

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**EPHRAIM GREENBERG,
12 Arieli St., Apt. 2
90500 Beitar Illit
Israel 977,**

*individually on behalf of himself, and on behalf of
all others similarly situated*

Plaintiff,

- versus -

**CAROLYN W. COLVIN,
Social Security Administration
Room 617, Altmeyer Building
6401 Security Boulevard
Baltimore, MD 21235-6401,**

*in her official capacity as Acting Commissioner of
the Social Security Administration, and*

THE SOCIAL SECURITY ADMINISTRATION,

Defendants.

CLASS ACTION COMPLAINT

INTRODUCTION

1. Ephraim Greenberg (“Plaintiff”) brings this class action on behalf of himself, and on behalf of a class of similarly situated individuals, to challenge the unlawful policy of defendants Carolyn W. Colvin (“Acting Commissioner”) and the Social Security Administration (“SSA”) (collectively, “Defendants”) which treats the National Insurance Institute of Israel (“NII”)’s Old Age benefits as a “two-tiered” pension, *i.e.*, based at least in part, on the recipients’ earnings in employment (the “Policy”). Because of Defendants’ Policy, Defendants unlawfully apply the Windfall Elimination Provision (“WEP”), 42 U.S.C. §§ 415(a)(7), (d)(7); 20 C.F.R.

§ 404.213(a), to reduce claimants' SSA retirement benefits solely because of claimants' receipt of NII Old Age benefits.

2. NII Old Age benefits are guaranteed to **all** residents of Israel who have reached a certain age, regardless of the individual's work history or prior earnings (if any), so long as the individual (1) meets residency requirements; and (2) has paid the requisite contributions into the system for the required amount of time. Neither entitlement to the benefits, nor the amount of benefits to which an individual is entitled, is dependent on the individual's work history or prior earnings (if any).

3. Defendants' Policy violates the Social Security Act, 42 U.S.C. §§ 415(a)(7), (d)(7), and regulation promulgated thereunder, 20 C.F.R. § 404.213(a). The statute and regulation provides that the WEP is applied *only* when a person receives a pension based on noncovered employment. In particular, the regulation provides (in relevant part): "you are [] entitled to a **monthly pension(s) . . . based in whole or part on your earnings in employment** which was not covered under Social Security." 20 C.F.R. § 404.213(a)(3) (emphasis added).

4. On information and belief, SSA has misapplied this regulation systematically for many years.

JURISDICTION AND VENUE

5. The Court has jurisdiction over Plaintiff's claims under 42 U.S.C. §§ 405(g) and 1383(c)(3), as well as 28 U.S.C. § 1361.

6. Venue is proper pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 405(g) because the Plaintiff does not reside within the United States.

PARTIES

7. Plaintiff EPHRAIM GREENBERG is a United States citizen and an SSA retirement benefits recipient who currently resides in the State of Israel. Mr. Greenberg became entitled to SSA retirement benefits in March 2011, and began receiving benefits in January 2012 (retroactive to March 2011). Mr. Greenberg also became eligible for, and began receiving, NII Old Age benefits in May 2010. In January 2012, SSA informed Mr. Greenberg that his monthly retirement benefits would be reduced because of his receipt of a pension based on work that is not covered by Social Security.

8. Defendant CAROLYN W. COLVIN is the Acting Commissioner of the SSA. As such, she is charged with administering and supervising all benefits programs administered by SSA, including SSA retirement benefits. Acting Commissioner Colvin is sued in her capacity as the official charged with performing the statutory and regulatory duties of the SSA and with supervisory responsibility over the SSA and its divisions, agents, employees and representatives.

9. Defendant the SOCIAL SECURITY ADMINISTRATION is a federal agency charged with administering and supervising all SSA benefits programs under the Social Security Act, including SSA retirement benefits.

10. All divisions, agents, employees, contractors, and representatives of Defendants were acting within the scope of their agency or employment while making any of the statements and committing any of the acts alleged herein.

CLASS ACTION ALLEGATIONS

11. Plaintiff brings this action as a class action pursuant to Rules 23(a) and 23(b) and of the Federal Rules of Civil Procedure.

12. Plaintiff brings this class action on behalf of himself, and as a representative of a class of similarly situated persons. The class consists of:

All persons whose SSA retirement benefits have been reduced by application of the Windfall Elimination Provision based solely on their receipt of Old Age benefits from NII.

13. The class is so numerous that joinder of all members is impracticable. The exact number of class members is currently unknown and only can be obtained through appropriate discovery. However, on information and belief, there are at least two thousand class members.

14. There are questions of law and fact common to all class members that predominate over questions only affecting individual class members, including: (a) whether SSA's internal policy treating NII benefits as "two-tiered" pensions is contrary to 20 C.F.R. § 404.213(a); and (b) whether Defendants have engaged in a pattern of applying the WEP to reduce SSA beneficiaries' retirement benefits solely because these beneficiaries also receive NII Old Age benefits.

15. Plaintiff's claims are typical of the claims of all class members, and arise from the same course of conduct by Defendants. The relief sought is common to all class members. In addition, Defendants have acted, and continue to act, on grounds generally applicable to all class members, thereby making injunctive and declaratory relief appropriate to the class as a whole.

16. Plaintiff will fairly and adequately represent the members of the class .

17. The named Plaintiff and proposed class are represented by Kelley Drye & Warren LLP, whose attorneys are experienced in class action litigation and will adequately represent the class.

18. A class action is superior to other available methods for fairly and efficiently adjudicating this case because of the number of potential plaintiffs involved. Individual

litigation would be unduly burdensome to the courts in which the individual litigation would proceed, and would pose the risk of different and inconsistent case law.

PRESENTMENT, EXHAUSTION AND 60-DAY REQUIREMENT

19. Plaintiff and class members have presented their claims to the Defendants within the meaning of 42 U.S.C. § 405(g).

20. Any exhaustion of administrative remedies requirement should be waived because Plaintiff's claims are collateral to his claim for benefits, there is irreparable harm, and exhaustion would be futile. *See* ¶¶ 63-82, *infra*.

21. The 60-day requirement in 42 U.S.C. § 405(g) should be equitably tolled for any class member who otherwise does not meet this requirement, (1) for the same reasons that the exhaustion requirement should be waived, and (2) because Defendants systematically denied benefits to class members based on an internal, unpublished policy which has been unknown to the class until recently. *See* ¶¶ 83-91, *infra*.

BACKGROUND

The Windfall Elimination Provision

22. The WEP was enacted as part of the Social Security Amendments of 1983, Pub. L. 98-21, and was intended to prevent a "windfall" to workers who received a pension from a job for which they did not pay Social Security taxes. *See* "Social Security Beneficiaries Affected by the Windfall Elimination Provision in 2006," Social Security Bulletin, Vol. 68, No. 2 (2008).¹ To SSA, these workers appeared to have low overall earnings, and therefore benefitted from a higher earnings replacement rate applicable to their SSA retirement benefits. *Id.* These workers purportedly received a "windfall" because they obtained SSA retirement benefits at a higher

¹ Available at: <http://www.ssa.gov/policy/docs/ssb/v68n2/v68n2p21.html> (last visited Nov. 12, 2013).

earnings replacement rate, *plus* they received a pension from a job where they had earnings but did not pay Social Security taxes. *Id.*

23. The WEP statute provides that the WEP is applied where, in relevant part, an individual “first becomes eligible after 1985 for a monthly periodic payment . . . which is based in whole or in part upon his or her earnings for service which did not constitute ‘employment.’” 42 U.S.C. §§ 415(a)(7)(A).

24. SSA’s regulations promulgating the WEP statute provide, in relevant part, that retirement benefits will be reduced where:

For the same months after 1985 that you are entitled to old-age or disability benefits, you are also entitled to a monthly pension(s) for which you first became eligible after 1985 *based in whole or part on your earnings in employment* which was not covered under Social Security.

20 C.F.R. § 404.213(a) (emphasis added).

25. SSA’s regulations also explain:

Pensions from noncovered employment outside the United States include both *pensions from social insurance systems that base benefits on earnings but not on residence or citizenship*, and those from private employers.

Id. (emphasis added).

26. In addition, SSA’s Program Operations Manual System (“POMS”) provides: “WEP does not apply if the foreign pension is based on factors other than work, e.g., residence, voluntary contributions or financial need.” POMS RS 00605.372(C)(1).

NII Old Age Benefits

27. The NII pays Old Age benefits to anyone residing in Israel who meets the following requirements: (a) is aged 18 or over, and immigrated to Israel prior to age 60-62; (b)

meets age requirements; and (c) paid the required amount of insurance contributions for the required amount of time.²

28. Insurance contributions are mandatory, and must be paid regardless of whether a person is employed, self-employed, or unemployed.³

29. The amount that a person is required to *pay into* the NII system (*i.e.*, insurance contributions) depends on that person's income and employment status;⁴ however, the amount of benefits that a person is entitled *to receive* bears no relationship to the amount paid in to the system, the person's employment history, or the person's prior earnings (if any). *See* Sep. 12, 2013 Letter from Edna Leiman, Senior Supervisor, Old-Age and Survivors Benefits for NII (Attachment 1 hereto)⁵ ("The amount of insurance contributions that have been paid by the insured during the years of insurance do not affect the amount of the allowance that will be paid to him. The fact that an insured has or has not worked and the level of his work income before reaching the qualifying age do not affect either his eligibility for an allowance or the amount of allowance to which he will be entitled.").

² *See* NII's Old Age benefits "Conditions of Entitlement," available at: <http://www.btl.gov.il/English%20Homepage/Benefits/Old%20Age%20Insurance/Conditions/Pages/default.aspx> (last accessed Nov. 6, 2013).

³ *See* NII's Old Age benefits requirement, "insurance contributions have been paid for you as prescribed by law," available at: <http://www.btl.gov.il/English%20Homepage/Benefits/Old%20Age%20Insurance/Conditions/Pages/havebeenpaid.aspx> (last accessed Nov. 6, 2013).

⁴ *See* NII's Old Age benefits "Details of types of the insured and determining payment obligations," available at: <http://www.btl.gov.il/ENGLISH%20HOMEPAGE/INSURANCE/NATIONAL%20INSURANCE/DETAILSOFTYPES/Pages/default.aspx> (last accessed Nov. 6, 2013).

⁵ The original letter from Ms. Leiman appears in Hebrew. We included attached a certified English translation of her letter.

30. In other words, all else being equal, an Israeli resident who works, and an Israeli resident who does not work, will both be entitled to NII Old Age benefits, and their benefits amount will be the same.

SSA's Prior Application of the WEP to NII Old Age Benefits

31. Defendants repeatedly have applied the WEP to reduce SSA retirement benefits of claimants receiving NII Old Age benefits, despite the fact that NII benefits are not based on the claimant's earnings in employment.

32. In 2001, Mr. Jerome Berger appealed SSA's determination that the WEP applied to reduce his retirement benefits because of his receipt of NII Old Age benefits. In that case, SSA initially found that because Mr. Berger had earnings in Israel from self-employment, his NII benefits were based on those earnings and therefore triggered the WEP. SSA found that the letter from NII provided by Mr. Berger in support of his claim was deficient because it did not "state that the stipend received by the claimant is one received by citizens in the same amount regardless of their prior work (or lack thereof)."

33. Mr. Berger then brought suit in this Court (*Berger v. Barnhart*, Civ. No. 04-0431 (D.D.C. 2004)). He produced a new letter from NII which explained that the NII Old Age benefits are (1) universal and (2) uniform:

Universality:

Earnings or lack of earnings are not a factor in determining eligibility or the amount of the benefit. A person's employment or lack of employment is not a factor in determining eligibility or amount of the benefit.

The only requirement for eligibility for this benefit is that payments be made, either by the employed or unemployed person to the NII.

Uniformity:

The amount of payments made by an employed person and an unemployed person to the NII to qualify for benefits differ.

However, once the required respective payments are made, all persons, both employed and unemployed, are entitled to the same amount of benefits.

June 3, 2003 Letter from Yaffa Maroz, Director of NII (Attachment 2, hereto).

34. While the suit was pending, SSA agreed that the WEP should not apply to Mr. Berger's benefits, and requested a remand to the agency for a new determination of Mr. Berger's benefits. Accordingly, the court ordered a remand.

35. On remand to the agency, the SSA Appeals Council determined that Mr. Berger's pension did not trigger the WEP because NII Old Age benefits are based solely on residency status and contributions into the NII system. *See* Sep. 3, 2004 SSA Appeals Council Decision (Attachment 3, hereto). Specifically, the Appeals Council determined that because neither "earnings or lack of earnings" nor "[a] person's employment or lack of employment" were factors "in determining eligibility or the amount of the benefit," the benefits received by Mr. Berger "is not based, in whole or in part on work." *Id.* at 2. The Council further directed SSA to recalculate Mr. Berger's retirement benefits without regard to his NII benefits. *Id.*

36. In 2005, Martin H. Gerry, Deputy Commissioner for Disability and Income Stability Programs for SSA, wrote a letter to Mr. Mordechai Biser, Associate General Counsel for Agudath Israel of America. *See* Dec. 16, 2005, Letter from M. Gerry to M. Biser (Attachment 4, hereto). In that letter, Mr. Gerry discussed Mr. Berger's case, and stated: "On remand, we found that we had incorrectly applied the WEP to Mr. Berger's benefits because *the NII pension is based on residency in Israel, not on employment that was not covered by the U.S. Social Security system.*" *Id.* (emphasis added). Mr. Gerry added:

We agree that other beneficiaries who are also receiving the NII pension may have had the WEP erroneously applied and that we should recalculate the current benefit amounts of all such beneficiaries and pay any back benefits due. We have begun the process of identifying such persons in our files, and we will take appropriate actions to correct any misapplication of the WEP.

Id.

STATEMENT OF FACTS

37. In or around May 2010, Mr. Greenberg began receiving Old Age benefits from NII.

38. In or around March 2011, Mr. Greenberg became eligible for SSA retirement benefits.

39. On or about January 28, 2012, SSA notified Mr. Greenberg that he would begin to receive his SSA retirement benefits, retroactive to March 2011, but noted:

We reduced the amount of your monthly Social Security benefit beginning March 2011. This is the first month that you are entitled to both Social Security and a pension based on work which is not covered by Social Security. Because of this pension, we must use a special formula to figure your Social Security benefit.

40. SSA did not disclose the “special formula” used to calculate Mr. Greenberg’s benefits, or how his NII Old Age benefits would be used in that calculation.

41. After receiving SSA’s letter, Mr. Greenberg learned of the *Berger* case, and Mr. Gerry’s 2005 letter, in which Mr. Gerry promised that SSA would rectify its improper application of the WEP to SSA retirement beneficiaries based on those beneficiaries’ receipt of NII Old Age benefits.

42. Mr. Greenberg contacted NII to request a letter re-affirming that NII benefits are not based on an individual’s earnings in employment.

43. Mr. Greenberg received that letter in November 2012. *See* Nov. 6, 2012 Letter from NII to E. Greenberg (Attachment 5, hereto). That letter states, in relevant part:

The conditions for entitlement [to Old Age benefits] are as follows:

1. The claimant is insured.
2. He has accrued the requisite period of insurance.

3. There was no delay in paying national insurance contributions.

Entitlement to old age pension is not dependent on the claimant having worked or not worked.

44. On December 13, 2012, Mr. Greenberg appealed SSA's determination to reduce Mr. Greenberg's retirement benefits based on his receipt of NII Old Age benefits, and attached to that letter the Nov. 6, 2012 letter from NII.

45. On May 20, 2013, after SSA failed to respond to Mr. Greenberg's December 13 letter, Mr. Greenberg sent a follow-up letter to SSA. Mr. Greenberg attached to that letter the 2005 letter from Mr. Gerry as further support for his argument that the WEP does not apply to NII Old Age benefits.

46. On August 20, 2013, the Federal Benefits Unit of the American Consulate General in Jerusalem sent Mr. Greenberg a letter asking for information regarding Mr. Greenberg's NII payment, and requesting information about the time Mr. Greenberg spent working in Israel. Specifically, the Federal Benefits Unit asked Mr. Greenberg to complete SSA Forms 308 and 795.

47. On September 16, 2013, Mr. Greenberg sent the Federal Benefits Unit completed SSA Forms 308 and 795.

48. In those forms, Mr. Greenberg indicated that his NII benefits were not based on his prior employment, and again requested that the WEP be removed from his SSA retirement benefits calculation. He also re-attached to those forms, among other things, the relevant documents from the *Berger* decision in which the SSA determined that NII Old Age benefits do not trigger the WEP.

49. On September 30, 2013, as a result of inquiries made to SSA on his behalf by Senator Ben Cardin's office, Mr. Greenberg received an email from Jane Weisbaum of the

SSA's Office of International Operations. *See* Sep. 30, 2013 Email from J. Weisbaum to E. Greenberg (Attachment 6, hereto).

50. In her email, Ms. Weisbaum informed Mr. Greenberg that SSA had made a new determination that the WEP would apply only to a *portion* of his benefits. *Id.* Specifically, SSA determined that because Mr. Greenberg had worked in Israel 167 out of the 432 months he paid premiums to the NII, only 38% (*i.e.*, 167/432) of his NII benefits would be used in his SSA retirement benefits calculation. *Id.*

51. Ms. Weisbaum also attempted to distinguish the *Berger* case by claiming that Mr. Berger either first immigrated to Israel after the age of 60-62, or had been unemployed. *Id.*

52. On October 3, 2013, Mr. Greenberg responded by email to Ms. Weisbaum. *See* Oct. 3, 2013 Email from E. Greenberg to J. Weisbaum (Attachment 7, hereto).

53. In that email, Mr. Greenberg explained that although premium payments to NII may be made while a claimant is working (but must be made regardless of whether or not the claimant is working) *entitlement* to NII Old Age benefits, and the *amount* of those benefits, have *no* relationship to the claimant's work history or prior earnings. *Id.* Thus, Mr. Greenberg argued that NII Old Age benefits cannot be a "foreign pension based on employment."⁶ *Id.*

54. That same day, Ms. Weisbaum responded to Mr. Greenberg by email. *See* Oct. 3, 2013 Email from J. Weisbaum to E. Greenberg (Attachment 8, hereto).

55. In that email, Ms. Weisbaum revealed portions of a 2010 internal SSA Operations Bulletin which expressly directed SSA to treat NII Old Age benefits as a "two-tiered" pension –

⁶ SSA POMS 605.372.C.1 provides: "A foreign pension based on employment not covered by U.S. Social Security is treated as any other pension based on non-covered employment..."

i.e., one that is “based on work/contributions, but may also be partially based on residency.” *Id.*

Specifically, that policy provides:

[F]oreign pensions based partially on work and other non-work factors such as financial need, voluntary contributions and residency, are subject to WEP. The portion of the pension amount based on work must be obtained and prorated.

The National Israeli Institute Pension (NIIP) fits into this category of being an old-age pension system that is based on work/contributions, but may also be partially based on residency.

Id.

56. Ms. Weisbaum’s email was the first time Plaintiff became aware that SSA treated NII Old Age benefits as a “two-tiered” pension, or that SSA had a written policy dictating that NII benefits were to be treated as such.

57. In her email, Ms. Weisbaum again rejected Mr. Greenberg’s argument that the WEP should not apply to NII Old Age benefits, and concluded: “It may be that you do not *agree with the law itself*, and that is certainly your right. But we are applying the law correctly.” *Id.* (emphasis in original).

58. On or about October 12, 2013, SSA sent Mr. Greenberg a “Notice of Reconsideration,” Oct. 12, 2013 “Notice of Reconsideration” (Attachment 9, hereto) (“Notice”).

59. The Notice reiterated Ms. Weisbaum’s statement that because Mr. Greenberg had worked in Israel 167 out of the 432 months he paid premiums to the NII, only 38% (*i.e.*, 167/432) of his NII benefits would be used in his SSA retirement benefits calculation. *Id.*

60. The Notice thus informed Mr. Greenberg that although SSA had been using the full amount of his NII Old Age benefits (approximately \$324 per month) in its WEP calculation, SSA determined that only 38% of those benefits (*i.e.*, approximately \$123.12 per month) should be used in SSA’s WEP calculation. *Id.*

61. In support of its determination, SSA stated:

We understand that, as an Israeli resident, *you do not have to work in order to contribute to the Israeli system*, and, as long as you have contributed to the system for a sufficient period, you will qualify for a retirement pension. However, *if you do work, your contributions to the system are mandatory* and based upon your wages or earnings from self-employment.

Id. (emphasis added).

62. The Notice concluded:

Upon reconsideration of your claim, we have determined that WEP offset does not apply to the part of your Israeli pension that was based only on residency. However, it does apply to the part that was based on work.

Id.

63. To preserve his rights, Plaintiff filed a request for a hearing before an Administrative Law Judge on November 20, 2013. However, as discussed below, exhaustion of Plaintiff's administrative remedies in this case would be futile.

WAIVER OF THE EXHAUSTION REQUIREMENT FOR PLAINTIFF AND CLASS

64. "Judicial waiver of the exhaustion requirement is appropriate when further exhaustion would be futile, plaintiffs' legal claims are collateral to their demand for benefits or where the harm suffered pending exhaustion would be irreparable." *Duggan v. Bowen*, 691 F.Supp. 1487, 1507 (D.D.C. 1988) (citation omitted). In other words, any one of these three factors alone is enough to justify waiver of the exhaustion requirement. *See, e.g., Hall v. Sebelius*, 689 F.Supp.2d 10, 23 (D.D.C. 2009) ("In this circuit, the exhaustion requirement may be waived only in the most exceptional circumstances' . . . One such circumstance is where Plaintiffs can demonstrate exhaustion would be futile.") (citation omitted).

Exhaustion of Administrative Remedies Would Be Futile

65. Exhaustion of administrative remedies is futile where "an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law[.]" *Hall*, 689 F.Supp.2d at 18 (citations omitted).

66. Exhaustion of administrative remedies in this case would be futile because Defendants have adopted a written policy – the 2010 Operations Bulletin – which dictates that NII Old Age benefits are to be treated as a “two-tier” pension based, at least in part, on earnings in employment.

67. Moreover, Defendants have refused to accept that NII Old Age benefits are not based on earnings in employment.

68. Specifically, when Plaintiff challenged Defendants’ internal policy with regard to NII Old Age benefits, as described in the 2010 Operations Bulletin, Ms. Weisbaum of SSA replied: “It may be that you do not *agree with the law itself*, and that is certainly your right. But **we are applying the law correctly.**” *See* Attachment 8 (italics in original; bold added).

69. Finally, Defendants denied Plaintiff’s request for reconsideration, despite Plaintiff’s submission of evidence showing that NII Old Age benefits are not based on earnings in employment. *See* Attachment 9.

70. Because Defendants have a written internal policy which requires NII Old Age benefits to be treated as based (at least in part) on work, and because Defendants have repeatedly rejected Plaintiff’s request to treat his NII benefits as a payment *not* based on earnings in employment, it is clear that requiring Plaintiff and class members to exhaust their administrative remedies would be futile.

71. Accordingly, waiver of the exhaustion requirement here is appropriate and warranted.

Plaintiff’s and The Class’ Claim Is Collateral To Their Claim for Benefits

72. A plaintiff’s claim is “collateral” to his demand for benefits when the claim seeks “the vitiating of an unlawful policy.” *Pratt v. Bowen*, 642 F.Supp. 883, 887 (D.D.C. 1986) (“The

claims for benefits of the several class members are collateral to—indeed, had to be preceded by—the only relief sought for the class as a whole, viz., the judgment declaring the qualifying regulations invalid and an injunction against their enforcement.”).

73. Plaintiff and class members seek vitiation of Defendants’ unlawful policy, and the systemic application thereof, which treats NII Old Age benefits as pensions based, at least in part, on work.

74. Plaintiff and class members seek declaratory and injunctive relief from this Court which will declare Defendants’ policy illegal and enjoin its enforcement. This relief will precede Plaintiff’s and the class members’ demand for benefits.

75. Accordingly, Plaintiff’s and the class members’ claim is collateral to their demand for benefits, and waiver of the exhaustion requirement here is appropriate and warranted.

Plaintiff and the Class Will Suffer Irreparable Injury

76. In the context of Social Security benefits, “economic hardship [while awaiting back benefits due] does constitute irreparable harm.” *Johnson v. Shalala*, 2 F.3d 918, 922 (9th Cir. 1993). *See also Leschniok v. Heckler*, 713 F. 2d 520, 524 (9th Cir. 1983) (“We fail to comprehend the Secretary’s argument that financial compensation at some future date, should the claimants survive and prevail, mitigates the hardship which is visited upon claimants and their families each and every day.”).

77. Plaintiff is an elderly individual on a limited income, and, as such, suffers economic hardship due to the reduction in his SSA benefits.

78. By definition, SSA retirement beneficiaries are a class of elderly persons (aged 62 years and older), with a much higher mortality rate than the average population.

79. For example, in 2001, the mortality rate of SSA retirement beneficiaries was approximately 5.3%.⁷

80. By contrast, the population-wide mortality rate that same year was a mere 0.85%. *See* Center for Disease Control, “DEATH RATES BY 10-YEAR AGE GROUPS: UNITED STATES AND EACH STATE, 2001.”⁸

81. Because SSA retirement beneficiaries face a greater mortality risk than the general population, they also face a greater likelihood of mortality while awaiting resolution of the lengthy administrative determination of their claims. Thus, the payment of back benefits due on some future date is insufficient to compensate these persons.

82. Accordingly, Plaintiff and the proposed Class will be irreparably harmed if they are required to exhaust their administrative remedies.

WAIVER OF THE 60-DAY REQUIREMENT FOR CLASS

83. The exhaustion of administrative remedies requirement, and 42 U.S.C. § 405(g)’s requirement that a final decision of the Commission of SSA must be appealed within 60 days, can both be excused for the same reasons. *See Dixon v. Shalala*, 54 F.3d 1019, 1031 n.3 (2d Cir. 1995) (“exhaustion may be excused for the same reasons requiring tolling of the statute of limitations”) (citing *City of New York v. Heckler*, 476 U.S. 467, 482 (1986)).

84. Because waiver of the exhaustion of administrative remedies requirement is warranted here, the Court should also equitably toll the 60-day requirement in 42 U.S.C. § 405(g).

⁷ *See* “Life Tables for the United States Social Security Area 1900-2100,” available at: http://www.ssa.gov/oact/NOTES/as120/LifeTables_Tbl_1.html#wp1229200 (last visited Nov. 11, 2013)

⁸ Also available at: http://www.cdc.gov/nchs/data/statab/mortfinal2001_work23R.pdf (last visited Nov. 11, 2013)

85. Furthermore, Courts have equitably tolled the 60-day requirement where the case “involve[s] an unpublished SSA policy which resulted in the denial of benefits over an extended period of time.” *Dixon*, 54 F.3d at 1027 (citing *Bowen v. City of New York*, 476 U.S. 467 (1986)).

86. In *Dixon*, the Second Circuit upheld the district court’s equitable tolling of the 60-day requirement, and rejected SSA’s attempt to distinguish the case from *Bowen*:

That case, like this, involved an unpublished SSA policy which resulted in the erroneous denial of disability benefits to a plaintiff class over an extended period of time. As in this case, the policy in question was never published in the Federal Register but was instead implemented through internal memoranda and the quality assurance process.

. . .

In this case, tolling would appear particularly warranted in light of the district court’s finding . . . that the Secretary’s public statements of policy, the POMS and SSR, were themselves systematically misapplied.

Id. at 1032-33 (citations omitted).

87. As in *Bowen* and *Dixon*, equitable tolling is warranted here because this case involves an unpublished SSA policy (*i.e.*, the 2010 Operations Bulletin) which prevented Plaintiff from knowing the “*per se* rules [of the Operations Bulletin],” *Dixon*, 54 F.3d at 1032 (citation omitted), applied to his NII benefits.

88. As in *Bowen* and *Dixon*, equitable tolling is warranted here because SSA’s unpublished Policy resulted in the systematic, erroneous denial of benefits to the proposed class over an extended period of time.

89. Moreover, SSA’s unpublished policy here is at odds with its published guidance in the POMS, which provides that “WEP *does not apply* if the foreign pension is based on factors other than work, e.g., residence, voluntary contributions or financial need.” POMS RS 00605.372(C)(1).

90. Equitable tolling is also warranted here because SSA engaged in duplicitous behavior by *acknowledging* in 2005 that NII Old Age benefits are not based on work and that the WEP does not apply to them, *see* Attachment 4, and then subsequently instituting an unpublished internal policy which directs NII Old Age benefits to be treated as pensions based on work. *See, e.g., Bowen*, 476 U.S. at 481 (equitable tolling of 60-day requirement is appropriate “[w]here the Government’s secretive conduct prevents plaintiffs from knowing of a violation of rights.”).

91. Because the class did not learn of SSA’s unpublished, internal policy regarding the “two-tier” treatment of NII benefits until Ms. Weisbaum happened to partially disclose the policy in her October 3, 2013 email (*see* Attachment 8), the Court should equitably toll the 60-day requirement for the class members who have not otherwise met that requirement.

FIRST CAUSE OF ACTION:
VIOLATION OF THE SOCIAL SECURITY ACT AND SSA’S REGULATIONS

92. Paragraphs 1-91 are repeated and incorporated as if fully set forth herein.

93. The Social Security Act, 42 U.S.C. §§ 415(a)(7), (d)(7), and its implementing regulations, 20 C.F.R. § 404.213, only permit application of the WEP to pensions “based on earnings in employment.”

94. Because NII Old Age benefits are not based on earnings in employment, Defendants’ treatment of NII benefits as “two-tiered” pensions based (at least in part) on work is contrary to law.

95. Because NII Old Age benefits are not based on earnings in employment, Defendants’ application of the WEP to reduce the SSA retirement benefits of claimants receiving NII Old Age benefits violates 42 U.S.C. §§ 415(a)(7), (d)(7) and 20 C.F.R. § 404.213.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and class members request that the Court:

- (a) Assume jurisdiction over this matter;
- (b) Enter an order certifying the proposed plaintiff class, designating Mr. Greenberg as the named representative of the class, and designating the undersigned as class counsel;
- (c) Declare that Defendants' interpretation and implementation of 42 U.S.C. §§ 415(a)(7), (d)(7) and 20 C.F.R. § 404.213 is unlawful;
- (d) Declare that Defendants' treatment of NII Old Age benefits as "two-tiered" pensions is contrary to law;
- (e) Preliminarily and permanently enjoin Defendants from continuing to implement 42 U.S.C. §§ 415(a)(7), (d)(7) and 20 C.F.R. § 404.213 in a manner inconsistent with law;
- (f) Preliminarily and permanently enjoin Defendants from applying the WEP to reduce SSA retirement benefits on the grounds that NII Old Age benefits do not constitute a pension "based on earnings in employment";
- (g) Preliminarily and permanently enjoin Defendants and order them immediately to re-calculate all SSA retirement benefits calculations where the WEP was applied pursuant to 20 C.F.R. § 404.213 because of the claimant's receipt of NII Old Age benefits, and to provide full payment, including back benefits due, as a result of that re-calculation to Plaintiff and the class;
- (h) Award Plaintiff and the other members of the class costs, disbursements, and reasonable attorneys' fees;
- (i) Allow, as part of the Court's judgment, an attorneys' fee for representation of Plaintiff and the class equal to 25 percent of the total of the past-due benefits, pursuant to 42 U.S.C. § 406(b)(1)(A); and
- (j) Grant Plaintiff and the other members of the class costs and such other and further relief as the Court may find just.

Dated: November 21, 2013

Respectfully submitted,

KELLEY DRYE & WARREN LLP

By: /s/ Ira T. Kasdan

Ira T. Kasdan (D.C. Bar. No. 292474)
Joseph D. Wilson (DC Bar. No. 466652)
Elizabeth C. Johnson (DC Bar. No. 987429)

3050 K St. NW, Suite 400
Washington, DC 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451
ikasdan@kelleydrye.com
jwilson@kelleydrye.com
ejohnson@kelleydrye.com

Attorneys for Plaintiff

Attachment 1



המוסד לביטוח לאומי
משרד ראשי
אגף זקנה שאירים והבטחת קיום
שד' ויצמן 13
ירושלים 91909

טלפון 02-6709378
פקסי 02-6515749

12.09.2013
ח בתשרי תשע"ד

1/9
2/6
1361822-8

לכבוד
מר אפרים גרינברג
רח' אריאלי 12/2
ביתר - 90500

א.ג.נ.,

הנדון: תשלום קצבת זקנה

במענה לפנייתך הריני להודיעך כי על פי הוראות חוק הביטוח הלאומי, הזכות לקצבת הזקנה איננה מותנית בעבודה אלא בתושבות ותשלום דמי ביטוח.

גובה דמי הביטוח ששולמו ע"י המבוטח במהלך שנות הביטוח אינו משפיע על סכום הקצבה שתשלם לו.

העובדה שהמבוטח עבד או לא עבד וגובה הכנסותיו מעבודה לפני הגיעו לגיל המזכה, אינם משפיעים, לא על עצם הזכאות לקצבה ולא על גובה הקצבה לה יהיה זכאי.

על פי בדיקתנו הגעת לגיל פרישה החל בחודש מאי 2010 החל ממועד זה הינך מקבל קצבת זקנה ללא התחשבות בגובה הכנסותיך.

תשלום פנסיה social security בארה"ב, אינו נלקח ואינו יכול להילקח בחישוב זכאותך לקצבת זקנה.

בכבוד רב,

עדנה ליימן
ממונה בכיר, זקנה ושאירים

העתק: עו"ד נורית יצחק, מנהלת אגף פניות הציבור



STATE OF NEW YORK)
)
) ss
COUNTY OF NEW YORK)

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Hebrew into English of the attached letter from Edna Leiman to Efraim Greenberg, dated September 12, 2013.

Evan Finch, Senior Project Manager
Geotext Translations, Inc.

Sworn to and subscribed before me

this 7th day of November, 2013.

MORGEN MYRDAL
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MY6274933
Qualified In Kings County
My Commission Expires January 14, 2017



**The National Insurance Institute of Israel
Main Office
Old Age, Survivors and Income Support Department
13 Weizmann Boulevard
Jerusalem 91909**

1/9
2/6
1361822-8

Telephone: 02-6709378
Fax: 02-6515749

To
Mr. Efraim Greenberg
12/2 Arieli Street
Beitar 90500

September 12, 2013
8 Tishrei 5774

Dear Sir or Madam,

Re: **Payment of Old-Age Pension**

In answer to your inquiry, I hereby inform you that, pursuant to the provisions of the National Insurance Law, the right to old-age pension is not contingent upon employment but on residency and payment of insurance contributions.

The amount of insurance contributions that have been paid by the insured during the years of insurance does not affect the amount of the allowance that will be paid to him.

The fact that an insured has or has not worked and the level of his work income before reaching the qualifying age do not affect either his eligibility for an allowance or the amount of the allowance to which he will be entitled.

According to our review, you reached retirement age as of May 2010. Since this date, you have been receiving an old-age pension irrespective of the level of your income.

Payment of a social security pension in the U.S. is not and cannot be taken into account when calculating your eligibility for an old age pension.

Best regards,

[signature]

Edna Leiman
Senior Supervisor, Old-Age and Survivors' Pensions

CC: Adv. Nurit Yitzhak, Director, Department of Public Inquiries

Attachment 2



**NATIONAL INSURANCE INSTITUTE
ISRAEL
Old-age and Survivors Branch**

June 3, 2003

To Whom it May Concern:

Re: Information about the Old Age Benefits of the National Insurance Institute of Israel

Briefly, two of the significant characteristics of the Old Age Benefit Program are its,

1. universality
2. uniformity

Universality:

Earnings or lack of earnings are not a factor in determining eligibility or the amount of the benefit. A person's employment or lack of employment is not a factor in determining eligibility or the amount of the benefit.

The only requirement for eligibility for this benefit is that payments be made, either by the employed or unemployed person to the NII.

Uniformity:

The amount of payments made by an employed person and an unemployed person to the NII to qualify for benefits differ.

However, once the required respective payments are made, all persons, both employed and unemployed, are entitled to the same amount of benefits.

As of August 2002, the basic Old Age monthly allowance payment which is paid to all insured persons, is as follows:

Single Person	1,114 NIS
Adult with one child	1,464 NIS
Adult with 2 or more children	1,810 NIS

The amount of these payments are subject to change, by the NII, based on government economic and/or budgetary factors.

Explanation of Seniority Increment:

A seniority increment is an additional benefit paid to all insured persons, for each year payments are made after the required initial 10 year payment period.

The employed person and the unemployed person are entitled the same amount of this benefit.

Earnings are not a factor in determining eligibility for, or the amount of, this seniority increment.

The yearly seniority increment is 2% of the basic Old Age Benefit, up to a maximum of 50%.

Example: An insured person who makes contributions to NII for 29 years will receive a seniority increment of 38% (19 years x 2%), in addition to the basic Old Age benefit he receives.

Sincerely yours,


Yaffa Marez
Director

Attachment 3

4 ArAt SOCIAL SECURITY ADMINISTRATION

Refer to: TAHB
sITA [REDACTED]

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255
Telephone: (703) 605-8000
Date:

SEP 3 2004

**NOTICE OF APPEALS COUNCIL DECISION
FULLY FAVORABLE**

Stephen Arner
Attorney at Law
Kelly Drye & Warren LLP
8000 Towers Crescent Drive, Suite 1200
Vienna, VA 22182

Re: JEROME BERGER v. COMMISSIONER OF SOCIAL SECURITY
U.S.D.C. FOR THE DISTRICT OF COLUMBIA
Civil Action Number 04-0431(RMU)

We have made the enclosed decision in this case. Please read this notice and the decision carefully.

This Decision Is Fully Favorable to You

Another office will process the decision and send you a letter about your benefits. Your local Social Security office or another office may first ask you for more information. If you do not hear anything for 60 days, contact your local office.

What This Action Means

This decision is the final decision of the Commissioner of Social Security after remand by the court.

If You Have Any Questions

If you have any questions, you may call, write, or visit any Social Security office. If you do call or visit an office, please have this notice with you.

JEROME BERGER (b)(6)

Page 2 of 2

The telephone number of the local office that serves your area is . Its address is:

CMRS 010 DIO
P O BX 17049
BALTIMORE, MD 21207

Enclosure(s)

cc:

JEROME BERGER
P.O. BOX 18332
JERUSALEM, ISRAEL

ATTENTION REPRESENTATIVE:

A representative who wants to charge a fee for services performed in a proceeding before the Social Security Administration must submit a fee agreement or file a petition.

If you submitted a fee agreement that was not previously approved, the Appeals Council's action on the agreement is enclosed.

If you did not submit a fee agreement but want to charge a fee for your service, WHEN SERVICES ARE COMPLETED:

- **Complete the enclosed petition form.**
- **Give your client the CLAIMANT'S COPY and retain the REPRESENTATIVE'S COPY.**
- **Send the remaining copies directly to the**

Attorney Fee Staff
Office of Hearing and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

- **Mark the envelope "Do Not Open in Mailroom."**

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF THE APPEALS COUNCIL

In the case of

Claim for

JEROME BERGER

(Claimant)

Old-Age Insurance Benefits

(Wage Earner) (Leave Blank if same as above)


(Social Security Number)

Jerome C. Berger v. Commissioner of Social Security Administration
United States District Court for the District of Columbia
Civil Action Number 04-0431(RMU)

Pursuant to a court order issued on June 30, 2004, this case was remanded to the Commissioner in accordance with sentence four of 42 U.S.C. 405(g) to consider the petitioner's claim in matters relating to the application of the windfall elimination provision of the Social Security Act. Because this decision is fully favorable to the claimant, the Appeals Council did not issue a separate notice advising of its action.

The Administrative Law Judge found that the claimant became entitled to a pension from the National Insurance Institute of Israel (NII) on September 29, 2000 and that, because this pension is based on work not covered by the United States Social Security Act, his U.S. Social Security old-age insurance benefits were properly reduced, pursuant to the windfall elimination provision (WEP) of section 215(a)(7) (A)&(B) of the Social Security Act.

The Appeals Council adopts the Administrative Law Judge's statements regarding the pertinent provisions of the Social Security Act, Social Security Administration Regulations, Social Security Rulings and Acquiescence Rulings, the issues in the case, and the evidentiary facts, as applicable. The Appeals Council does not adopt the Administrative Law Judge's finding and conclusion that the claimant's old-age insurance benefits are subject to the WEP provision of the Social Security Act.

When the claimant initially filed an application for old-age insurance benefits, he indicated that he was receiving a pension from the NII which was based on his employment in Israel for the period from September 1971 through September 2000. Based on this information, the Social Security Administration properly applied the WEP provision of the Act, reducing the claimant's old-age insurance benefits.

JEROME BERGER ([REDACTED])

Page 2 of 2

Ori appeal, the claimant submitted letters from NII indicating that the pension he was receiving was based on his being a resident of Israel and contributions. Clarifying the Israel pension system from which the claimant receives a pension, the NII indicated that "earnings or lack of earnings are not a factor in determining eligibility or the amount of the benefit. A person's employment or lack of employment is not a factor in determining eligibility or the amount of the benefit." In essence, the NII verified that the pension received by the claimant is not based, in whole or in part, upon work. Rather, the pension is based entirely upon nonwork-related factors such as his resident status and contributions into the pension system.

The Social Security Administration's policy clarifying this issue provides that "a foreign pension based on employment not covered by U.S. Social Security is treated as any other pension based on non-covered employment. However, WEP does not apply if the foreign pension is based on factors other than work, e.g., residence, voluntary contributions or financial need" (POMS RS 00605.372C.1). Because the pension received by the claimant from the NII is based solely on his residency status and contributions to the Israel pension system, the Appeals Council finds that WEP does not apply. Accordingly, the Appeals Council directs the proper component of the Social Security Administration to recalculate the claimant's old-age insurance benefits by disregarding the pension the claimant receives from NII.

DECISION

It is the decision of the Appeals Council that the claimant's benefits from the National Insurance Institute of Israel are not subject to the windfall elimination provision of the Social Security Act. The Administrative Law Judge's decision is reversed

APPEALS COUNCIL

ORIGINAL SIGNED BY

ORIGINAL SIGNED BY

C. Michael Sullivan
Acting Administrative Appeals Judge

Date:
SEP 3 2014

SUPPLEMENTAL LIST OF EXHIBITS

- Exhibit AC-1 Administrative Law Judge's decision dated February 10, 2003 - 6 pages
- Exhibit AC-2 Notice of Appeals Council Action dated November 19, 2003 - 4 pages
- Exhibit AC-3 Letter dated February 11, 2003 from the Office of Hearings and Appeals and attachments - 3 pages
- Exhibit AC-4 Facsimile Transmission dated July 6, 2004 containing the U.S.D.0 Order dated June 30, 2004 - 7 pages

Attachment 4



SOCIAL SECURITY

Office of Disability and Income Security Programs

December 16, 2005

Mr. Mordechai Biser, Esq.
Associate General Counsel
Agudath Israel of America
The Rabbi Moshe Sherer National Headquarters
42 Broadway
New York, NY 10004

Dear Mr. Biser:

Commissioner Barnhart has asked me to reply to your letter of November 3, 2005. You informed us about Mr. Jerome Berger, who had filed a Federal district court action against us. We had found Mr. Berger entitled to retirement benefits, but reduced the amount of his benefits based on the Windfall Elimination Provision (WEP) and his receipt of a pension from the National Insurance Institute (NII) of Israel. The court reversed our final decision to reduce benefits and remanded the matter to us for further action. On remand, we found that we had incorrectly applied the WEP to Mr. Berger's benefits because the NII pension is based on residency in Israel, not on employment that was not covered by the U.S. Social Security system.

You have asked us to identify all other Social Security retirement beneficiaries who are similarly situated to Mr. Berger, correct their current benefit payments, and pay whatever back benefits may have accrued due to the incorrect application of the WEP to their U.S. retirement benefits. We agree that other beneficiaries who are also receiving the NII pension may have had the WEP erroneously applied and that we should recalculate the current benefit amounts of all such beneficiaries and pay any back benefits due. We have begun the process of identifying such persons in our files, and we will take appropriate actions to correct any misapplication of the WEP.

We hope this satisfies your concerns on this matter. Please contact me if you have additional concerns or have your staff contact Mr. Robert Treadaway, in our Office of International Programs, at (410) 965-2764.

Sincerely,

Martin H. Gerry
Deputy Commissioner for
Disability and Income Security Programs

Attachment 5

Jerusalem Branch
Department of Old Age and Survivors Insurance

4 Shimon Ben Shetach St.
Tel. 6497209 Zipcode 91007
Facsimile No. 6755406
www.hfi.gov.il

Date: 21 Heshvan, 5773
November 06, 2012

Attn.
Ephraim Greenberg
12/2 Harav Arieli Yitzchak St.
Jerusalem 90500

Re: Old Age Pension According to the National Insurance Law

The above person receives an old age pension commencing May 01, 2010.

The conditions for entitlement are as follows:

1. The claimant is insured.
2. He has accrued the requisite period of insurance.
3. There was no delay in paying national insurance contributions.

Entitlement to old age pension is not dependent on the claimant having worked or not worked.

Yours sincerely,
Ariela Rephael
Director, Department of Old Age and Survivors Insurance
[Signature]

Attachment 6

From: Weisbaum, Jane F. Contractor [<mailto:Jane.F.Weisbaum@ssa.gov>]
Sent: Monday, September 30, 2013 10:08 PM
To: 'famfrien@orange.net.il'
Cc: 'Peddicord, Ashley (Cardin) (Ashley.Peddicord@cardin.senate.gov)'; Goodman, Monica; Hamilton, Victor
Subject: WEP and Israeli Pensions

Dear Rabbi Greenberg,

We have determined that WEP applies – but only to a small part of your pension. In this email, I will try to explain how we came to that conclusion. I would be happy to speak with you directly, as well. I know this can be very confusing and complicated - please forgive me if this long email is tedious!

The point that you and Don Shrensky, your accountant, make is that everyone who receives an Israeli Old Age Pension receives the same amount regardless of how you qualify and that you do not have to work in order to qualify.

The following statement is on the translation of a letter from the Department of Old Age and Survivors Insurance:

“Entitlement to old age pension is not dependent on the claimant having worked or not worked.”

The operative word here is “Entitlement.” Entitlement can be met several ways, and contributions based on work is one of the ways one can qualify.

According to the NII website, to qualify for Old Age Pension, you need to have fulfilled a qualifying period. How do you do that? Depending upon your age and residency factors, you have to make contributions for a certain number of years. This is your qualifying period. You can meet it in the follow ways:

- If you work, a portion of your pay is withheld and your employer sends it in along with the employer portion. This is similar to FICA tax.
- If you are self-employed, you are responsible for the contributions. The amount is a percentage of your income.
- If you have never worked, you still must make contributions. If you have no income, the amount appears to be a small fixed amount. If you have income (i.e. investment) you pay an amount based on your income. Social Security would not apply WEP to any pension- or part of a pension that is based on this.

WEP applies to a pension-or the proportion of the pension, based on years in the qualifying period that count because of the first two situations.

In your case, your qualifying period is 432 months (36 years). Out of this, 167 months were based on contributions from work and 265 were based on contributions based on residency.

So, now we can get the proportion of your pension that is based on work contributions and the proportions that is based on contributions and residency.

First, we see that that out of your total qualifying period only about 38 percent is based on contributions from work. So we will calculate 38 percent of your pension to use in our WEP offset calculation.

We converted the amount effective May 2008 from Shekels to USD to get the amount \$324. That was the amount we used in our previous calculation. Now that we know only 38 percent of your pension is based on work, we multiply your pension by .38 and (with rounding) get \$125. This is the new amount we will use in the calculation.

Your new benefit amount will be as follows:

Starting	Amount
03/2011	\$256.30
12/2011	\$260.60
01/2012	\$256.80
12/2012	\$273.80

We will pay you the difference between what was paid and what we now owe you.

To understand more, please my comments below, copied from the email I sent to Ashley Peddicord in Senator Cardin's office:

*I believe the problem is that people don't understand **why** WEP is applied.*

*Social Security tax is regressive, but the payments are progressive. **This is the crux of the issue.** If you have a lifetime of low earnings, your SS benefits will represent a higher replacement rate.*

When does WEP apply?

Q: When is it that the SSA earnings record does not represent a lifetime of earnings?

A: If there are earnings outside the system.

*Remember the purpose of WEP is to correct the calculation when the system calculates the benefit **as though the individual had very low earnings over a lifetime.***

Benefits to those individuals with low overall earnings, represents a higher income replacement rate.

If you worked outside SSA, the normal calculation cannot “consider” that you had outside earnings.

Q: Why doesn't WEP apply to people with 30 YOCs? (A “YOC” stands for Years of Coverage. It should be called “Years of High Earnings! When you have very high earnings in a year you get a “YOC”.)

A: If you have 30 YOCS, you really do have very high earnings on the SSA earnings record and the normal calculation will already provide a lower replacement rate. That's why we don't have to apply WEP. It's in there!

In order to support the argument presented that WEP should not apply because the pension is the same whether one worked or not, Don Shrensky presented a fictitious tale of two people with identical wealth, one worked and contributed the mandatory percentage of earnings to the social insurance system; the other did not work. Yet, they both receive the same amount of pension.

When you remember the point of WEP is to correct the earning replacement rate, you see that WEP would apply to the one who worked and had earnings, but not to the one who did not.

That is because, when there are no earnings outside the US, the US Social Security record really does represent a lifetime of earnings. So the calculation is correct.

But the Social Security earnings record of the individual who worked and had earnings outside of SSA does not represent a lifetime of earnings, so the normal calculation would not be correct and WEP would apply.

Finally, in regards to the Jerome Berger case. (Jerome C. Berger v. Jo Anne B. Barnhart):

The court found that Mr. Berger's pension was based on residency. There are only two situations, that I can find, in which this would be the case:

There is a "Special Old-Age benefits" for Israeli residents who first immigrate to Israel after the age of 60-62. Older individuals would not be able to meet a "qualifying period". The benefit is paid from another source.

Or perhaps Mr. Berger did not work but paid into the system (3rd bullet). This is not really based on residency, because he would have had to meet the qualifying period by paying into it – but it isn't based on work either.

Because of the finding of the court, SSA reviewed all cases where WEP was applied because of an Israeli pension, to see if WEP was being applied correctly. Some were, some were not.

I hope this helps. Please feel free to contact me or let me know if you want me to give you call. I will be happy to call tomorrow when it isn't so late in Israel.

Kind regards,

Jane Weisbaum

FCTE/CA
Translations/Priority Workload Unit (TPWU)
Office of International Operations (OIO)
P – 410-966-5212
F – 410-965-8020

Attachment 7

From: Ephraim Greenberg [<mailto:famfrien@orange.net.il>]
Sent: Thursday, October 03, 2013 1:36 PM
To: Weisbaum, Jane F. Contractor
Subject: Greenberg

Dear Ms. Weisbaum:

Thank you for your e-mail. While I appreciate your attempt to explain why WEP would apply to me, I respectfully disagree with your conclusion that WEP applies to Bituach Leumi (Israeli National Insurance payments).

SSA POMS 605.372.C.1 provides: “A foreign pension based on employment not covered by U.S. Social Security is treated as any other pension based on non-covered employment. However, WEP does not apply if the foreign pension is based on factors other than work, e.g., residence, voluntary contributions or financial need.” The operative question is thus whether a claimant is *entitled* to receive a foreign pension “*based on*” work outside of the US. An Israeli resident who meets the age, income and residency requirements is entitled to Bituach Leumi so long as payments have been made into the National Insurance system for the requisite amount of time.

True, as you note, payments are made into the National Insurance system on an employee’s behalf during the time that he works. But neither the claimant’s *entitlement* to Bituach Leumi, nor the amount of his pension, is “based on” the claimant’s work. In other words, the claimant’s work history (whether or not he worked, and how long he worked) have absolutely no bearing on his entitlement to the pension or the amount of pension he receives. It cannot be said, then, that his entitlement to a pension is “based on” work.

You state that WEP is intended to “correct the earning replacement rate,” but the fact is that this rate simply is not corrected when entitlement to the foreign pension is not based on work. For example, SSA POMS 307.290.C.6 exempts from the WEP old age benefits paid under Canada’s Old Age Security Program (which is based on residency). It also exempts Australia and New Zealand’s social security benefits: “Since Australia and New Zealand benefit eligibility and amounts are not based on work, these benefits do not cause WEP to apply.” Thus, if the fictitious people with identical wealth in Mr. Shrensky’s hypothetical lived in Canada, Australia, or New Zealand, their entitlement to social security in those countries would be the same (just as it would be in Israel), and WEP would not apply to either – even though one’s earnings exceeded the other’s. Although Israeli claimants must pay into the National Insurance system (whether they are working or not), they – like Canadians, Australians and New Zealanders – are entitled to the same pension regardless of their work history. There is no reason why WEP would apply to them when it would not apply to pensioners in these other countries.

In sum, I ask you to remove the WEP from my social security benefits calculation, and restore 100% of my benefits due.

Regards,

Rabbi Ephraim Greenberg

Attachment 8

From: Weisbaum, Jane F. Contractor [<mailto:Jane.F.Weisbaum@ssa.gov>]

Sent: Thursday, October 03, 2013 9:58 PM

To: 'Ephraim Greenberg'

Subject: RE: Greenberg

Dear Rabbi Greenberg,

You seems to be misunderstanding the POMS section to which you refer. It says, *Many countries have a “two-tiered” social security system; i.e., some benefits are directly related to the individual's work and earnings, while other benefits are residence-based.*

It is alerting us that in these countries, there are circumstances in which the pension is totally or partially based on factors to which WEP will not apply. If entitlement to such a pension is based on both, we can only consider the part that is “related to the individual’s work and earnings”.

It does *not* say that ALL of the pensions in these country are not subject to WEP- it is pointing out that, unlike the U.S. system, there are systems where all or part of the pension is not considered for the purpose of applying WEP. It is exactly the same for Israel.

Section E provides the way to prorate the pension, just exactly the same as we have done with yours.

I understand that you are saying is that your entitlement is not based on work, but the way the SSA views the Israeli system is that entitlement is not *necessarily* based on work.

My conclusion is not based on a personal interpretation. It is based on instructions provided by the Social Security policy analysts.

Let me share with you parts from an Operations Bulletin we received in 2010. This is the information and instructions provided to us after the completion of a review of all cases in which WEP was applied because of an Israeli pension:

For the purposes of WEP, eligibility to a foreign social insurance benefit based on work (employment or self-employment) not covered by U.S. Social Security is treated as any domestic pension based on non-covered work.

Foreign pensions based totally on non-work factors are not subject to WEP. However, foreign pensions based *partially* on work and other non-work factors such as financial need, voluntary contributions and residency, are subject to WEP. The portion of the pension amount based on work must be obtained and prorated.

The National Israeli Institute Pension (NIIP) fits into this category of being an old-age pension system that is based on work/contributions, but may also be partially based on residency.

If a beneficiary believes that their pensions are based entirely on residency, the FSP should obtain evidence to support this allegation from the Bituach Leumi (BL), the Israeli paying agency. Confirmation of the pensions payable appears to be readily obtainable from BL. A letter from BL will be necessary to confirm their allegations.

It goes on to outline the steps the Foreign Service Post (FSP) must take. These include:

- An SSA-308, Modified Benefit Formula Questionnaire must be secured with certified proof for each foreign pension.
- Determine if pension amount is based on all work factors or work and non-work factors. Document paperwork of the breakdown.
- Translate all documents.
- Convert the pension amounts based on the applicable conversion rate.
- Complete the Israel Foreign WEP Checklist. If a beneficiary received 2 or more pensions, a checklist must be completed for each pension.
- Upon receiving a letter from the paying agency, the FSP should provide an explanation of any breakdown in the gross pension amount. (Example: non-work factors that

When we received your objection, we contacted the Foreign Service Post (FSP) in Jerusalem. They determined that your total "pension period" is 432 months. The period based on work is 167 months and the period based on residency is 265 months. Dividing 167 by 432 gives .38 (rounded down). Since only 38 percent of your pension is from a period of work contributions, we used only 38 percent of your pension in our calculation.

It may be that you do not *agree with the law itself*, and that is certainly your right. But we are applying the law correctly.

You will receive a "formal" notice of our decision in which you will be told of your right to appeal.

Kind regards,

Jane Weisbaum

FCTE/CA
Translations/Priority Workload Unit (TPWU)
Office of International Operations (OIO)
P – 410-966-5212
F – 410-965-8020

Attachment 9

Social Security Administration Retirement, Survivors, and Disability Insurance Notice of Reconsideration

Office of Central
Operations
P.O. Box 17769
Baltimore, Maryland 21235-7769 U.S.A.
Date: October 12, 2013
Claim Number: [REDACTED]



0000110 CTPML8 1A 0.610
EPHRAIM M GREENBERG
12 ARIELI STR
APT 2
BEITAR ILLIT
90500 ISRAEL 977

You asked us to take another look at your claim for Social Security retirement benefits.

You told us that you disagree with our decision to apply the Windfall Elimination Offset (WEP).

Someone who did not make the initial decision review your claim. After this review, we made a new determination that is partially favorable to you.

Sections 215(a)(7)(A) and (B) of the Social Security Act provide for a modified formula for figuring benefits for workers who are first eligible after 1985 for both a Social Security retirement or disability benefit and a pension based in whole or in part on noncovered employment.

The 90 percent rate, which is the first factor in the regular benefit formula, is reduced to 40 percent. This lower percentage is being phased in gradually for workers first eligible in 1986 and thereafter, as follows:

First Eligible in:	First Factor in Formula is:
1986	80%
1987	70%
1988	60%
1989	50%
1990 and later	40%

Our records show that you applied for Social Security retirement benefits and were awarded effective March 2011. You told us you began receiving a pension from Israel in May 2010.

When we say, "non-covered earnings" we mean earnings from wages or self-employment income from which Social Security taxes are not paid.

Since you worked in Israel, and receive a pension from Israeli, we applied your full pension amount to calculate your WEP offset.

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When you were awarded, we converted your pension from Israeli New Shekel to U.S. dollars arriving at \$324. We applied \$324 in the WEP offset calculation. We determined your Primary Insurance Amount (PIA) to be as follows:

Effective Date	PIA
03/2011	\$144.00
12/2011	\$149.10
12/2012	\$151.60

The PIA is the amount from which your monthly benefits are derived.

You began to receive benefits after your full retirement age. As a result, you receive a delayed retirement credit for each month from the first month of the quarter in which you became fully insured for benefits to the month before the month your entitlement. This is the 5 months from October 2010 through and including February 2011. The delayed retirement credits increased your monthly benefit amount. The following shows the monthly benefit amount (MBA) that was originally determined:

Effective Date	MBA
03/2011	\$146.80
12/2011	\$152.00
01/2012	\$154.00
12/2012	\$156.60

You told us that you disagree with our decision because of the way in which individuals are entitled to benefits under the Israeli system. You explained that entitlement is not dependent upon work.

We understand that, as an Israeli resident, you do not have to work in order to contribute to the Israeli system, and, as long as you have contributed to the system for a sufficient period, you will qualify for a retirement pension. However, if you do work, your contributions to the system are mandatory and based upon your wages or earnings from self-employment.

The issue to be resolved upon reconsideration, is whether the application of WEP is correct.

THE REASON FOR WEP

Social Security retirement benefits are designed to replace a portion of your average monthly income. The calculation provides a higher replacement rate to individuals with low overall earnings and a lower replacement rate to individuals with high overall earnings.

With the normal calculation, we will derive a lifetime monthly average based only on your earnings covered by Social Security. This amount will not represent your true lifetime monthly average and the replacement rate will be too high.

OUR REVIEW

We received new information about your Israeli pension. Your pension period is 432 months. The period based on work not covered by Social Security is 167 months, and the period based on residency is 265 months.

We determined that only 38 percent of your pension is based on work.

We recalculated your benefit amount using 38 percent of your pension in the offset calculation.

YOUR NEW BENEFIT AMOUNT

Below shows your amended award.

Effective date	PIA
03/2011	\$251.60
12/2011	\$260.60
12/2012	\$265.00

Your new monthly benefit amount is shown below.

Effective date	MBA
03/2011	\$256.30
12/2011	\$265.80
01/2012	\$269.20
12/2012	\$273.80

OUR DETERMINATION

When we reviewed your claim, we received the information we requested about the total number of months in your pension period, the number of months that were based on work, and the number of months that were based only on residency.

Upon reconsideration of your claim, we have determined that WEP offset does not apply to the part of your Israeli pension that was based only on residency. However, it does apply to the part that was based on work. This decision is partially favorable to you.

We have amended your award to apply WEP using only the prorated pension amount to in the offset calculation. We have determined that this decision is correct according to the law.

SEE NEXT PAGE

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If You Disagree With This Decision

If you disagree with the decision, you have the right to request a hearing. A person who has not seen your case before will look at it. That person is an Administrative Law Judge (ALJ). The ALJ will review your case again and consider any new facts you have before deciding your case.

- You have 60 days to ask for a hearing.
- The 60 days start the day after you get this letter. We assume you got this letter 5 days after the date on it unless you show that you did not get it within the 5-day period.
- You must have a good reason if you wait more than 60 days to ask for a hearing.
- You have to ask for a hearing in writing. We will ask you to sign a form HA-501-U5, called "Request For Hearing." Contact one of our offices if you want help.

Social Security Administration