

Legal Basics: Social Security Overpayments

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Community Legal Aid Society, Inc. (CLASI) (Delaware) is a statewide, nonprofit law firm in Delaware whose mission is to combat injustice through creative and persistent advocacy on behalf of vulnerable and underserved Delawareans. CLASI is also Delaware's designated Protection and Advocacy agency for individuals with disabilities.

Introduction

For low-income individuals, receiving a notice that they have been overpaid by the Social Security Administration (SSA) often causes alarm and confusion, and great concern about how repayment will affect their ability to pay their ordinary living expenses. This chapter summary walks through the options individuals have in understanding and challenging a Social Security overpayment.

An overpayment is the total amount of benefits an individual received from SSA for any period which exceeded the amount which should have been paid for that period.¹ Once a final determination on the overpayment is made, the amount is a debt the individual owes to the federal government.²

An overpayment determination is, by definition, a backward-looking process, as the amount of the overpayment is the difference between the amount paid and the benefits actually due for a given retroactive period. SSA may send an overpayment notice around the same time as it sends a notice regarding current eligibility, but the latter concerns whether the individual continues to be eligible to receive benefits, prospectively, going forward. Individuals often get confused by the multiple notices from SSA, and focus on the overpayment without fully understanding that the same circumstances which are alleged to have caused an overpayment have also resulted in a suspension or termination of benefits. While this chapter summary focuses on overpayments, advocates should also address continued eligibility for benefits, if relevant.

Example

Mr. X receives one notice alleging that he has been overpaid almost \$5,000 because his bank account exceeded the Supplemental Security Income (SSI) resource limit for the past several months. He also receives a second notice informing him that his SSI benefits will stop being paid effective the first of the coming month, due to his bank account currently still exceeding the SSI resource limit. Although sometimes co-occurring and related, these are two separate issues, and must be handled separately.

¹ 42 USC § 404, § 1383(b); 20 CFR § 404.501, § 416.537

² POMS GN 02201.001, SI 02201.005

Determining What Kind of Benefits Were Overpaid

The two most common kinds of benefits administered by SSA are Social Security and Supplemental Security Income (SSI) benefits. It is important to know which kind of benefits is alleged to have been overpaid, since there are differing rules for how the overpayment can be collected and appealed for each.

Social Security is also referred to as “Title II” and “RSDI” (Retirement, Survivors and Disability Insurance). Financial need is not a factor in eligibility determinations, so there aren’t eligibility rules limiting how much other income or resources an individual can have.³ SSI, in contrast, is a means-tested program based on financial need. It provides cash assistance to people who are at least 65, blind, or disabled and who have very low income and limited assets.⁴ SSI is also referred to as “Title XVI.”

The Individual Must Receive a Written Notice

An overpayment does not exist until the initial overpayment notice is sent.⁵ The written notice must include:

- 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.

The notice will request full, immediate payment, and inform the individual of SSA’s rights to collect the overpayment from future monthly benefits or through seizure of federal tax refunds. The notice must also inform the individual of the rights to reconsideration and waiver, and how those rights can be asserted.⁶

The written notice of overpayment must fully inform the individual of the basis for SSA’s decision. On a practical level, the individual or their advocate should be able to determine from the notice whether all or part of SSA’s overpayment determination is correct or incorrect. If SSA sends an overpayment notice that does not include all the required information, it must send a new notice before collection can begin.⁷ In this situation, it may be useful to contact the local Social Security office to request clarification and a new, complete notice, to file a Reconsideration request challenging the adequacy of the notice, or to do both, depending on the needs of the particular case and any looming appeal deadline.

Options for Responding to a Notice of Overpayment

When an individual receives a notice of an alleged overpayment from SSA, they have three options (other than agreeing to pay back the full amount)⁸:

1. The individual can use the SSA appeals process to challenge the fact or the amount of the overpayment determination.
2. The individual can agree with the overpayment determination, and seek a waiver of SSA’s right to recover the overpayment.
3. The individual, facing repaying the overpayment through collection of all or part of their monthly benefits, can seek to negotiate a lower monthly amount of repayment.

³ 42 U.S.C. § 402

⁴ *Id.* at §§ 1381–1383f.

⁵ POMS SI 02201.025

⁶ POMS GN 02201.009, SI 02201.025

⁷ POMS GN 02201.009(I)

⁸ Individuals can also discharge an overpayment debt by filing a bankruptcy petition in federal court, but that doesn’t involve the SSA administrative process. POMS GN 02215.185, SI 02220.040. Unless SSA proves an individual had acquired the overpayment debt through fraud at an adversary proceeding, it would be discharged as an unsecured debt like credit card debt or medical bills.

Option One: Challenging the Fact and/or Amount of the Overpayment

An individual can challenge the fact and/or the amount of the overpayment by filing a Request for Reconsideration.⁹ Although the statute is silent on which party bears the burden of proof to establish the fact of an overpayment, courts have found that the burden is on SSA to provide a coherent explanation of how an overpayment occurred and how it was calculated.¹⁰ Always consider asking for reconsideration if it is not clear that the overpayment is correct. Errors in overpayment computations are frequent, and a Request for Reconsideration forces SSA to double-check its calculations and explain how they were done.

A Request for Reconsideration can be filed only in the first **65 days** after the date on the notice, absent a showing of good cause for late filing,¹¹ so the individual will lose this key right to verify the fact and/or amount of the overpayment if the appeal is not filed during this time period, or if only a waiver application is filed upon receiving the notice of overpayment.

Filing a Request for Reconsideration will stop recoupment of the overpayment while this initial appeal is pending, and recoupment should not start at all if it is filed within 30 days for the receipt of the notice.¹² For an overpayment of Title II benefits, an individual has a case review before a reconsideration determination is issued, but for a Title XVI overpayment, an individual may choose between having a case review, an informal conference or a formal conference.¹³ Those filing a Title XVI request for reconsideration should request a formal conference, so that they can utilize all of the due process protections involved with this option.

The Request for Reconsideration must be in writing,¹⁴ and it is recommended that individuals and advocates use the SSA form (Form SSA-561) to file the appeal.¹⁵ It can be mailed to the address specified on the notice, it can be delivered in person to a local SSA office, or it can be submitted online through SSA's iAppeals system.¹⁶ SSA policy also states that an appeal can be filed by calling SSA's 800 number, but since the appeal must be in writing, and there is no documentation of when the call was made, this method is not recommended.

If the appeal is mailed, it should be sent by certified mail, return receipt requested, so that there is proof that it was sent within the 65-day limit. If the individual goes in person to the local SSA office to file the appeal, they are required to have a face to face interview that same day. Since this means there will be no further opportunity to prepare for this interview before it is held, it may not be best for an individual to submit their Request for Reconsideration in person.

Option Two: Asking SSA to Waive its Right to Collect the Overpayment

A waiver asks SSA not to require repayment of an overpayment. SSA will waive recovery of an overpayment if both of the following are true:

1. The individual must be without fault in causing the overpayment; **and**
2. Recovery would either “defeat the purpose of the Social Security Act” **or**
3. “Be against equity and good conscience.”¹⁷

9 POMS GN 02201.025, SI 02220.017(A)(4)

10 See, e.g., *Cannuni on Behalf of Cannuni v. Schweiker*, 740 F.2d 260, 263 (3d Cir. 1984), *McCarthy v. Apfel*, 221 F.3d 1119, 1124 (9th Cir. 2000)

11 20 CFR § 404.911, § 416.1411

12 POMS GN 02201.011(B), SI 02220.001 and 02220.017(A)(1)(a)

13 POMS GN 02201.025, SI 04020.020(B)(7)(b)

14 *Id.*

15 [Request for Reconsideration \(ssa.gov\)](https://ssa.gov)

16 secure.ssa.gov/iApplNMD/start

17 42 USC § 404(b), § 1383(b)(1)(B); 20 CFR §§ 404.506 – 404.512, §§ 416.550 – 416.556

“Without fault”

A finding regarding fault is a threshold matter in all waiver cases, and the individual must be found to be without fault in causing the overpayment before the second step is evaluated.¹⁸ “Without fault” generally requires a showing that the individual was blameless in the creation of the overpayment. The burden of proof is on the overpaid individual to submit evidence or provide a reasonable explanation as to why they believe they are “without fault.” SSA must consider all circumstances, including the individual’s disability (if any), age, education, English language proficiency, and comprehension of reporting requirements when evaluating whether they were “without fault.” Pay attention to fact development of exactly how and why the overpayment occurred from the recipient’s perspective, and also consider whether and how the individual’s circumstances affect a finding of fault.

“Defeat the purpose of the Act”

This is construed as whether recovery would cause financial hardship to the individual.¹⁹ It is presumed to be met for those currently receiving Title XVI benefits and other sources of cash public assistance. SSA will also presume that recovery would be a financial hardship if the individual uses substantially all of their current income to meet “ordinary and necessary living expenses,” and if repayment would reduce their assets below certain levels. Careful and complete documentation of expenses is helpful to show that substantially all current income is needed to meet living expenses.

“Against equity and good conscience”

This is an alternative to showing that repayment would be a financial hardship, for situations where it would be unfair to require repayment of the overpayment. In its policies, SSA defines “equity and good conscience” narrowly, as whether the individual, in relying on the overpayment, relinquished a valuable right or changed position for the worse.²⁰ However, some federal courts have held that “equity and good conscience” should be defined more broadly.²¹

The individual has the burden of proof to demonstrate all aspects of the waiver test by a preponderance of evidence.²² An individual should use SSA’s form “Request for Waiver of Overpayment Recovery” (Form SSA-632), as the completed form will provide SSA with the information necessary to process the waiver request.²³ Those currently receiving SSI or other forms of public assistance, as well as those claiming it would be “against equity and good conscience” to repay the overpayment, should only complete through question 12 in section 7 at the bottom of page 2 and sign it. Others must complete all of the income, assets, and expenses portions of the form, and attach documentation regarding their financial situation, including bills, rent receipts, etc.

SSA may approve a waiver when the individual files the waiver form. If SSA cannot issue a favorable decision, it must schedule a personal conference before making a decision.²⁴ The next step in the appeal process varies depending on whether the overpayment is for Title II or Title XVI benefits. For Title II cases, if the personal conference is declined by the individual or the individual does not appear at the conference, the next level of review is a request for reconsideration on the waiver denial.²⁵ However, if the personal conference is held and the waiver is denied, the next level of review is a hearing before an Administrative Law Judge (ALJ).²⁶ For Title XVI cases, regardless of whether this personal conference is held or waived, the next level of review is a request for reconsideration on the waiver denial, and then an ALJ hearing.²⁷

18 POMS GN 02250.005 – GN 02250.072, SI 02260.010, SI 02260.015

19 POMS GN 02250.100 – GN 02250.130, SI 02260.020

20 POMS GN 02250.150, SI 02260.025

21 *See e.g., Stoltzfus v. Astrue*, EDPA, Civil Action No. 11-6056, 2013 WL 1842237; casetext.com/case/stoltzfus-v-astrue

22 *See e.g., Sipp v. Astrue*, 641 F.3d 975, 981 (8th Cir.2011)

23 [Request for Waiver of Overpayment Recovery \(ssa.gov\)](http://www.ssa.gov); POMS GN 02250.230, SI 02260.005

24 20 CFR § 404.506(c); POMS GN 02270.000 et seq.; 20 CFR § 416.557; POMS SI 02260.006

25 20 CFR § 404.506(h)

26 POMS GN 02250.380

27 POMS SI 02260.006

Recoupment begins once the waiver application is denied. If the individual declines a personal conference, recoupment begins upon that refusal. After a waiver request is denied, an individual can file a request for reconsideration or hearing on the waiver denial within 65 days of the date on the written denial. However, recoupment of the overpayment will happen while the appeal is pending.²⁸

Tips for a Waiver Application

A waiver may be requested **at any time**. This means that a waiver may be requested even after the overpayment has already been fully or partially repaid.²⁹ Once a request for waiver is made, the recoupment should stop while a decision on the request is pending. If the waiver request is made within 30 days of receipt of the overpayment notice, recoupment should not begin while a decision on the request is pending.³⁰

If the amount of the original overpayment is \$1,000.00 or less, SSA will grant an administrative waiver of the debt without further development when the individual or their representative makes a specific written or oral request for waiver or reconsideration, unless SSA believes there is an indication of fault on the part of the overpaid individual.³¹

An individual can file a request for reconsideration and a waiver application at the same time on any overpayment; in that case, the appeal process should be completed before SSA considers the waiver application.³² Or an individual can file the appeal first and complete that process, and then file the waiver application later. When in doubt, both should be filed. In some circumstances, SSA will treat a reconsideration request as an implied waiver request as well; however, it must still make a formal determination on the reconsideration before it considers the implied waiver request.³³

Option Three: Seeking to Negotiate a Lower Repayment Amount

An individual should use SSA's form "Request for Change in Overpayment Recovery Rate (Form SSA-634) to request a change in the repayment rate.³⁴ For those receiving Title XVI benefits, SSA is limited to recouping just 10% of the monthly benefits.³⁵ However, for Title II beneficiaries, there is no limit on how much SSA can recoup. Unless the individual applies to have the repayment rate adjusted, Social Security will withhold the full monthly benefit.³⁶

Generally, SSA attempts to negotiate a repayment rate for a Title II overpayment that will permit the recovery of all outstanding amounts within 12 months, or at the most within 36 months.³⁷ However, if the financial information on Form 634 indicates that the individuals cannot afford such an amount without financial hardship, the monthly amount is limited to the difference between their income and expenses.

²⁸ POMS GN 02201.011(C)

²⁹ POMS GN 02201.019, SI 02201.005(H)(3) and SI 02260.001(A)(3)

³⁰ 20 CFR § 404.506(b)

³¹ POMS GN 02201.013(E), SI 02260.030

³² POMS GN 02201.021(D)

³³ POMS GN 02201.025(B)(4)

³⁴ Request for Change in Overpayment Recovery Rate (ssa.gov): ssa.gov/forms/ssa-634.pdf; also available in Spanish here: ssa.gov/forms/ssa-634-sp.pdf

³⁵ 42 USC § 1383(b)(1)(B); 20 CFR § 416.571; POMS SI 02220.016

³⁶ POMS GN 02210.010

³⁷ POMS GN 02210.030

Practice Tip

For those receiving a Medicare Part D low-income subsidy, the amount can be set as low as \$10 per month without financial development.³⁸ Any decision as to the amount of recoupment is an administrative action and not an initial determination; therefore, it cannot be appealed.³⁹

Tips for Handling an Overpayment Case

Advocacy on overpayment cases should start as early in the process as possible, at the local SSA office on the request for reconsideration and/or initial waiver application. Preparation is key in overpayment cases. It is important to access all relevant information in the individual's files at SSA, so that you understand SSA's theory about how the overpayment occurred and how it was calculated. Frequently SSA sends out multiple overpayment notices, so you need to be clear on when each overpayment is alleged to have happened, how much SSA is claiming was overpaid, and when SSA sent the notices. You can then map out your plan for requesting reconsideration, requesting a waiver, or both.

Depending on the cause of the overpayment, you will need to collect additional evidence to support your case, such as affidavits from the individual, their family members, friends or treating physicians. If you have requested a formal conference, you may also consider asking SSA to subpoena certain essential evidence, such as testimony from SSA employees or documents from SSA files.

You will also need to prepare your client and other witnesses to give testimony with detailed information when having a conference at the local SSA office. Be aware that SSA employees are often hostile to those who are alleged to have overpayments. Be alert to any signs of bias against your client, and be sure to provide zealous representation, without adopting SSA's negative viewpoint.

Commonly, SSA's local office or payment center will misplace documents involved in overpayment cases, and fail to make decisions for lengthy periods on requests for reconsideration and/or waiver. Consider whether it is in your client's best interest to press for a decision, or to permit the matter to remain pending at SSA, especially while collection is suspended. Be aware, however, that even if SSA is not currently recouping the overpayment, it does not mean that the agency will not begin to recoup the overpayment later, without notice, even though the request for reconsideration and/or waiver was never resolved. In such cases, you will need to remind SSA that a request for reconsideration or waiver is still pending to get the recoupment stopped again. It is important to retain copies of all documents, so that even after a long delay, you can easily determine what was done or not done, when and why. It is also essential to be sure to get any determination made by SSA on an appeal or waiver in writing, so that you preserve your client's right to pursue an appeal of an adverse decision, as well as retain documentation of a favorable decision.

Conclusion

Dealing with an overpayment at SSA can be an overwhelming process, both for the individual receiving the notice and for the advocate helping the individual to navigate SSA's appeal and waiver process. Attention to the requirements of the particular path that an individual chooses to deal with the overpayment, collecting documentation relevant for that path, and persistent follow up with the local SSA office can increase the chances of a positive outcome for the individual.

³⁸ Id. at (C) Exception

³⁹ 20 CFR § 404.903(e)

Additional Resources

- Regulations:
 - » 20 C.F.R. §§ 404.502 – 545 (Title II)
 - » 20 C.F.R. §§ 416.550 – 590 (Title XVI)
- Program Operations Manual System (POMS)
 - » GN 02210.000 et seq. (Title II)
 - » SI 02220.000 et seq. (Title XVI)
- [SSA Publication: Overpayments](#)

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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