninth TWP month, the beneficiary is entitled to a 36-month extended period of eligibility (EPE).

The first time the beneficiary earns gross countable wages of more than the SGA amount following the TWP, the individual will be entitled to SSDI benefits for that month and the following two months (known as the three-month grace period). If this occurs during the EPE, the individual will be entitled to SSDI checks in subsequent EPE months only when his or her monthly countable wages are less than the SGA amount for the year involved. When countable wages are more than the SGA amount, the individual will not be entitled to an SSDI check for that month. Should an individual earn more than the SGA amount after the EPE, the individual faces an immediate termination of SSDI benefits, subject to expedited reinstatement if wages are later reduced below the SGA level.¹⁵

A very common overpayment occurs when an SSDI beneficiary continues to receive benefits when they are performing SGA during the EPE or following the EPE. Compared to SSI overpayments associated with work activity, the SSDI monthly overpayment amounts tend to be much higher. This is because the SSDI overpayment, in these cases, will always be equal to the full monthly check. So, for example, an SSDI beneficiary who was performing SGA as their EPE began and continued to do so throughout their entire 36-month EPE will face a 33-month overpayment if they continued to receive SSDI throughout that period. If this individual received a \$700 per month SSDI check during these 33 months, he or she would face an overpayment of more than \$23,000. As we explain below, sometimes overpayments like this occur, despite timely reporting of wages, because SSA's staff fails to timely determine continuing SSDI eligibility during and after the EPE.

¹³ See 20 C.F.R. §§ 404.1574(b). The SGA amount will be indexed each year based on the National Wage Index. *Id.* The 2009 SGA amount for the legally blind is \$1640 per month, which will also be indexed each year. In this article, our examples will all reference the \$980 SGA rule. SSA will usually announce the new SGA amounts no later than November for the upcoming year.

¹⁴ 42 U.S.C. § 422 ©; 20 C.F.R. § 404.1592; POMS DI 13010.035 et. seq.

¹⁵ An article which thoroughly discusses the SGA rule, the TWP, the EPE, and the new expedited reinstatement of benefits provisions, in the SSDI context, is contained in the summer 2004 edition of the Benefits Planner newsletter. This newsletter, which is produced by the New York State Work Incentives Support Center, can be found on the website Neighborhood Legal Services, Inc., www.nls.org/planner/summer04.htm. Policy and Practice Brief #28 also provides an in depth discussion of expedited reinstatement. Expedited Reinstatement of Social Security or Supplemental Security Income Disability Benefits, J. Sheldon, May, 2006, www.ilr.cornell.edu/publications/PPBriefs/PP_28.pdf.

III. How a Beneficiary is Informed of an Overpayment

A. The Beneficiary Must Receive a Written Notice

The SSI and SSDI regulations require that SSA issue a written notice to the current or former beneficiary whenever it asserts that the individual has received an overpayment of benefits.¹⁶

B. The Written Notice Must Explain the Basis for SSA's Claim that the Individual was Overpaid

The written notice of overpayment must fully inform the recipient of the basis for SSA's decision. The notice must advise the individual of the following: the time period or periods during which the overpayment of benefits arose; the amount of overpayment in each time period and the total overpaid amount for all periods; and the reason for the overpayment.¹⁷ On a practical level, the notice must provide enough information, in simple, understandable language, so that the beneficiary or the beneficiary's advocate can determine whether all or part of SSA's determination is incorrect.

What if an SSI recipient received an overpayment because a \$200 wage increase was not recorded by SSA for 10 months, resulting in a \$1,000 overpayment? The notice should indicate the months for which benefit amounts were affected, the SSI amount that was due each month and the SSI checks actually received, as well as the total amount of the overpayment that SSA claims must now be repaid.

C. The Written Notice Must Inform the Beneficiary of the Rights to Reconsideration and Waiver

The SSI or SSDI recipient has the right to appeal SSA's overpayment determination and the amount of the overpayment. This initial appeal is known as a reconsideration. A reconsideration is for the purpose of challenging the existence of or amount of an overpayment. Denials, or adverse determinations, of a reconsideration request are appealable and will follow the traditional administrative appeal process.

Even if the beneficiary agrees with SSA with respect to the entire alleged overpayment or agrees that part of the overpayment determination is correct, the individual can request that SSA waive its right to recover the overpayment. If the recipient requests waiver and SSA denies the waiver request, the recipient can appeal the denial by filing a request for reconsideration and then following the traditional appeal process.

SSA's notice of overpayment must fully inform the individual of the right to reconsideration and waiver, and how those rights can be asserted. For example, the notice format that SSA uses explains what reconsideration and waiver are, and explains that the beneficiary can request either reconsideration or waiver, or both, by filing a written

¹⁶ 20 C.F.R. §§ 404.502a, 416.558.

¹⁷ Id. §§ 404.502a, 416.558; POMS GN 02201.009.

request and either mailing it to a specified address or turning it in at an SSA office. The notice must also inform the individual of any time limits for filing their request which, in the case of a reconsideration, is 60 days from receipt of SSA's notice. In the case of a request for waiver, there is no time limit for filing that initial request.

In many cases, the beneficiary has the right to have his or her benefits continue without change (i.e., without any benefit reduction to begin collecting the overpayment), if the reconsideration or waiver is requested within a specified time period. The notice of overpayment must specify any time limit for requesting the reconsideration or waiver in order to receive benefits without change, pending the determination on the reconsideration or waiver request.¹⁸

D. The Written Notice Must Inform the Beneficiary of Limitations on SSA's Right to Collect the Overpayment from Future SSI or SSDI Checks, or through Seizure of Federal Tax Refunds

With SSI overpayments, recouping the overpayment from future SSI checks is limited to 10 percent of the individual's total, monthly income; defined as countable income plus SSI and state supplementary payments.¹⁹ The practical effect of this is that the reduction to the individual's SSI check is generally limited to 10 percent of the SSI payment rate for the individual, whether they receive only SSI payments or a combination of SSI payments and other income. For example, in a state that pays the 2009 federal benefit rate of \$674, the reduction to the check can be no more than \$67.40 per month. In states where a state supplement is paid, this amount must also be considered here.

With SSDI overpayments, there is nothing like SSI's 10 percent rule. The general rule is that SSA will immediately begin collecting the overpaid amount, subject to any rights to continued payments pending an appeal, by withholding the entire SSDI check each month until the overpaid amount is recovered. SSA's regulations require a reduction of the amount withheld if "it is determined that withholding the full amount [of the SSDI check] each month would ... deprive the person of income required for ordinary and necessary living expenses."²⁰ The minimum amount of withholding authorized is \$10 per month.²¹ SSA personnel are often willing to reduce the withholding amount to a level that the SSDI beneficiary can afford. The SSDI notice must advise the beneficiary of the proposed rate of

¹⁸ See, e.g., 20 C.F.R. 404.506(b) (providing that SSDI benefits will not be reduced to recover the overpayment if waiver requested within 30 days of notice), 416.1336(b) (providing that SSI benefits will not be reduced to recover an overpayment if appeal, i.e., reconsideration, is filed within 10 days of receipt of notice or good cause is established for failing to file within 10 days).

¹⁹ Id. § 416.571.

²⁰ Id. § 404.502(c).

²¹ Id.

withholding and advise the individual of the right to seek a lower rate if he or she claims an economic hardship.²²

Note: As of March 3, 2004, SSA will limit the amount of recovery from SSDI benefits for an SSI overpayment to 10 percent of the total monthly benefits. Prior to this date “cross-program” recoupment was not allowed. New regulations will allow the practice subject to certain limitations and dependent upon the benefit currently being received.²³

SSA also has the right to collect an overpayment that is owed and past due by seizing a federal tax refund.²⁴ When it proposes to do so, it must send a written notice to the individual, advising the individual of the conditions under which SSA will waive recovery of the original overpayment. This provision cannot be applied to recover an SSI overpayment from a current recipient of SSI. Nor can this provision be applied to recover an SSDI overpayment from a current recipient of SSDI. However, a person with an SSI overpayment who now receives SSDI only can have their tax refund seized to recover the SSI overpayment. Similarly, a person with an SSDI overpayment who now receives SSI only can have their tax refund seized to recover the SSDI overpayment. Since many wage earners allow their employers to over-withhold federal taxes to ensure a federal tax refund, benefits specialists should routinely advise beneficiaries that, subject to certain limitations, their entire tax refund could be seized in the future to collect an outstanding overpayment. SSA cannot resort to this type of collection method unless the recipient, or former recipient, is failing to cooperate with earlier and less onerous collection methods.

E. Subsequent Notices Following the Determination Regarding a Reconsideration or Waiver Request

Following the request for a reconsideration, SSA personnel will review the case again and issue a reconsideration determination. If this determination is in any way unfavorable to the beneficiary (i.e., it determines that the overpayment determination was either totally or partially correct), the beneficiary will have a right to appeal that determination and have the matter heard by an administrative law judge (ALJ). The individual will have 60 days from receipt of the reconsideration determination to request an ALJ hearing.²⁵ The written reconsideration determination must advise the beneficiary of this right to an ALJ hearing, the time limit for requesting that appeal, and the manner in which the appeal can be requested. If the ALJ decision is in any way unfavorable, that decision can be appealed to the Social Security Appeals Council. An Appeals Council decision is subject to review by a federal district court.

²² Id. § 404.502a.

²³ 42 U.S.C. § 1320(b) – 17(b).

²⁴ Id. §§ 404.520 – 526, 416.580 – 586.

²⁵ The time limit to request any review of a previous determination can be extended beyond 60 days from receipt of the determination if the individual can establish “good cause” for failing to meet the deadline. See, e.g., 20 C.F.R. §§ 404.911, 416.1411, regarding good cause for failing to request a reconsideration within 60 days.

Following the request for a waiver, SSA personnel in the field office will review the request and the facts supporting it. SSA will then notify the individual if the waiver can be approved. If the determination is in any way unfavorable (i.e., it determines that all or part of the overpayment cannot be waived), the field office will notify the individual and schedule dates for a folder review and a personal conference. This will occur without the beneficiary requesting the personal conference. After the personal conference, SSA will notify the beneficiary of the waiver decision. If the individual declines the personal conference, a waiver denial decision will be issued.

At this point, the procedures vary slightly depending on whether the case involves SSI or SSDI. Both benefits programs will see a personal conference being offered by SSA prior to the denial of the initial waiver request. In the case of an SSI claim, a reconsideration will be available to appeal any unfavorable waiver determination and another personal conference must be offered before any denial of a waiver can be granted. The beneficiary can choose to waive this personal conference however, it is highly recommended that the beneficiary participate in this process. If the reconsideration decision is in any way unfavorable, the individual will have a right to request an ALJ hearing.²⁶

When an overpayment is involved in an SSDI claim, a personal conference will be scheduled prior to the waiver being denied. Should the waiver request be formally denied after the personal conference, the beneficiary can request a hearing before an Administrative Law Judge.²⁷

The initial waiver determinations, as well as the reconsideration determinations on appeal, must advise the beneficiary of the right to the next level of appeal (i.e., reconsideration or ALJ hearing), the time limit for requesting it, and the manner in which it can be requested. Like the appeals challenging the overpayment, the waiver appeals can also be pursued to the Appeals Council and to federal district court.

IV. Submitting the Request for Reconsideration and/or Waiver

A. Reconsideration — Challenging the Existence of the Alleged Overpayment

The beneficiary can file the reconsideration in one of two ways, by drafting a letter or by using SSA's Request for Reconsideration form.²⁸ To avoid any confusion, the beneficiary or advocate should use the SSA-approved form. If the individual submitting the request needs to write a longer explanation than will fit in the form, a letter of explanation can

²⁶ See POMS SI 02260.006.

²⁷ See POMS GN 02201.011 & GN 02201.021.

²⁸ SSA's "Request for Reconsideration" form, SSA-561-U2, is available on SSA's website at www.socialsecurity.gov/online/ssa-561.pdf.

be submitted with the Request for Reconsideration form. The written request can either be mailed to the address specified on SSA's notice or it can be hand-delivered to an SSA office. When important documents like this are mailed, many advocates routinely send them by certified mail, return receipt requested, so that they can prove that the request was filed within the 60-day limit for requesting a reconsideration. When documents are hand delivered to a local Social Security Office it is important to always keep a copy and, if possible, have the local office personnel "date stamp" the copy.

B. Waiver — Asking SSA to Waive its Right to Collect the Overpayment

Like the request for reconsideration, the request for waiver can be submitted by drafting a letter or by completing an SSA form.²⁹ In the case of waiver requests, the official SSA form will eventually have to be completed in all cases as it asks a series of questions that relate to the criteria that must be established to obtain a waiver.

C. Submitting Additional Documents or Written Arguments to Support the Request for Reconsideration or Waiver

Requests for reconsideration or waiver typically will be supported by the underlying facts. In many cases, the beneficiary or the beneficiary's attorney or advocate will need to submit additional documents to support their case. For example, in a reconsideration which challenges an SSI determination of overpayment associated with earned income, the individual or advocate may wish to submit actual wage stubs or a statement from an employer that shows that SSI's determination was based on inaccurate information. In the case of a waiver request, which seeks to establish that the beneficiary was without fault in causing the overpayment, the individual or advocate may wish to submit copies of a series of SSA notices which support the beneficiary's contentions or documentation of impairment related work expenses or subsidies that may reduce countable income for SSI purposes or reduce SGA income for SSDI purposes.

V. Avoiding Overpayments Through Timely Reporting of Income and Other Events

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A. Work with SSA Offices to Establish the Best Method of Reporting Wages and Other Information

Many overpayments occur because information about wages and other events affecting SSI or SSDI payments is either not reported in a timely manner or not reported in a fashion that ensures a timely determination of SSI payment amounts or continuing eligibility

²⁹ SSA's "Request for Waiver of Overpayment Recovery or Change in Repayment Rate" form, SSA-632-BK, is available on SSA's website at www.socialsecurity.gov/online/ssa-632.pdf.

for SSDI benefits. To avoid these unnecessary overpayments (and underpayments as well), benefits planners and advocates should enter into discussions with SSA field offices to establish protocols for communication and reporting changes in income and other information. Due to differences in the ways SSA offices operate it is best to have these discussions with each office with which your clients deal.

With SSI, for example, after the initial two months of eligibility, SSI payments in a given month are determined by income received two months earlier. The SSI program refers to this as retrospective monthly accounting (RMA).³⁰ The June SSI check is based on April's income, July is based on May's income, and so forth. If income is expected to be the same each month, many SSA offices prefer that reports be made only if that income changes. Keep in mind, however, that since SSI income is counted in the month it is received, individuals who work and are paid weekly will experience a five-paycheck month four times per year. Similarly, individuals who are paid every two weeks will experience a three-paycheck month twice per year. Regulations require that income received in a month should be reported by the tenth of the following month in order to ensure that the SSI payment amount that is based on that income is properly calculated and paid under the RMA system.

When the SSI recipient is expected to have fluctuating wages, another strategy that has been employed by some beneficiaries and their advocates is to provide SSA with future wage estimates that are somewhat higher than what the individual expects to earn. The advantage to beneficiaries is they avoid overpayments and often receive small supplements to their SSI payment to make up for any underpayment. Many SSA offices have embraced this strategy, as it takes much less time to issue a periodic underpayment supplement than it does to process an overpayment determination and then collect it from future checks and/or devote staff time to dealing with requests for reconsideration and waiver.

B. Timely Reporting of Income

Earned income should be reported monthly, unless there is a pre-arranged agreement with a local SSA office to only report wages when the monthly amount increases or decreases. As described in the previous section, timely reporting should minimize the occurrence of underpayments or overpayments in the SSI program. If monthly reporting and monthly input of wage information present special challenges for either the beneficiary or SSA, see if SSA would like projected estimates of monthly wages using the system outlined at the end of the last section.

Timely reporting of earned income will also enable SSA staff to track use of TWP and EPE months for SSDI beneficiaries. The potential challenge here is that many SSI recipients are dually entitled to both SSI and SSDI benefits. Many SSA offices have one group of claims representatives handling SSI cases and another group handling SSDI cases. In the author's

³⁰ 20 C.F.R. § 416.420.

experience, this often means that a report of wages to the SSI claims representative does not guarantee that the wage report ever reaches the SSDI claims representative, and vice versa. Separate reports to the different claims representative may be needed.

Most unearned income will come in equal amounts each month. For example, SSDI benefits, Veterans Administration benefits, private disability benefits, and pension benefits most frequently do not change from month to month. Subject to any different arrangement that your local SSA office may prefer, it is usually enough to only report to SSA if there are changes in the monthly payment amounts.

Sometimes unearned income may be temporary. It can also vary from month to month. For example, unemployment insurance benefits will be available to many working beneficiaries who lose their jobs. Typically, unemployment benefits will continue for no more than six months. If the individual returns to work part-time while receiving unemployment benefits, the unemployment check may be reduced accordingly. Other examples of unearned income that may be temporary include worker's compensation and private disability payments.³¹ Whenever the income in question varies from month to month, it is important that the beneficiary report the receipt of income to SSA on a monthly basis.

C. Timely Reporting of Other Changes

SSI payments and payment rates can be affected by a wide range of circumstances. A change of address or living arrangements can affect the SSI payment amount and should be reported promptly. Clearly, any receipt of a non-excluded resource which might place a person's resources above SSI's \$2,000 limit for an individual (or \$3,000 for federally married couple) must be reported. When the SSI beneficiary is made aware of the impact that resources (typically cash) can have on eligibility, the beneficiary may opt to reallocate the resources so that their new assets are excludable. For example, excess cash could be used to set up a burial fund (an excluded asset) or to put a new roof on a residential home (repair to an excluded asset). The excess cash would also be excluded if it is used toward a vocational goal in an approved PASS.

D. Contact SSA about any Unexpected Benefits

Sometimes an SSI or SSDI beneficiary receives a check with a payment amount that is much larger than usual. The individual might also receive an extra check when he or she was not expecting it. Whenever the beneficiary receives an unexpected larger check or an extra check, it is always best to review any correspondence from SSA that either accompanies

³¹ Many beneficiaries do not realize that these forms of income, i.e., unemployment benefits, workers compensation, and private disability benefits, are treated as unearned income by the SSI program. See 20 C.F.R. §§ 416.1120, 416.1121. Unearned income is subject only to a \$20 exclusion, rather than the more generous \$65 plus 50 percent earned income exclusion. See *id.* §§ 416.1112, 1124. A failure to report that these benefits have replaced all or part of one's wages could result in a significant overpayment.

the check or precedes its delivery, to see if that explains the extra money. If there is no correspondence from SSA, or the correspondence is unclear, it is always best to contact the local SSA office about why the larger check or extra check was sent. Pending any final word from SSA about the extra money, the beneficiary should be advised to retain the extra money until SSA makes it clear it is their money to spend.

VI. Challenging SSA's Overpayment Finding: Evaluating the Merits of a Reconsideration

Before a beneficiary or advocate assumes that SSA made a correct determination, a few steps can be taken to evaluate the merits of a potential challenge to that determination. Since SSA's determination may be based on information about income and other changes in a person's life, reported at various times during a period of months or years, it is often the case that SSA has acted upon wrong or incomplete information, for instance lack of consideration of all available work deductions. Additionally, since SSA's determination may be based on any number of complex rules and exceptions to rules, SSA may have misapplied or failed to apply one of these rules or exceptions.

This section will provide a framework for evaluating SSA's overpayment determination when the alleged overpayment is caused by wages from work activity. In a significant number of cases, a quick review will reveal that the overpayment found by SSA is either totally wrong or much higher than it should be. Keep in mind, however, that sometimes a review will show that the overpayment may be even higher than what SSA determined it to be.

A. SSI Overpayments Due to Excess Income

1. Review the notice to verify dates and income amounts.

Since the notice must contain a summary of the monthly income used to re-do the calculations, a quick comparison of SSA's information to the beneficiary's information (or that supplied by an employer) should tell you whether there are any mistakes here. When verifying income for SSI purposes, remember that the gross wages (not take-home pay) are counted when received.

This means that most individuals will have "extra paycheck months" each year (a fifth paycheck four times per year if paid weekly; a third paycheck twice per year if paid every two weeks). The best record of how much money the beneficiary earned each month will be pay stubs.

This part of the review can be very labor-intensive. If you provide services as a benefits planner or advocate, you should encourage the beneficiary to perform this task whenever that is realistic. Sometimes the beneficiary will be working with a social worker, job coach or other professional who can work with the beneficiary to perform this task.

2. Use SSI's formula and check the monthly calculations.

Budget sheets are available from many sources that can be used to enter earned and unearned income, and any special deductions, in order to calculate the amount of monthly countable income and the resulting SSI amount due for that month.³²

Based on the monthly income information you gathered or verified, do monthly calculations and see if the SSI check received agrees with SSA's calculation. Do not forget that under SSI's RMA rules, an SSI check is based on the wages and other income received two months earlier. Be particularly diligent with calculations in those cases that have added complications, such as: monthly income that is constantly changing; wages from two or more jobs; a combination of earned and unearned income; impairment-related work expenses; and blind work expenses.

3. Are there any special deductions that SSA failed to use?

The most common deductions that you should look for are the student earned income exclusion (SEIE), impairment-related work expenses (IRWEs), and blind work expenses (BWEs). These are all deductions that SSA staff frequently overlooks or are not reported by the working beneficiary. Even when SSA uses the deduction, they sometimes don't identify every dollar of deduction allowed. Identification of these deductions can significantly reduce the overpayment identified by SSA.

The SEIE is only available to certain students, up to age 22. Prior to January 2001, the SEIE was a maximum of \$400 per month, up to a maximum of \$1620 per year. Effective January 2001, the SEIE was increased to a maximum of \$1290 per month and \$5200 per year, with SEIE amounts indexed each year based on the Consumer Price Index.³³ Since the 2001 increase in the SEIE was so large, and even the old SEIE was not well publicized, the benefits specialist or advocate should pay special attention to ensure students are getting the benefit of this exclusion. The 2009 SEIE is \$1640 per month and \$6600 per year.³⁴

An IRWE may include any expense that is paid by a beneficiary, is related to his or her disability, and enables the beneficiary to work.³⁵ Since IRWE expenses, in the SSI calculation, are deducted before the 50 percent earned income exclusion, their value is up to 50 cents on the dollar. So, for example, a person with \$200 in countable earned income without accounting for IRWEs, who has \$200 in IRWE deductions, would see their countable earned income reduced by \$100.

A BWE may include a range of expenses that are related to work.³⁶ Some BWEs, like IRWEs, are related to the blindness and enable the individual to work. These include items like guide dog expenses and special transportation expenses associated with the disability.

³² A sample budget worksheet appears at the end of this article at Appendix-B.

³³ 20 C.F.R. § 416.1112(c)(3).

³⁴ See SSA's website at www.socialsecurity.gov/pressoffice/factsheets/colafacts2006.htm.

³⁵ 20 C.F.R. § 404.1576, 416.976.

³⁶ Id. § 416.1112(c)(8).

Other BWEs, unlike IRWEs, are related to work but have no relationship to the disability. These include federal, state, and local tax withholding, and meals consumed during work hours. Since BWE expenses, in the SSI calculation, are deducted after the 50 percent earned income exclusion, their value is up to one dollar for every dollar spent.³⁷ So, for example, a person with \$200 in countable earned income without accounting for BWEs, who has \$200 in BWE deductions, would see their countable earned income reduced by \$200.

B. SSDI Overpayments Due to Performance of Substantial Gainful Activity

1. Review the notice to verify dates and income amounts.

This review will be very similar to the review in SSI cases. Like SSI, you will want to verify gross wages on a monthly basis. One difference is that wages that are used to determine if a person performed substantial gainful activity (SGA) are counted when those wages are earned, not when they are received. An individual who earns \$400 every two weeks would have gross wages assessed to the month in which they were actually earned rather than the month in which they were received. This may require the benefits planner or advocate to assess wages to the month of earning on a day-by-day basis. For example, if a paycheck in the amount of \$400 is received for a two week period, each work day resulted in gross wages of \$40. Each of those work days must be assessed to the month in which they were earned in order for SSA to make an SGA determination.

2. Verify correct application of Trial Work Period and Substantial Gainful Activity amounts, as indexed.

A TWP month, between January 1990 and December 2000, was any month in which gross earnings were \$200 or more. For calendar year 2001, a TWP month was any month in which gross earnings were \$530 or more. For calendar years beginning in 2002, a TWP month will be either the same as the previous year's figure or higher based on any recent increases in the National Wage Index.³⁸ Now that the TWP figure will probably vary each year, you must check to ensure that SSA is applying the correct figures.

The monthly SGA amount has followed a similar pattern. The monthly gross earnings considered to be SGA, between January 1990 and June 1999, was \$500. The monthly gross earnings considered to be SGA, between July 1999 and December 2000, was \$700. For calendar year 2001, the SGA amount was \$740 per month. For calendar years beginning

³⁷ The SSI budget worksheet, attached as Appendix-B, illustrates how the IRWE and BWE exclusions are deducted in calculating the SSI check.

³⁸ SSA has announced that the 2009 TWP month amount is \$700. See SSA's website at www.socialsecurity.gov/pressoffice/factsheets/colafacts2009.htm.

in 2002, the SGA amount will be either the same as the previous year's figure or higher based on any recent increases in the National Wage Index. Now that the SGA figure will probably vary each year, you must check to ensure that SSA is applying the correct figures.³⁹

3. Verify correct determination of Trial Work Period, Extended Period of Eligibility, and Expedited Reinstatement Rights.

Once you verify the correct amount of monthly wages and match up the correct TWP and SGA amounts for the period in question, you can begin to analyze whether SSA has correctly applied the TWP, EPE and expedited reinstatement rules. This will also involve analysis, as explained in the next section, of potential application of IRWEs and subsidies as deductions from earned income.

This task is among the most challenging to be performed by the benefits specialists or advocates, and it is beyond the scope of this article to discuss the detailed fact development and policy analysis that is necessary to evaluate SSA's determination of a work-related SSDI overpayment. This development and analysis is, however, at the heart of the benefits specialist's job. In fact, when benefits planning is done in combination with timely reporting to SSA, this development and analysis will ensure that the beneficiary is aware of the effects that work will have on benefits before those effects occur. Therefore, SSA's timely determinations regarding continuing eligibility, due to performance of SGA, will not come as a surprise.

4. Have any Impairment-Related Work Expenses or Subsidies been deducted?

To determine "countable income" to be measured against the SGA rule, SSA is required to deduct any IRWEs or subsidies that may exist. The presumption of SGA based on gross wages is often overcome by good documentation of IRWEs or subsidies. Here again, this analysis is at the heart of the benefits specialist's job and will often be done before SSA has made a determination that an individual has performed SGA. When IRWEs or subsidies are identified before SSA has made an SGA determination, it is appropriate for the benefits specialist to advocate before SSA for an IRWE or subsidy determination. When IRWEs or subsidies are identified after the SGA and overpayment determinations, it is appropriate to assist the beneficiary with analyzing whether IRWEs and subsidies exist and provide the beneficiary with counsel on how to appeal if IRWEs and/or subsidies appear to reduce countable wages below the SGA amount for any of the months in question.

³⁹ SSA has announced that the 2009 monthly SGA amount is now \$980 or \$1640 for persons who are legally blind. See SSA's website at www.socialsecurity.gov/pressoffice/factsheets/colafacts2009.htm.

VII. Establishing the Right to a Waiver: Practice Tips

A. The Waiver Standard: A Two-Part Test

Both the SSI and SSDI programs follow the same two-part test for granting a waiver. First, the beneficiary must show that he or she was “without fault” in causing the overpayment to occur. Second, the beneficiary must show one of two things: 1) that recovery of the overpayment would cause an undue hardship; or 2) that recovery would be against equity and good conscience. NOTE: In the case of either SSI or SSDI, SSA will automatically grant a waiver, on the basis that recovery would impede the effective and efficient administration of the SSI or SSDI program, if: waiver is requested and the overpayment is \$1000 or less.⁴⁰

B. Part One: Was the Beneficiary without Fault in Causing the Overpayment?

1. Did the beneficiary report any changes he or she is required to report?

When an individual first qualifies for benefits and periodically thereafter, SSA provides written notices that detail the recipient’s obligation to report changes in income, living arrangements, marital status, and other things that may affect continuing eligibility for SSI or SSDI benefits. A good general rule is that monthly income should be reported to SSA within 10 days of the last pay period each month, unless SSA has agreed upon less frequent reporting. If the beneficiary has reported wages and other income in a timely fashion, subject to this general rule, he or she should be able to establish without fault unless the beneficiary knew or should have known that the checks they received were more than they were entitled to.

2. Did the beneficiary know or should they have known that benefits were mistakenly paid?

Even if the beneficiary quickly and accurately reported wages, unearned income or other events affecting eligibility, the individual can still be at fault if they knew or had reason to believe that the SSI or SSDI checks received were more than they deserved. For example, some beneficiaries may know the rules governing work and benefits very well. If they continued to receive the same SSI check after a significant increase in wages, or continued to receive an SSDI check despite performing SGA throughout the EPE, SSA may decide the individual was not without fault because they had reason to know that they were not entitled to the checks they received.

⁴⁰ 20 C.F.R. § 416.550; POMS GN 02201.013 D., SI 02260.030C.

On the other hand, a majority of beneficiaries have, historically, had very limited knowledge of how work affected benefits. Many advocates have successfully asserted to SSA's decision-makers that the rules for determining SGA, the TWP, the EPE, IRWEs and subsidies are so complex that very few beneficiaries can be expected to know how they operate. Faced with a complexity of rules that even the best SSA Claims Representative struggles with, many SSA staff have been very willing to find the beneficiary without fault so long as the individual timely reported his or her wages in a timely fashion.

3. SSA must determine fault on an individual basis.

SSA must consider all of the circumstances involved in the overpayment and the individual charged with the overpayment when determining whether or not fault exists. These circumstances include any physical, mental, educational or linguistic limitations that the beneficiary has. If the evidence shows that the beneficiary did not understand the reporting responsibilities, the beneficiary can usually be found without fault. SSA rules require that any doubt be resolved in the favor of the beneficiary.⁴¹

C. Part Two: Three Alternative Tests

1. Would recovery defeat the purpose of the SSI or SSDI program by causing an undue hardship?

Current SSI beneficiaries will automatically meet this test.⁴² On the Request for Waiver form, once the questions related to fault are completed, the SSI recipient is not expected to complete the questions about household income and expenses as an SSI recipient is presumed to be incapable of repaying the overpayment without undue hardship. A beneficiary of both SSI and SSDI is an SSI beneficiary for this purpose.

For persons not on SSI, i.e., recipients of SSDI only, SSA presumes recovery of the overpayment will defeat the purpose of the program if the person uses substantially all of his or her income to meet "ordinary and necessary living expenses," and if resources are less than \$3,000 for an individual or \$5,000 for a couple, with \$600 added for each additional dependent.⁴³ Whether a person meets this test will be determined by how he or she completes the Request for Waiver form, a series of questions designed to establish income, expenses, and resources available to repay the overpayment.

Most beneficiaries who complete the expenses section of the Request for Waiver form tend to leave out many expenses. For example, the following expenses are often not included when the beneficiary completes the form: over-the-counter medications, haircuts, a daily newspaper, modest amounts for birthday and holiday gifts, modest amounts for entertainment, modest amounts for church donations, vehicle maintenance, occasional

⁴¹ 20 CFR 416.552, POMS GN 02250.005.

⁴² Id. § 416.553(b).

⁴³ POMS GN 02250.115 A.4.

long distance charges to retain family relationships, and cable TV. Some may debate whether cable TV is a legitimate expense, but many individuals with disabilities report that it is one of their only forms of entertainment.

2. Would recovery be against equity and good conscience?

Recovery will be waived for any individual who is without fault and for whom recovery would be “against equity and good conscience.” If an individual has lost valuable rights or changed his or her position for the worse as a result of reliance upon the overpayment, then SSA will waive recovery of the overpayment.⁴⁴ To prevail on this ground, the individual should describe ways in which he or she either declined additional income (such as refusing a job) or spent money, or otherwise became obligated to spend money due to a reasonable belief that incorrect payments were correct. For example, SSA should be able to find recovery against equity and good conscience if an individual leased a more expensive apartment believing that an incorrect benefit rate was correct.

SSA has also instructed its staff to find recovery against equity and good conscience and waive any SSI overpayment caused by excess resources of \$50 or less.⁴⁵ Similarly, SSA has instructed its staff to waive the remainder of any SSI overpayment, resulting from excess resources, once SSA has first recouped the amount of money that exceeded the resource limit.⁴⁶

Finally, it should be pointed out that the evaluation of equity and good conscience does not take into account the individual’s finances. Thus, it may provide a crucial ground for obtaining waiver of overpayments in cases where the overpaid individual has income or resources too high to ever permit the individual to establish that recovery would create an undue hardship.

3. Would recovery impede the effective and efficient administration of the SSI program due to the small amount involved?

Recovery will be waived for any individual who is without fault if recovery would impede the efficient and effective administration of the SSI or SSDI program in that the amount of the overpayment is less than the average cost of attempting to recover the overpayment.⁴⁷

The availability of waiver on this particular ground depends on the amount of the alleged overpayment. If an SSI overpayment is less than \$1, SSA will presume “without fault” and will normally not send a notice to the individual or pursue recovery. If the overpayment

⁴⁴ 20 C.F.R. §§ 404.509, 416.554.

⁴⁵ POMS SI 02260.025.C.2, 002260.030-035.

⁴⁶ POMS SI 02260.025.D.

⁴⁷ 20 C.F.R. § 416.555.

is between \$1 and \$30, SSA will send a notice only under certain very rare conditions.⁴⁸ If notice is sent and the individual requests a waiver, SSA will grant the waiver automatically.

In other cases, for both SSI and SSDI, if the overpayment is less than \$1000 (for overpayments pending or occurring after September 21, 2008) and the individual requests waiver, SSA will usually presume “without fault” and will grant the waiver.⁴⁹ SSA’s policy requires its staff to “administratively discontinue” any efforts to recover the overpayment “unless from the facts that are apparent on the face of the waiver/reconsideration request you believe that there is an indication of fault on the part of the overpaid person. When there is such an indication, you may conduct full waiver development.”⁵⁰ If the overpayment is less than \$1000 and the recipient requests only reconsideration, SSA will treat the request for reconsideration as a request for waiver and will waive recovery of the overpayment.⁵¹

VIII. Conclusion

Overpayments are very common problems that SSI and SSDI beneficiaries encounter when they go to work. This means that those who work with beneficiaries may encounter many individual beneficiaries who receive notices of alleged overpayments.

⁴⁸ POMS SI 02260.030.

⁴⁹ POMS GN 02201.013 D.

⁵⁰ POMS SI 02260.030 C.1. (emphasis in original).

⁵¹ Id.; POMS SI 02260.030 C.3.

Appendix A — Abbreviations and Acronyms

Abbreviations and Acronyms Used in this Brief

ALJ.....	Administrative Law
BWE.....	Blind Work Expense
CDB.....	Childhood Disability Benefits
C.F.R.....	Code of Federal Regulations
DAC.....	Disabled Adult Child's Benefits (referring to form of SSDI benefits, officially known as Child's Insurance Benefits)
EPE.....	Extended Period of Eligibility
IRWE.....	Impairment Related Work Expense
POMS.....	SSA's Program Operations Manual Systems
RMA.....	Retrospective Monthly Accounting
SEIE.....	Student Earned Income Exclusion
SGA.....	Substantial Gainful Activity
SSA.....	Social Security Administration
SSDI.....	Social Security Disability Insurance
SSI.....	Supplemental Security Income
TWP.....	Trial Work Period
U.S.C.....	United States Code

Appendix B — SSI Budget Worksheet

Name _____

Month _____ Social Security Number _____

SSI Budget Worksheet		
Unearned Income		\$
General Income Exclusion (GIE)	–	\$ 20.00
Countable Unearned Income		\$
Gross Earned Income		\$
GIE if not used above	–	\$
Student-Earned Income Exclusion	–	\$
Remainder		\$
Earned Income Exclusion	–	\$ 65.00
Remainder		\$
Impairment Related Work Expense	–	\$
Remainder		\$
Divided by 2	/2	\$
Remainder		\$
Work Expenses if Blind	–	\$
Total Countable Earned Income		\$
Total Countable Unearned Income	+	\$
Total Countable Earned Income		\$
Countable Income		\$
PASS Deduction	–	\$
Total Countable Income		\$
Base SSI Rate	–	\$
Total Countable Income		\$
SSI Payment		\$

NOTES

www.NYMakesWorkPay.org

Contact Information

Employment and Disability Institute
ILR School / Cornell University
201 Dolgen Hall
Ithaca, New York 14853-3901
607.255.7727 (voice)
607.255.2891 (tty)
607.255.2763 (fax)
ilr_edi@cornell.edu
www.edi.cornell.edu

Partnering Organizations

New York State Office Of Mental Health
Employment and Disability Institute (Cornell University)
Burton Blatt Institute (Syracuse University)

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