

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JEANNETTE A. FLANAGAN :
 :
VS. : C.A. NO. 86-0089 L.
 :
OTIS R. BOWEN, in his capacity :
as Secretary of the Department :
of Health and Human Services :

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, United States District Judge.

This case concerns the alleged failure of plaintiff to exercise proper degree of care in reporting her annual earnings to the Social Security Administration (SSA) as required by 20 C.F.R. § 404.511. Procedurally, this matter is before the Court on defendant's motion for an "order affirming the decision of the Secretary." As is made clear by defendant's memorandum of law the title is a misnomer. The case is actually before the Court on defendant's motion to affirm the recommendation of the Magistrate to deny plaintiff's request for a waiver of overpayment because she was not "without fault" "in receiving benefit overpayments."

According to the record, this case originated in July of 1971, shortly after plaintiff's husband, Thomas J. Flanagan, Jr., had passed away leaving plaintiff to support herself and their five children. At this time, plaintiff applied to the SSA for two types of benefits: mother's insurance benefits and child's insurance benefits. On the form for the former type of benefit, plaintiff was asked the following question:

An annual report must be filed with the Social Security Administration within 3 months and 15 days after the end of any year in which you earned more than \$1,680 and received some benefit payment for a month in that year. FAILURE TO REPORT MAY RESULT IN THE LOSS OF ONE OR MORE MONTHLY BENEFITS.

13. Do you agree to file the annual report of earnings when required?

In response to this question, plaintiff x-ed the box marked "YES" (Tr. 39). Although plaintiff did not remember "signing anything" (Tr. 27), it appears that she did sign the application as her signature appears at the bottom right hand corner of the same page upon which question thirteen

is located (Tr. 39). In addition, during this application process (which apparently took place at plaintiff's home) someone from the SSA "told" plaintiff that she "would get these benefits until her youngest child had graduated from school." (Tr. 26, 27).

In November of 1971, plaintiff received a two page document from the SSA informing her that she was entitled to receive both mother's insurance benefits and that her children were entitled to receive surviving child's insurance benefits (Appendices 1 and 2 respectively) (Tr. 83, 84). The first page of the document indicated that Jeannette A. Flanagan was entitled to receive "mother's" insurance benefits as of "7/71" at a rate of \$46.10 per month and a lump sum death payment of \$255.00. Thus, the amount of plaintiff's first check was \$439.40 (4 x \$46.10 = \$184.40 for the months of July, August, September and October + \$255.00). Page one of this document next informed plaintiff that "at the end of the year we will send you a form so you can report your actual earnings for the year. We will then make any necessary adjustments in your benefit payments." Plaintiff, however, never received any annual report forms (Tr.4).

Underneath this statement, the document informed plaintiff of the following:

YOU WILL RECEIVE MONTHLY PAYMENTS OF \$46.10 BEGINNING JULY 1971. ACTUALLY YOUR BENEFIT AMOUNT IS NOT NOW PAYABLE BECAUSE OF YOUR WORK AND EARNINGS. HOWEVER, THE BENEFITS DUE OTHER MEMBERS OF YOUR FAMILY SHOULD BE INCREASED SO THAT THEY STILL RECEIVE THE MAXIMUM AMOUNT PAYABLE ON THIS RECORD. TO SAVE ADMINISTRATIVE COSTS, THE LAW PERMITS US TO PAY THE FAMILY'S INCREASE TO YOU. BUT IT IS FOR THE USE AND BENEFITS OF THE OTHER FAMILY MEMBERS AND IS NOT CONSIDERED YOUR INCOME. YOUR FULL BENEFIT MAY BE PAYABLE IF YOUR EARNINGS FOR 1971 ARE LESS THAN EXPECTED OR YOU NEITHER EARN OVER \$140 AS AN EMPLOYEE NOR PERFORM SUBSTANTIAL SERVICES IN SELF-EMPLOYMENT IN ANY MONTH. IF THESE CHANGES OCCUR, PLEASE NOTIFY ANY SOCIAL SECURITY OFFICE PROMPTLY.

Finally, below this statement, plaintiff was informed that the right to receive social security benefits "carried with it certain responsibilities." Plaintiff was then warned to read the booklet in order to understand the nature of these responsibilities. If she had any questions, plaintiff was to get in touch with any social security office by phone, mail or in person.

The second page of this two page document designated Jeanette A. Flanagan as representative of the claimant children and notified her that she was entitled to receive \$46.10 for each child as of July 7, 1971. Thus, the amount of plaintiff's first check was \$922.00 (5 x \$46.10 =

\$230.50 x 4 for the months of July, August, September and October). Thereafter, plaintiff was informed that she would receive a monthly check of \$230.50 each month.

Plaintiff testified she believed that she was only required to report her annual income if she was receiving a check for herself (Tr. 27). After plaintiff became entitled to receive social security benefits, she started receiving two checks (Tr. 27). Plaintiff testified that she interpreted the notice of entitlement to mean that both checks were to be used for her children even though she was designated as payee of one of the checks (Tr. 28). That plaintiff interpreted the notice of entitlement in this manner resulted from a combination of factors.

Plaintiff was the mother of five children at the time in question. They were Stephen, Deborah, Daniel, Jan and Lisa who were to turn eighteen years of age in 1972, 1973, 1975, 1977 and 1979, respectively (Tr. 29). Since the children were approximately one year apart, they would graduate from high school in successive years. Once each child graduated from school he or she would no longer be entitled to children's insurance benefits. It was plaintiff's understanding that the first check was made out

to the plaintiff so that the SSA "would not have to keep changing checks all the time" when each child graduated from school (Tr 28). Even though plaintiff was designated as payee, it was plaintiff's understanding that the money from this check was to be used for the benefit of plaintiff's children (Tr. 28). As to the second check that plaintiff received, this check was made out "for the children," and thus, was exclusively for their use (Tr. 28).

In addition to testimony regarding the social security benefits that plaintiff received, plaintiff testified regarding her general background and economic situation. As of December 1984, plaintiff was a sixty-one year old person of little formal education (Tr. 89) who lived at 154 South Bend in Pawtucket, Rhode Island (Tr. 25). Plaintiff indicated that she had been working as a skirtfolder at a company called Union Wadding for fifteen years with a present rate of income of \$744.88 per month (Tr. 25, 85). Since plaintiff's work involved the manufacture of Christmas skirts, her work was seasonal in nature. Plaintiff, therefore, was unemployed a portion of the year (anywhere from seven to eleven months) (Tr. 28).

Although plaintiff received unemployment compensation when she was temporarily laid off, she did not receive any compensation for 1985 because she worked that entire year (Tr. 28, 85).

Although plaintiff had no sources of income other than her monthly earnings, she did have several assets. Among these assets were a house, which she purchased on the death of her husband, and a life insurance policy. While the amount of plaintiff's payments on the mortgage and insurance policy is a matter of dispute, there is no question that plaintiff incurred these payments along with numerous other expenses (Tr. 50, 61, 85). Finally, plaintiff testified that she has severe gout and rheumatoid arthritis; conditions which would necessitate her retirement in 1985 (Tr. 30).

On January 7, 1983, plaintiff was notified that she was overpaid \$1,794.00 in 1978 and \$1,544.10 in 1979 (Tr. 44, 46). Plaintiff responded to this notice by seeking a waiver of the overpayment (Tr. 47-50). In October of that year, plaintiff's waiver was denied on the grounds that plaintiff was not "without fault" in accepting the

overpayments (Tr. 52). A personal conference between plaintiff and a SSA employee was then scheduled for November 8, 1983 (Tr. 54). Once again, plaintiff's request for waiver of the overpayments was denied (Tr. 55-57). Plaintiff followed up this denial by requesting a hearing on November 28, 1983. Apparently, plaintiff's initial request was not acted upon because the filing was premature (Tr. 72). In April of 1984, plaintiff was contacted by the SSA's collection unit (Tr. 72). Interpreting this contact to mean that her request for a hearing was denied, plaintiff entered into an agreement to repay the overpayments (Tr. 72). After finding that she was financially unable to make the second payment, plaintiff sought legal assistance regarding her liability (Tr. 72). On August 1, 1984, plaintiff refiled a request for hearing (Tr. 74). This time her request was granted and the hearing took place on December 6, 1984 (Tr. 23).

After careful consideration of the evidence presented at the hearing, the Administrative Law Judge (ALJ) rendered a decision on January 23, 1985, denying plaintiff's request for a waiver. The ALJ found that

plaintiff was "without fault" because a reasonable claimant, upon receiving the notice of entitlement in question here, could have believed that she did not have to file any annual report forms and that both checks were only for her children. The ALJ, however, denied plaintiff's request for waiver because she was earning \$300.00 more than she was spending per month and had not shown any detrimental reliance upon the actions of the SSA (Tr. 16). The former conclusion was based upon figures which the ALJ elicited from plaintiff at the December hearing as distinguished from those submitted to the Appeals Council upon review of the ALJ's decision (Tr. 31-34, 85).

After the ALJ rendered his decision, plaintiff appealed the matter to the Appeals Council (Tr. 9) on the grounds that the financial evidence adduced at the hearing was inaccurate. Plaintiff alleged that new, material financial evidence showed that she had a monthly deficit of \$54.17 of earnings over expenses instead of a \$300.00 surplus (Tr. 11, 85). The Appeals Council, however, did not consider this new evidence because it found that plaintiff was not "without fault" in accepting the benefit overpayments. This conclusion was based upon plaintiff's

failure to exercise a "high degree of care" in failing to file an annual report of earnings in any year that she earned more than \$1680.00 and received some benefits (Tr. 4).

On February 6, 1986, approximately two months after the Appeals Council rendered its decision, plaintiff filed a complaint in this Court to review the final decision of the Secretary as provided by 42 U.S.C. 405(g). Soon thereafter, the Secretary filed an answer requesting that the Court dismiss plaintiff's complaint and affirm the decision of the Secretary. The matter was referred to the Magistrate who recommended that there was substantial evidence on the record to affirm the decision of the Secretary. In November of 1986, defendant and plaintiff filed motions in support of and an objection to the Magistrate's recommendation, respectively. One month later, the Court heard oral argument on the matter and is now prepared to render a decision.

Two issues are presented for the Court's consideration. The first is whether there exists substantial evidence on the record to support a finding that

plaintiff was not "without fault" in failing to report her earnings to the SSA for the years 1978 and 1979? The second is, if plaintiff was without fault, whether recovery of the overpaid benefits would defeat the purposes of Title II?

In considering the first issue, the Court is guided by 20 C.F.R. § 404.511.

An individual will not be "without fault" if the Administration has evidence in its possession which shows either a lack of good faith or failure to exercise a high degree of care in determining whether circumstances which may cause deductions from his benefits should be brought to the attention of the Administration by an immediate report or by return of a benefit check.

The regulation further provides that "the high degree of care expected of an individual may vary with the complexity of the circumstances giving rise to the overpayment and the capacity of the particular payee to realize that he is being overpaid."

In determining that plaintiff failed to exercise a high degree of care in not reporting her annual earnings to the SSA, the Secretary examined the following four pieces of information.

- (1) The complexity of the circumstances giving rise to the overpayment.
- (2) The capacity of plaintiff to realize that she was being overpaid.
- (3) The language contained in the notice of entitlement.
- (4) The check stuffers and booklet provided by the SSA to plaintiff which allegedly explained her duty to report her annual income.

In discussing each of these four items of information, it is important to note the relationship that exists between them. The first and the second pieces of information constitute the backdrop against which the third one must be examined. Thus, the Court merely reiterates the findings of the Secretary regarding the former pieces of information before proceeding to discuss the latter piece in their light.

Although findings in the record regarding the first and second items of information are sparse, several observations do exist which enable review. The ALJ observed that Exhibit 12 (the notice of entitlement) was the "most confusing" piece of evidence of record (Tr. 16). Moreover, the Secretary concedes that the notice contained contradictory bits of information regarding whether plaintiff was entitled to receive benefits at all (Tr. 4-5). Implicit in these observations then, is the conclusion that

the notice is a complex assortment of information which necessitates a sophisticated reading in order to interpret correctly.

While § 404.511 does not directly define the term "capacity," it appears to be a function of the claimant's age, intelligence and physical and mental condition. See, 20 C.F.R. § 404.507. It is apparent from the record that plaintiff is an elderly woman of sixty-one years of age who has spent the past fifteen years of her life doing manual labor. Implicit in these facts is the conclusion that plaintiff neither possessed an advanced education nor has a greater than average intellect. Finally, it is apparent from the record that plaintiff does possess some physical incapacity in that she suffers from gout and arthritis (Tr. 16). These facts suggest that plaintiff might have some trouble in recognizing that an overpayment had been made.

Discussion of the third factor can be divided up into two parts: The language in the notice of entitlement which misinforms plaintiff as to material facts and the language in the notice which is subject to a mistaken interpretation.

In the present case, plaintiff received two pieces of erroneous information from the SSA. The first was the statement on the notice of entitlement which indicated the following:

At the end of the year we will send you a form so you can report your actual earnings for the year. We will then make any necessary adjustments in your benefit payments.

(Tr. 83). The Secretary, however, concedes that there is "no documentary evidence to show the form [for 1971] was actually sent and received by the claimant." Moreover, the Secretary concluded, "similarly, it appears that successive forms were not transmitted in succeeding years." (Tr. 4). The Secretary, then, simply did not fulfill his representation to plaintiff to send out annual report forms so that she could report her yearly earnings. Not having received such forms, plaintiff could only conclude that she did not have to report her income. This item of information, then, presents no support for the conclusion that plaintiff failed to exercise a "high degree of care" in not reporting her annual earnings to the SSA.

The second piece of erroneous information was the statement in the notice of entitlement which indicated that plaintiff was not entitled to receive any benefits.

You will receive monthly payments of \$46.10 beginning in July of 1971. Actually your benefit amount is not now payable because of your work and earnings.

This information is misleading because it informs plaintiff of a fact which is simply not true. Although the first sentence in this statement indicates that plaintiff is receiving a payment of \$46.10, the second sentence plainly indicates that this amount (the "monthly payment") is not a benefit attributable to plaintiff.

The ramifications of this statement are tremendous. When plaintiff signed her application for mother's insurance benefits she agreed to report her annual earnings in any year that she was making more than \$1,680.00 and receiving some benefit payments for a month in that year (Tr. 39). Since this piece of information informed plaintiff that she was not receiving any benefits, plaintiff could only conclude that she did not have to report her annual earnings to the SSA. Once again, the language of the notice of entitlement provides no support for the Secretary's decision in this matter.

In addition to that clearly erroneous information, the language of the notice of entitlement is subject to a reasonable but mistaken interpretation. The SSA may have intended to inform plaintiff that she was receiving only part of her benefit entitlement and could receive the full amount if either her earnings were less than expected or if she earned less than \$140.00 as an employee and did not perform substantial services in self-employment in any month (Tr. 83). Since plaintiff was receiving a portion of her benefits, it is further implied that she was still under a duty to report her annual income to the SSA. The intended message is partially communicated by the statement:

Your full benefit may be payable
if your earnings for 1971 are less
than expected or you neither earn
over \$140 as an employee nor perform
substantial services in self-employment
in any month.

The meaning of this statement, however, is obscured by the sentence which follows it. "If these changes occur, please notify any social security office promptly." The latter statement, when combined with the statement that plaintiff was not receiving any benefits, informed plaintiff of two duties. First, plaintiff was not

under a continuing obligation to inform the SSA regarding her annual earnings since she was not receiving any benefits. Secondly, plaintiff did not have to inform the SSA of her yearly earnings unless she earned less than expected or failed to earn \$140 as an employee and did not perform substantial services in self-employment in any month.

To complicate matters further, the statement which informed plaintiff that she was not entitled to benefits is succeeded by the following lines:

However, the benefits due other members of your family should be increased so that they still receive the maximum amount payable on this record. To save administrative costs, the law permits us to pay the family's increase to you. But it is for the use and benefit of the other family members and is not considered your income.

Properly construed, this statement refers to the fact that plaintiff's children were entitled to an increase in benefit payments and that plaintiff would be receiving this increase as a representative of the claimant children. These lines, however, are subject to misinterpretation for two reasons. First, they immediately follow the statement

indicating that plaintiff's benefit amount is "not now payable." The monthly payment of \$46.10 payable to plaintiff is thus easily confused with the increase due other members of plaintiff's family. Once this confusion occurs, plaintiff could more than reasonably regard herself as representative payee for both the "increase" and her childrens' regular monthly benefits. This interpretation is reaffirmed by the sentence, "To save administrative costs, the law permits us to pay the family's increase to you." Once again, the words "family's increase" appear to refer to the \$46.10 payment and not to any separate payment being made to plaintiff in her own capacity.

The second cause for confusion is that the statement regarding benefits due other members of plaintiff's family appears on the first page of the notice of entitlement rather than on the second page. The first page of the notice was intended to deal with benefits due the plaintiff while the second page was intended to deal with benefits due to her children. Had the statement appeared on the page which coincided with its subject matter (page two), it would have decreased the likelihood that

plaintiff would have confused the increase due other members of her family with the partial payment of benefits being paid to her.

Finally, the words "to save administrative costs" shield the mistake from discovery when examined in light of the relationship between the graduation dates of plaintiff's children and the termination of their benefits. Plaintiff had five children Stephen, Deborah, Daniel, Jan and Lisa who were to graduate from school in 1972, 1973, 1975, 1977 and 1979, respectively. Plaintiff correctly understood that as each child graduated from school, his or her benefit amount would be terminated by the SSA. When the next payment to the remaining children was due it was plaintiff's belief that the SSA would not have to change the name of the payees on the check to account for the graduating child. Rather, the SSA could pay "the increase" and other benefit amounts directly to plaintiff as a representative of her children. As a result, it was plaintiff's understanding that the SSA could save the administrative cost of having to change checks everytime one of plaintiff's children graduated (Tr. 28).

The Secretary contends, however, that since plaintiff could have construed the notice properly, she failed to exercise a "high degree of care" in apprising herself of circumstances which would have required her to report her earnings (Tr. 5). While the mere possibility of an appropriate construction, may be some evidence that a claimant has failed to exercise the requisite degree of care, it alone is not substantial evidence of such neglect. This is particularly true in the present case where the interpretation given by plaintiff to the notice was more than reasonable under the circumstances.

As provided by § 404.511, these circumstances include the "complexity" of the notice's language and the capacity of plaintiff to interpret the notice. An elderly person with a workman's education and average intelligence could more than reasonably interpret the notice in the manner plaintiff interpreted it - that the \$46.10 payment to plaintiff represented the "increase," and thus, was payable to plaintiff's children rather than to plaintiff herself.

The Court's conclusion on this point is confirmed by the reasoning underlying the decision in Cucuzzella v.

Weinberger, 395 F. Supp 1288 (D. Del. 1975). Plaintiff in Cucuzzella was severely injured in an automobile accident and became eligible for child's insurance benefits under his deceased father's social security account. Id. at 1290. After some recovery, plaintiff recommenced work. Thereafter he was informed by letter on January of 1967 that he would be entering the ninth month of his trial work period in April of 1967. Id. at 1293. At that time the SSA indicated that his case would be reviewed to determine if plaintiff was still disabled within the meaning of the law. Id. at 1293-1294. The letter then stated the following:

If it is determined that you are your
benefits will be continued.

If plaintiff was determined as not disabled then he would receive three months of additional benefits after the end of the trial period. Id. at 1294.

In August of 1967, plaintiff was contacted by the SSA to determine if plaintiff's disability should cease. Id. Based on this contact a determination was made to terminate plaintiff's benefits as of May of 1967; however, plaintiff was not informed of this decision until July of 1972. Id. As a result, plaintiff continued to receive benefits for a substantial period of time after his benefits were formally terminated.

The ALJ ruled that that plaintiff was at fault in receiving the overpayments on two grounds. First, the January letter fully explained to plaintiffs the "final work period." Id. at 1293. Second, the fact that plaintiff was receiving substantial wages between August of 1967 and December of 1971 should have alerted plaintiff that he was not entitled to the benefits. Id.

Upon review, however, the District Court reversed the Secretary's decision on the grounds that it was not supported by substantial evidence. The Court found that prior to July of 1972, all plaintiff knew was that benefits continued to arrive every month.

Since the January 3rd letter had stated that "If it is determined that you are [still disabled], your benefits will be continued," the obvious conclusion for them to draw was that the Administration had determined that Lee was still disabled. And the longer the benefits kept coming, the less reason they had to suspect that anything was wrong.

Id. at 1294.

While the decision in Cucuzzella is distinguishable from the present case in that it was decided under a standard of ordinary care, it is analogous to plaintiff's case in several ways. As in the present case,

plaintiff in Cucuzzella received a notice from the SSA which was subject to more than one interpretation. As the Secretary contended, the notice could have been interpreted as an indication that plaintiff's benefits were about to be terminated. Alternatively, the notice could have been interpreted to mean that plaintiff could be entitled to benefits as long as he received them. Similarly, when plaintiff in Cucuzzella interpreted the notice incorrectly, the surrounding circumstances (the receipt of benefits after formal termination) prevented discovery of the mistake. The receipt of benefits after formal termination merely confirmed plaintiff's interpretation of the notice that he would be entitled to benefits as long as he received them.

Despite these similarities the holding in Cucuzzella is even broader than the conclusion reached by this Court in the present case. In Cucuzzella, plaintiff was receiving wages at the same time that he was receiving overpayments in benefits. The Secretary contended that this fact should have apprised plaintiff that he was not entitled to the benefits. The Court, however, held that even this fact was not substantial evidence to support a finding that plaintiff should have known he was being overpaid.

In contrast, plaintiff here did not know that she was receiving benefits because the erroneous and confusing language of the notice apprised her that the payments were for her children. Unlike the plaintiff in Cucuzzella there were no other circumstances (like the receipt of wages) to correct plaintiff's reasonable but mistaken interpretation of the notice. Plaintiff, then, could only have realized her mistake had she managed to decipher the meaning of the notice. The mere possibility that plaintiff could have properly interpreted the confusing and erroneous language contained in the notice is not substantial evidence to support the Secretary's decision. Rather what is needed are other indications outside the face of the notice, which instead of perpetuating the confusion of the notice's language, would lead a vigilant and prudent person to report her earnings. These other indications are completely lacking in this case.

The Court's conclusion is further supported by the reasoning of the ALJ. After examining the first page of the notice of entitlement the ALJ focused upon two statements. These were the statements indicating that the SSA would send

plaintiff annual earning report forms and the statement which equated the \$46.10 payment to plaintiff with the increase for plaintiff's children. The ALJ then concluded the following:

Since there is evidence to show that any annual report forms were ever sent to the claimant, a reasonable person receiving benefits which she thought were for her children, could believe that she did not have to file any annual earnings reports since she did not believe that she was receiving benefits which would be affected by her earnings. Therefore the Administrative Law Judge concludes that the claimant acted reasonably in accepting and receiving Social Security benefits which she believed were only for her children. Thus she was not at fault in causing the overpayment.

(Tr. 16). While it is true that the ALJ only examined plaintiff's actions in terms of a standard of ordinary care, his conclusion is a further indication that a reasonable person would have had great difficulty in correctly interpreting the notice of entitlement.

The fourth piece of information considered by the Secretary in determining that plaintiff failed to exercise a

"high degree of care" is the presence of a booklet and check stuffers which allegedly informed plaintiff of her duty to report her earnings. The booklet and check stuffers, however, have no bearing on this case for two reasons. First, there is no evidence on the record to indicate that plaintiff ever received these materials. Plaintiff was never examined on this point, nor was she ever requested to produce any information that she may have been sent by the SSA. Rather, the Secretary contends that plaintiff received the booklet and check stuffers because it was the SSA's "uniform practice" to transmit such information to all beneficiaries (Tr. 5).

Even if plaintiff had received the booklet and the check stuffers, she would not have been put on notice that she had a duty to report her earnings. The underlying assumption of these materials is that the persons reading them are in fact beneficiaries. The check stuffers and booklet, in turn, inform beneficiaries that their duty to report may be affected by new rules concerning their earnings. Since plaintiff was under the impression that she was not a beneficiary, the check stuffers and booklet fail

to convey any meaning which would correct this mistaken impression. Thus, they have no applicability in plaintiff's case, and are not evidence that plaintiff failed to exercise great care in not reporting her annual earnings.

For all the above reasons, the Court concludes that the Secretary's decision is not supported by substantial evidence. The question now arises whether recovery of the overpayments would defeat the purposes of Title II. The phrase "to defeat the purposes of Title II" is defined as whether recovery of overpayments would "deprive a person of income required for ordinary and necessary living expenses." 20 C.F.R. § 404.508. In the present case, the ALJ found that plaintiff was earning \$300 more than she reported spending per month, and therefore, recovery of the payment would not defeat the purpose of Title II as long as it was spread over a period of months. Thus, the ALJ "recommended" that the overpayment be recovered at a rate of \$50.00 per month based upon plaintiff's present financial circumstances (Tr. 16).

After the ALJ rendered his decision, but prior to the "final decision" rendered by the Secretary, plaintiff

introduced "new, material financial" evidence which showed that plaintiff's monthly expenses exceeded her monthly income by \$54.17 (Tr. 85). When this case reached the Appeals Council, the new material evidence was not considered because the Appeals Council held that plaintiff was not "without fault" in accepting the overpayment of benefits. Since this new evidence was appropriately introduced upon the record prior to the rendering of the Secretary's "final decision," it must be considered in any ruling upon whether recovery of the overpayments would defeat the purposes of Title II. The Court, however, cannot make such a determination for to do so would be to substitute its judgment for that of the Secretary regarding findings of fact. See Camp v. Pitts, 411 U.S. 1138, 1142 (1973). The case, therefore, must be remanded to the Secretary with instructions to consider the new financial evidence in determining whether recovery of the overpaid benefits would defeat the purposes of Title II.

In addition, upon remand the Secretary should consider whether plaintiff ceased making repayment of the overpayments precisely because she could not afford to repay

the funds at a rate of \$50.00 per month. Although the latter fact was on record at the time the December hearing took place, it apparently was not considered by the ALJ in determining plaintiff's ability to repay the excess benefits. This was due to the fact that the evidence adduced at the hearing appeared to indicate that plaintiff could pay back the overpaid benefits on a monthly basis. In light of the new financial evidence introduced by plaintiff, the fact becomes somewhat more probative of plaintiff's ability to repay the overpaid benefits. Finally upon remand, the Secretary should consider, as did the ALJ, the fact that plaintiff suffers from severe gout and arthritis and upon reaching the age of 62 will be receiving Social Security benefits.

For all the above reasons, the Secretary's motion to affirm the recommendation of the Magistrate is denied, and the case is remanded to the Secretary to consider whether in light of the new financial evidence, recovery of the overpaid benefits would defeat the purposes of Title II. It is so Ordered.


Judge Ronald R. Lagoux
United States District Judge

3/22/87
Date

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

CLAIM NUMBER
037-14-8244-E
83

DATE: 11/03/71

THIS IS TO CERTIFY THAT THE PERSON(S) NAMED BELOW BECAME ENTITLED TO THE INSURANCE BENEFITS SHOWN,
PAYABLE UNDER TITLES II AND XVIII OF THE SOCIAL SECURITY ACT.

NAME AND ADDRESS OF PAYEE AS THE CLAIMANT OR AS REPRESENTATIVE OF THE CLAIMANT	TYPE OF BENEFIT	DATE OF ENTITLEMENT	MONTHLY BENEFIT
JEANNETTE A FLANAGAN .54 S BEND ST PAWTUCKET RI 02860	MOTHER IS	7/71	\$46.10

AMOUNT OF FIRST CHECK: \$439.40

SHORTLY AFTER 10/27/71, YOU WILL RECEIVE YOUR FIRST CHECK WHICH WILL INCLUDE ALL BENEFITS DUE YOU THROUGH 10/71. THIS INCLUDES A LUMP SUM DEATH PAYMENT OF \$255.00. AFTER THAT, A CHECK FOR \$46.10 WILL BE SENT TO YOU EACH MONTH.

AT THE END OF THE YEAR WE WILL SEND YOU A FORM SO YOU CAN REPORT YOUR ACTUAL EARNINGS FOR THE YEAR. WE WILL THEN MAKE ANY NECESSARY ADJUSTMENTS IN YOUR BENEFIT PAYMENTS.

YOU WILL RECEIVE MONTHLY PAYMENTS OF \$46.10 BEGINNING JULY 1971. ACTUALLY YOUR BENEFIT AMOUNT IS NOT NOW PAYABLE BECAUSE OF YOUR WORK AND EARNINGS. HOWEVER, THE BENEFITS DUE OTHER MEMBERS OF YOUR FAMILY SHOULD BE INCREASED SO THAT THEY STILL RECEIVE THE MAXIMUM AMOUNT PAYABLE ON THIS RECORD. TO SAVE ADMINISTRATIVE COSTS, THE LAW PERMITS US TO PAY THE FAMILY'S INCREASE TO YOU. BUT IT IS FOR THE USE AND BENEFITS OF THE OTHER FAMILY MEMBERS AND IS NOT CONSIDERED YOUR INCOME. YOUR FULL BENEFIT MAY BE PAYABLE IF YOUR EARNINGS FOR 1971 ARE LESS THAN EXPECTED OR YOU NEITHER EARN OVER \$140 AS AN EMPLOYEE NOR PERFORM SUBSTANTIAL SERVICES IN SELF-EMPLOYMENT IN ANY MONTH. IF THESE CHANGES OCCUR, PLEASE NOTIFY ANY SOCIAL SECURITY OFFICE PROMPTLY.

The original document, of which this is a photocopy, appears to be genuine and unaltered and to have been made at the time purported.

Signature

Date 12/8/71 Title C-13

The right to receive social security benefits carries with it certain responsibilities. They are explained in the booklet furnished you. Read this booklet carefully. Be sure that you understand clearly what you can expect by way of benefits, and what is to be expected of you. If you have any questions or wish additional information about your benefits, please get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this Certificate with you.

A/N 12 (pages)
EXHIBIT

NOTICE: If you believe that this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it within 60 days from the date of this notice. You may make your

Robert M. Ball

DATE 11/03/71

THIS IS TO CERTIFY THAT THE PERSON(S) NAMED BELOW BECAME ENTITLED TO THE INSURANCE BENEFITS SHOWN, PAYABLE UNDER TITLES II AND XVIII OF THE SOCIAL SECURITY ACT.

NAME AND ADDRESS OF PAYEE AS THE CLAIMANT OR AS REPRESENTATIVE OF THE CLAIMANT	TYPE OF BENEFIT	DATE OF ENTITLEMENT	MONTHLY BENEFIT
JEANNETTE A FLANAGAN FOR CHILDREN 154 S BEND ST PAWTUCKET RI 02860.	CHILD'S	7/71	EACH \$46.10

AMOUNT OF FIRST CHECK: \$922.00

THE INFORMATION GIVEN IN THIS NOTICE CONCERNS LISA, JAN, DANIEL, DEBORAH AND STEPHEN,

BENEFITS HAVE BEEN COMBINED IN ONE CHECK, SHORTLY AFTER 10/27/71, YOU WILL RECEIVE YOUR FIRST CHECK WHICH WILL INCLUDE ALL BENEFITS DUE YOU THROUGH 10/71, AFTER THAT, A CHECK FOR \$230.50 WILL BE SENT TO YOU EACH MONTH.

NOTE TO REPRESENTATIVE PAYEE: PLEASE READ THE ENCLOSED PAMPHLET FOR DETAILED INSTRUCTIONS ON YOUR RESPONSIBILITIES AS A REPRESENTATIVE PAYEE.

The original document, of which this is a photocopy, appears to be genuine and unaltered and to have been made at the time purported.

Signature: Russell M. Ball
Date: 12/8/71 Title: CTA

The right to receive social security benefits carries with it certain responsibilities. They are explained in the booklet furnished you. Read this booklet carefully. Be sure that you understand clearly what you can expect by way of benefits, and what is to be expected of you. If you have any questions or wish additional information about your benefits, please get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this Certificate with you.

ENCL SSA-779.

NOTICE: If you believe that this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If additional evidence is available,

Robert M Ball
ROBERT M BALL