

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>CLIFFORD WARD,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b>Docket No. 98-168-B</b>
	)	
<b>KENNETH S. APFEL,</b>	)	
<i>Commissioner of Social Security,</i>	)	
	)	
<i>Defendant</i>	)	

**REPORT AND RECOMMENDED DECISION<sup>1</sup>**

This case concerns the interpretation of section 215(a)(7) of the Social Security Act, 42 U.S.C. § 415(a)(7), and its application to the specific factual circumstances presented by the plaintiff. This section of the Social Security Act is sometimes referred to as the windfall elimination provision or the WEP. The plaintiff contends that the commissioner has erroneously applied the provision to him, thereby wrongfully reducing his benefits under the Supplemental Security Income (“SSI”) program. I recommend that the court affirm the commissioner’s decision.

---

<sup>1</sup> This case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. The commissioner has admitted that the plaintiff has exhausted his administrative remedies. Oral argument was held before me on May 7, 1999 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

## I. Background

The plaintiff was awarded benefits, beginning in April 1994, under the Supplemental Security Income (“SSI”) program of the Social Security Act. Record p. 11. The monthly benefit amount awarded was \$262. *Id.* at 26. This amount apparently represented a reduction in the amount that might otherwise have been payable due to the plaintiff’s receipt of a government pension. *Id.* at 11. Contending that he was entitled to an exemption from the reduction by the terms of the WEP, the plaintiff requested a hearing before an administrative law judge. *Id.* at 11-12. After hearing, the administrative law judge found that the plaintiff was entitled to SSI benefits beginning in April 1994, Finding 2, Record p. 13; that he was not eligible for a civil service discontinued service retirement in 1984 because he took no affirmative action to waive his eligibility for a military retirement pension, Finding 3, Record p. 13; that he did not meet the exceptions to the application of a modified formula under the applicable statute for determining the amount of his SSI benefit and, accordingly, that he was receiving the maximum monthly benefit amount to which he was entitled, Findings 4 & 5, Record p. 13. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final decision of the commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

## II. Discussion

The statute at issue provides, in pertinent part:

In the case of an individual whose primary insurance amount would be computed under paragraph (1) of this subsection, who —

(i) attains age 62 after 1985 . . .

and who first becomes eligible after 1985 for a monthly periodic payment (including a payment determined under subparagraph (C), but excluding .

. . . a payment based wholly on service as a member of a uniformed service . . . ) which is based in whole or in part upon his or her earnings for service which did not constitute “employment” as defined in section 410 of this title for purposes of this subchapter (hereafter . . . referred to as “noncovered service”), the primary insurance amount of that individual during his or her concurrent entitlement to such monthly periodic payment and to old-age or disability insurance benefits shall be computed or recomputed under subparagraph (B).

42 U.S.C. § 415(a)(7)(A). The parties agree that the plaintiff’s employment, other than military service, was “noncovered service” within the meaning of 42 U.S.C. § 410 and that the plaintiff, who was born in 1932, Record p. 13, reached the age of 62 after 1985. Subsection (B) of 42 U.S.C. § 415(a)(7) provides, in pertinent part:

(i) If paragraph (1) of this Subsection would apply to such an individual (except for subparagraph (A) of this paragraph), there shall first be computed an amount equal to the individual’s primary insurance amount under paragraph (1) of this subsection, except that for purposes of such computation the percentage of the individual’s average indexed monthly earnings established by subparagraph (A)(i) of paragraph (1) shall be the percent specified in clause (ii). There shall then be computed (without regard to this paragraph) a second amount, which shall be equal to the individual’s primary insurance amount under paragraph (1) of this subsection, except that such second amount shall be reduced by an amount equal to one-half of the portion of the monthly periodic payment which is attributable to noncovered service performed after 1956 (with such attribution being based on the proportionate number of years of such noncovered service) and to which the individual is entitled (or is deemed to be entitled) for the initial month of his or her concurrent entitlement to such monthly periodic payment and old-age or disability insurance benefits. The individual’s primary insurance amount shall be the larger of the two amounts computed under this subparagraph (before the application of subsection (i) of this section) and shall be deemed to be computed under paragraph (1) of this subsection for the purpose of applying other provisions of this subchapter.

(ii) For purposes of clause (i), the percent specified in this clause is

—

**(I)** 80.0 percent with respect to individuals who become eligible (as defined in paragraph (3)(B)) for old-age

insurance benefits . . . in 1986;

\* \*\*

(V) 40.0 percent with respect to individuals who so become eligible in 1990 or thereafter.

42 U.S.C. § 415(7)(B). In essence, the plaintiff contends that he became eligible for a pension from noncovered service before 1985, so that the reduction required by subsection (A) does not apply to him. *See Newton v. Shalala*, 874 F. Supp. 296, 298-99 (D. Ore. 1994) (discussing effect and intent of WEP).

The regulation effectuating 42 U.S.C. § 415(a)(7) is 20 C.F.R. § 404.213. That regulation provides that the WEP is applicable in circumstances where the claimant became eligible for SSI benefits after 1985 and also first became eligible after 1985 for a monthly pension for the same months for which he is entitled to SSI benefits. Specifically, the regulation provides: “We consider you to first become eligible for a monthly pension in the first month for which you met all requirements for the pension except that you were working or had not yet applied.” 20 C.F.R. § 414.213(a)(3). Here, the administrative law judge held that the plaintiff was not eligible before 1986 for the monthly pension which he now receives because the plaintiff had to waive his eligibility for a military pension in order to receive the pension at issue, and he did not do so until 1988. Record pp. 12-13. The plaintiff responds that no waiver of a military pension can be made until the potential recipient actually retires, which the plaintiff did in 1988, but that the fact that he could have retired and executed such a waiver in 1984 made him “eligible” for the pension in 1984, and that is all that is necessary under the regulation. Plaintiff’s Statement at 4-5, 7-8. The pension that the plaintiff currently receives, in addition to his SSI benefits, is apparently a federal civil service pension. Record p. 18. At oral argument the commissioner conceded that the plaintiff did not have to waive

his military pension in order to establish eligibility before 1986 for the pension he currently receives, but took the position that the plaintiff was not eligible for the pension at issue before 1986 because he was not offered an “early out” pension in 1984 as he contends, was not involuntarily separated in that year, and was not otherwise eligible for a pension before 1986.

There is some suggestion in the case law that a court may not uphold a decision of a government agency based on reasons not articulated by the agency itself in its decision. *See HealthEast Bethesda Lutheran Hosp. v. Shalala*, 164 F.3d 415, 418 (8th Cir. 1998). This suggestion arises from *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (“[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”). However, the Southern District of New York has held that remand is not required under these circumstances in Social Security benefit cases where the outcome of a remand “is sufficiently clear.” *Thompson v. Shalala*, 868 F.Supp. 621, 624 (S.D.N.Y. 1994); *see also Benitez v. Califano*, 573 F.2d 653, 657 (9th Cir. 1978). In addition, the First Circuit has applied a “harmless error” rule in Social Security benefit cases. *Perez Torres v. Secretary of Health & Human Servs.*, 890 F.2d 1251, 1255 (1st Cir. 1989) (administrative law judge’s error in finding that claimant had never alleged mental condition harmless in light of entire record). Accordingly, if the likely outcome on remand in this case is clear and is the same as that reached in the decision under review, making the administrative law judge’s admitted error essentially harmless, the court may uphold the denial of the plaintiff’s claim. *See Sprague v. Heckler*, 595 F. Supp. 1380, 1383 (D. Me. 1984) (administrative law judge’s confusion regarding proper legal standard may be harmless error).

An individual becomes eligible for a federal civil service pension, for purposes of the WEP,

at the time he satisfies all prerequisites to the payment of benefits. *Das v. Department of Health & Human Servs.*, 17 F.3d 1250, 1253 (9th Cir. 1994). *See also Johnson v. Sullivan*, 777 F. Supp. 741, 743 (W. D. Wisc. 1991). The plaintiff contends that he became eligible for such a pension in 1984 when he received a letter informing him that, as a result of a reduction in force by the Department of Agriculture, his employer, his was one of two GS-11 positions in the Augusta, Maine field office that were being eliminated and replaced by two GS-9 positions. Record at 40-41. The plaintiff was offered one of the GS-9 positions, which he accepted. *Id.* at 19, 40. This “change to lower grade” was effective July 8, 1984. *Id.* at 41. The plaintiff relies on the written opinion of James E. Schillinger, chief of the Human Resources Management Service at the Medical and Regional Office Center of the Department of Veterans Affairs in Togus, Maine, that he would have been eligible for a federal civil service pension in 1984 “if he had a notice of his job abolishment and prior to any reasonable offer,” *id.* at 43, and the statement of Maureen Hardy, acting personnel officer for the Northeast Region of the Department of Agriculture, submitted to the Appeals Council after the administrative law judge had issued his opinion in this case, to the effect that, while no records are available concerning the 1984 reduction in force, the plaintiff would have been eligible for a “Civil Service, Discontinued Service Retirement” in 1984 if he had waived his military retirement pay, *id.* at 65.

The commissioner responds that the plaintiff was not entitled to an annuity under 5 U.S.C. § 8336(d), the applicable statute, based on the 1984 notice because that notice did not offer authorization for early-out retirement as a result of the reduction in force, the notice did not indicate that the Office of Personnel Management had determined that a significant number of employees in the agency would be separated or subject to an immediate reduction in basic pay during a major

reorganization or reduction in force, and the plaintiff was not separated involuntarily because he chose to accept the GS-9 position offered in the notice. Defendant's Reply to Plaintiff's Memorandum of Law (Docket No. 8) at 3-4. The statute at issue in this regard provides, in pertinent part:

An employee who —

(1) is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency; or

(2) while serving in a geographic area designated by the Office of Personnel Management, is separated from the service voluntarily during a period in which the Office determines that —

(A) the agency in which the employee is serving is undergoing a major reorganization, a major reduction in force, or a major transfer of function; and

(B) a significant percent of the employees serving in such agency will be separated or subject to an immediate reduction in the rate of basic pay . . . ;

after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity. For purposes of paragraph (1) of this subsection, separation for failure to accept a directed reassignment to a position outside the commuting area of the employee concerned or to accompany a position outside of such area pursuant to a transfer of function shall not be considered to be a removal for cause on charges of misconduct or delinquency. Notwithstanding the first sentence of this subsection, an employee described in paragraph (1) of this subsection is not entitled to an annuity under this subsection if the employee has declined a reasonable offer of another position in the employee's agency for which the employee is qualified, which is not lower than 2 grades (or pay levels) below the employee's grade (or pay level), and which is within the employee's commuting area.

5 M.R.S.A. § 8336(d). The regulation implementing section 8336(d)(2) makes clear that an agency of the federal government may offer early retirement to employees under this statute only with the approval of the Office of Personnel Management. 5 C.F.R. § 831.114(d)(1). Neither the

documentary evidence submitted by the plaintiff nor his testimony provides any indication that the determination required by section 8336(d)(2) was made by the Office of Personnel Management in connection with the 1984 reduction in force of two positions, or indeed that the Office of Personnel Management authorized any offer of an “early-out” annuity or retirement benefit to the plaintiff. The record does show that the position offered to and accepted by the plaintiff was only two grades below the position he held that was being eliminated. Since the plaintiff did not decline the GS-9 position, it is not possible to conclude that he was involuntarily separated for the purpose of subsection (d)(1).<sup>2</sup> The conclusory opinions of Schillinger<sup>3</sup> and Hardy do not mention these statutory and regulatory requirements. Schillinger appears to have been unaware of them. Record at 43. Hardy mentions 5 C.F.R. § 831 generally, but does not provide the necessary factual data — indeed, she states that no records concerning the 1984 reduction in force in Maine are currently available — to support her conclusion that the plaintiff would have been eligible for “discontinued service retirement” in 1984 so long as he waived his military retirement pay. *Id.* at 65. The only evidence in the record, as distinct from opinion, is to the contrary.

The plaintiff contends that the commissioner is asking the court to “go outside this record” in order to determine that he was not eligible in 1984 for an annuity under section 8336 because the necessary evidence to prove these points, one way or the other, is not present. Plaintiff’s

---

<sup>2</sup> The plaintiff argues that he would have been involuntarily separated if he had declined the GS-9 position and that he therefore was eligible for an annuity in 1984. Plaintiff’s Memorandum of Law (Docket No. 7) at 8. However, the evidence of record does not show that the GS-9 position accepted by the plaintiff was not “reasonable” or was not within his commuting area. 5 U.S.C. §8336(d).

<sup>3</sup> Schillinger’s opinion appears in any event to be conditioned upon the abolishment of the plaintiff’s job before his employing agency made him a reasonable offer of another job. Record p. 43. That is not what occurred in this case.

Memorandum of Law at 6-8. This argument ignores the fact that it was the plaintiff's burden before the agency to establish his entitlement to exemption from the WEP. *See Martin v. Sullivan*, 894 F.2d 1520, 1531-32 (11th Cir. 1990) (applicant's burden to establish that all entitlement requirements are met). The fact that the commissioner's decision is now on appeal does not relieve him of that burden. If the plaintiff had in fact submitted evidence tending to establish his entitlement to exemption from the WEP, recognition of the commissioner's admittedly erroneous imposition of an additional requirement of waiver of his military pension benefit in order to establish his eligibility for a civil service pension as of 1984 on appeal to this court would result in a remand, at least, and possibly a finding that he is entitled to the exemption, at best. However, the plaintiff's failure to meet that burden at the hearing before the administrative law judge is not excused by the fact that the case is now before the court on appeal. A remand directing the commissioner to consider the existing evidence under the proper legal standard would generate the same outcome on this issue. Accordingly, no remand is necessary.

In the alternative, the plaintiff asks this court to find, if he is not entitled to the full WEP exemption, that he is nonetheless entitled to receive 80% of his unreduced social security benefit as calculated without reference to the WEP, under the "phase-in" provisions of the governing statute, based on his eligibility for a civil service pension in 1986. Plaintiff's Memorandum of Law at 10. The commissioner correctly points out that this issue was not raised in the plaintiff's statement of errors submitted pursuant to this court's Local Rule 16.3 (Docket No. 5) and argues that the issue has therefore been waived. The commissioner's conclusion is correct. Even if that were not the case, the plaintiff's argument rests on a faulty premise. It is not the date upon which the claimant becomes eligible for a civil service pension that determines whether he is entitled to the 80% "phase-

in” figure but rather the date upon which the claimant becomes eligible for social security benefits. 20 C.F.R. §404.213(c)(1)(i). The plaintiff, who was born in 1932, Record at 23, first became eligible for social security benefits in 1994, at age 62, 20 C.F.R. §§404.310(a) & 404.311(b), so the 80% benefit, available only to those who became eligible for social security benefits in 1986, was not available to him.

### **III. Conclusion**

For the foregoing reasons, I recommend that the commissioner’s decision be **AFFIRMED**.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.*

*Dated this 2nd day of June, 1999.*

---

*David M. Cohen  
United States Magistrate Judge*