

DELAWARE STATE BAR ASSOCIATION

PRESENTS

# **SOCIAL SECURITY DISABILITY INSURANCE FOR YOUR PRACTICE: SUPPLEMENTAL SECURITY INCOME AND ETHICAL CONSIDERATIONS AND SOCIAL SECURITY OVERPAYMENTS: APPEALS AND WAIVERS 2021**

**LIVE SEMINAR AT DSBA WITH ZOOM OPTION**

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SPONSORED BY THE SOCIAL SECURITY DISABILITY SECTION  
OF THE SECTION OF THE DELAWARE STATE BAR ASSOCIATION

**WEDNESDAY, OCTOBER 20, 2021 | 10:00 A.M. TO 12:00 P.M.**

**2.0 Hours CLE credit for Delaware and Pennsylvania Attorneys**



**C L E**

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# SOCIAL SECURITY DISABILITY INSURANCE FOR YOUR PRACTICE:

## SUPPLEMENTAL SECURITY INCOME AND ETHICAL CONSIDERATIONS AND SOCIAL SECURITY OVERPAYMENTS: APPEALS AND WAIVERS 2021

### ABOUT THE PROGRAM

The first half of this program will cover an Overview of Social Security Disability Insurance and Supplemental Security Income and Ethical Considerations for your practice.

What can you do when Social Security tells your client they have been overpaid and want \$20,000 back within thirty days. Don't panic. In this session, you will learn about the many ways to fight Social Security Overpayments in ways that preserve your client's income. Even if you have never handled an overpayment case, you will learn practical tips so that you can help your client and set their mind at ease. Contrary to popular belief, most Social Security overpayments can be managed or even eliminated.

### PROGRAM

10:00 a.m. – 11:00 a.m.

#### **Overview of Social Security Disability Insurance and Supplemental Security Income and Ethical Considerations for Your Practice**

Melissa M. Green, Esquire  
*Linarducci Law*

Gary C. Linarducci, Esquire  
*Linarducci Law*

11:00 a.m. – 12:00 p.m.

#### **SSI/Social Security Overpayments, Appeals, and Waivers**

John S. Whitelaw, Esquire  
*Community Legal Aid Society, Inc.*

**COVID-19 POLICY:** The DSBA requires that everyone, including speakers and attendees, must be fully vaccinated against COVID-19 to attend live CLE events. In addition, all participants and attendees, regardless of COVID-19 vaccination status, must wear masks except when presenting, eating, or drinking.

CLE is a HYBRID CLE. You may register for this event as a live participant or by Zoom. Even if you register as a live participant, you will receive a Zoom link by email immediately which you may disregard if not attending by Zoom. (Check spam folders if you do not.) If you are going to attend the live session, you will report to the venue and check in. Only live attendees will receive live CLE credits after 12/31/2021.

#### REGISTRATION INFORMATION AND RATES

This CLE will be conducted live and via Zoom. To register, visit [www.dsba.org/cle](http://www.dsba.org/cle) and select this seminar, choosing whether you wish to attend live or by Zoom. If registering for EITHER method, you will receive an email back from Zoom immediately providing you with the correct login information. If attending by zoom and you do not receive this email, contact DSBA via email: [reception@dsba.org](mailto:reception@dsba.org). The Supreme Court of the State of Delaware Commission on Continuing Legal Education cannot accept phone conferencing only. You must attend through a device that allows DSBA to obtain your Bar ID in order to receive CLE Credit. Your attendance will be automatically monitored beginning at the scheduled start time and will be completed when the CLE has ended. If you enter or leave the seminar after or before the scheduled start /end time, you will receive credit only for the time you attended. Your


CLE credits will be submitted to the Delaware and Pennsylvania Commissions on CLE, as usual. Naturally, if you attend the seminar live, you must sign in and we will use your attendance as the means for reporting the live credit.

# Overview of Social Security Disability Insurance and Supplemental Security Income and Ethical Considerations for Your Practice

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Melissa M. Green, Esquire  
*Linarducci Law*

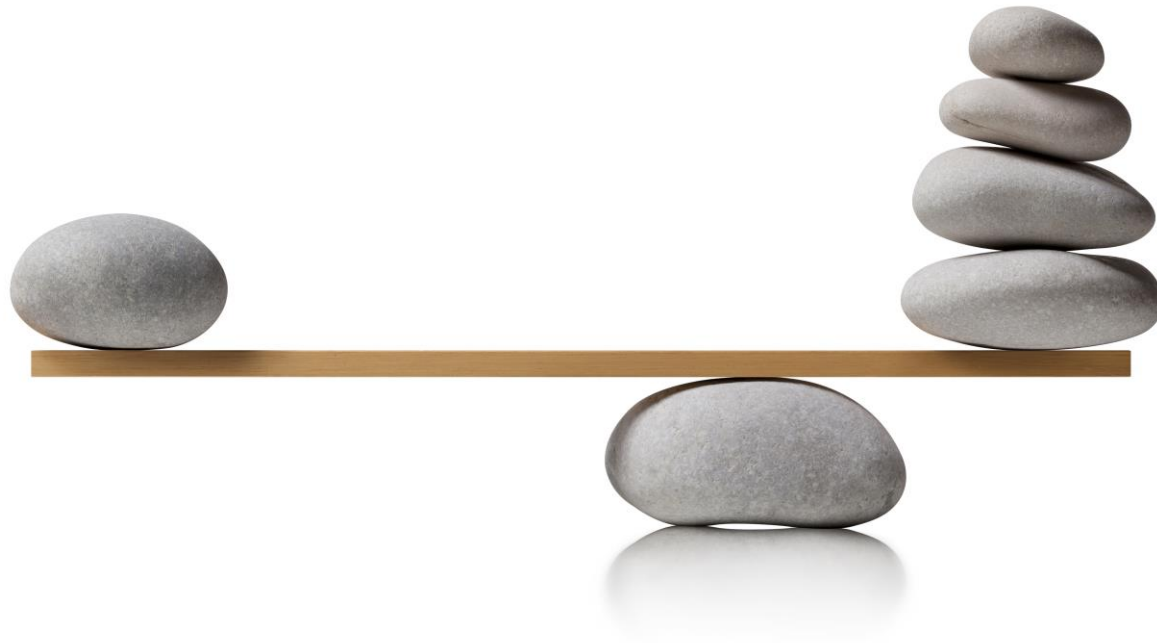
Gary C. Linarducci, Esquire  
*Linarducci Law*



# **WAITING TO APPLY FOR SOCIAL SECURITY DISABILITY INSURANCE MAY JEOPARDIZE YOUR CLIENTS' RIGHTS.**

HELPING YOUR CLIENT MAKE AN INFORMED DECISION





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**WHEN SHOULD YOUR CLIENT  
APPLY FOR SOCIAL SECURITY  
DISABILITY?**

**AT THE BEGINNING OF THE  
WORKERS' COMP CASE...**

***OR***

**AT THE END OF THE  
WORKERS' COMP CASE**

## 6 IMPORTANT QUESTIONS TO CONSIDER

1. What is the cost of a Medicaid set aside?
2. What is your client's principal insurance amount (PIA) from Social Security? – based on number of years and what has been paid in.
3. When is your client entitled to Medicare?
4. Will your client receive lump sum payments through WC (permanency, commutation, etc.)?
5. Does your client have medical conditions not covered by Workers' Compensation?
6. Will delaying SSDI application for several years make it more difficult to be approved later?
7. Will delaying application lose substantial benefits for your Workers' compensation client?





## **CLIENT - JOE**

**47-YEAR-OLD CHEMICAL  
OPERATOR**

**INJURED DECEMBER 1, 2018**

**EARNING \$77,149 AT THE  
TIME OF INJURY**

**PERMANENCY AWARD 2020  
\$50,000**

**COMMUTATION JUNE 2021**

## WORKERS' COMPENSATION (WC) BENEFITS

$\$77,149 / 52 \text{ weeks} = \$1,483.63/\text{week}$

$2/3 (.67) \times \$1,483.63/\text{week} = \$994/\text{week}$ , which exceeds the WC maximum amount

In Joe's case, the WC rate is limited by the maximum WC amount, therefore his compensation is reduced to \$713/week

WC is calculated by week; Social Security calculates benefits by month

$\$713/\text{wk} \times 4.3\text{wk}/\text{mo} \text{ (per WC).} = \$3,069/\text{month} \text{ (per SS)}$





## OFFSETS AND AVERAGE CURRENT EARNINGS (ACE)

Social Security will **offset** Social Security disability benefits if the Workers' Compensation and Disability Insurance benefits exceed 80% of the client's **Average Current Earnings (ACE)**

A Social Security Workers' Compensation **offset** will result in loss of benefits and additional tax liability.  
*Thompson v. Commissioner.*

### Client Annual Earnings

2010	51,784.00
2011	63,249.00
2012	63,475.00
2013	59,193.00
2014	67,001.00
2015	65,776.00
2016	73,462.00
2017	81,548.00
2018	77,149.00
2019	2,516.00

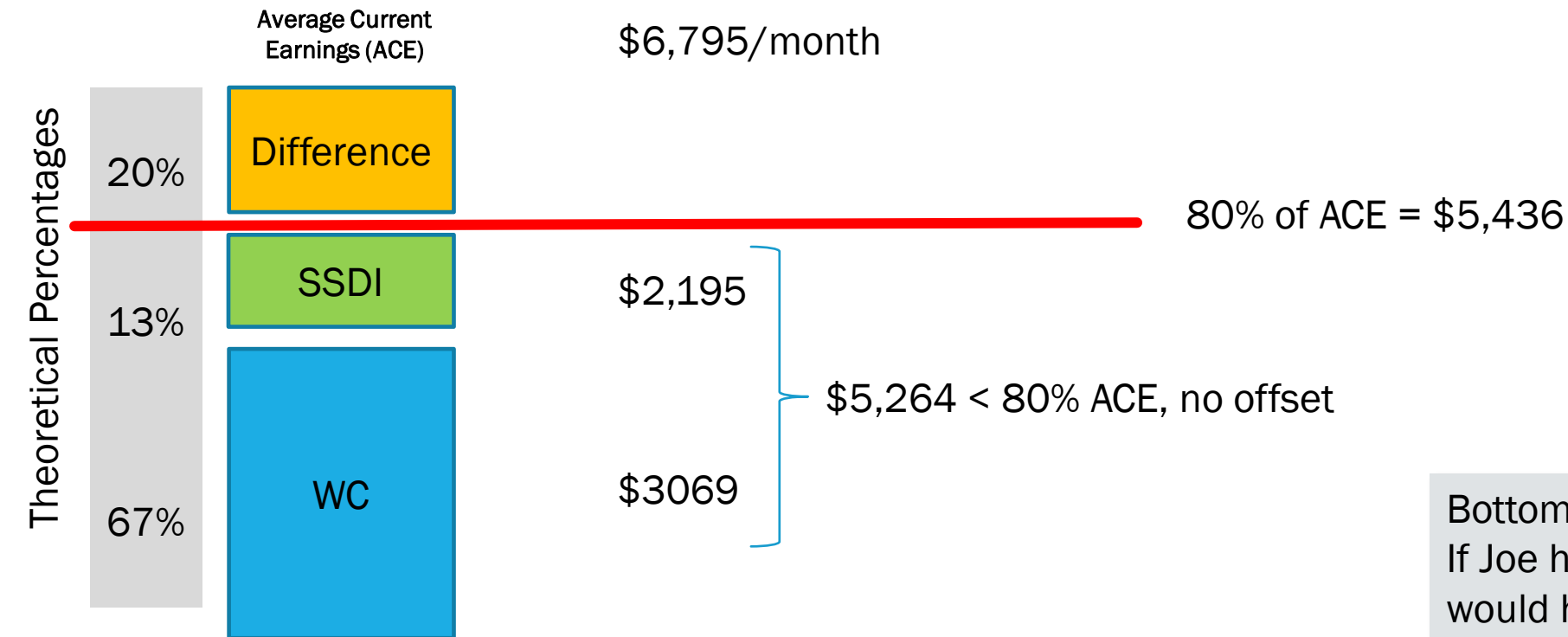
There are 3 ways to calculate ACE

- In Joe's case we will use the highest year of earnings in the last 5 years (\$81,548/year )
- $\$81,548 / 12 \text{ months} = \$6,795.67 / \text{month}$  in ACE\*
- 80% of ACE = \$5,436.53/month, which is the highest allowable benefit of WC and DI, before the offset begins

*\*Social Security performs their calculation using months and says there are 4.3 weeks in a month*

# LET'S RUN THE MONTHLY NUMBERS FOR JOE WITH SSDI

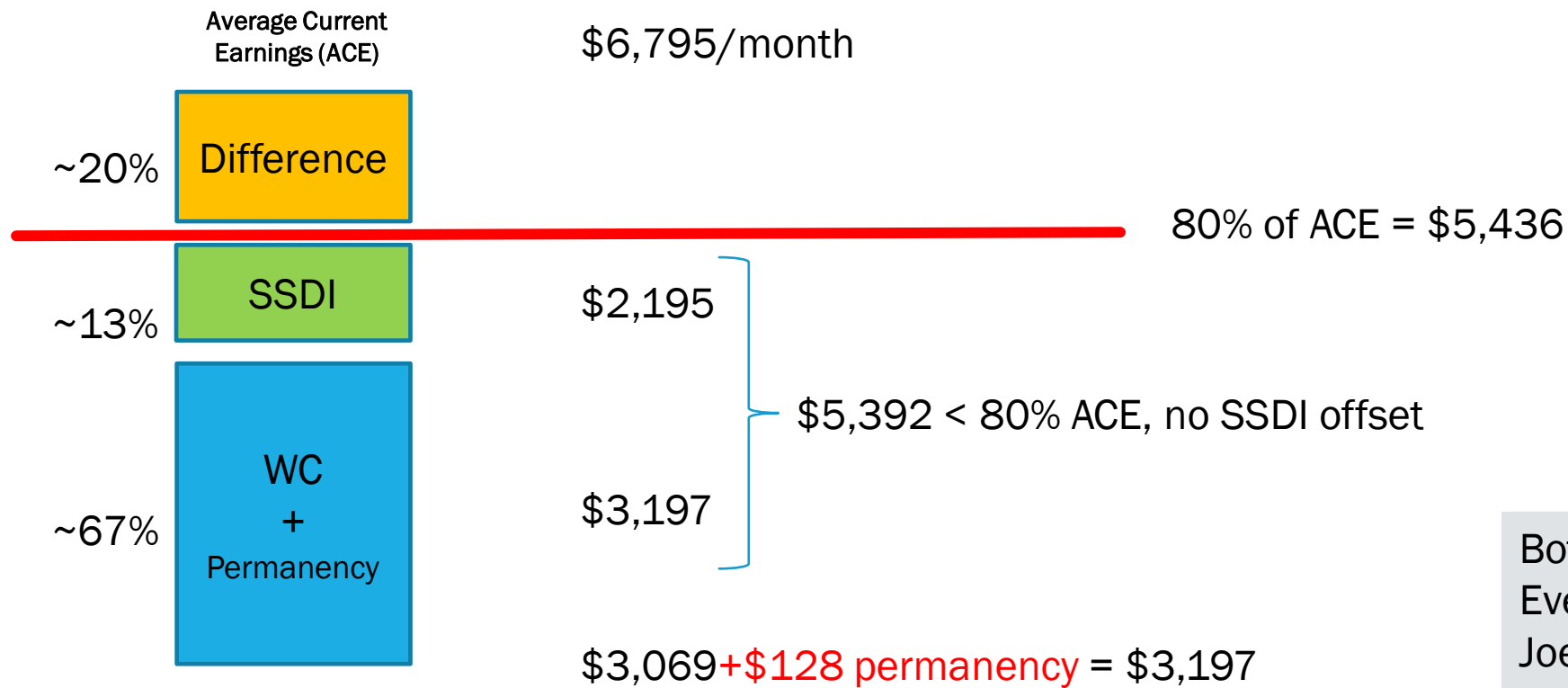
## WITHOUT PERMANENCY



Bottom line:

If Joe had not applied for SSDI he would have missed \$61,460 in cash between December 2018-August 2021

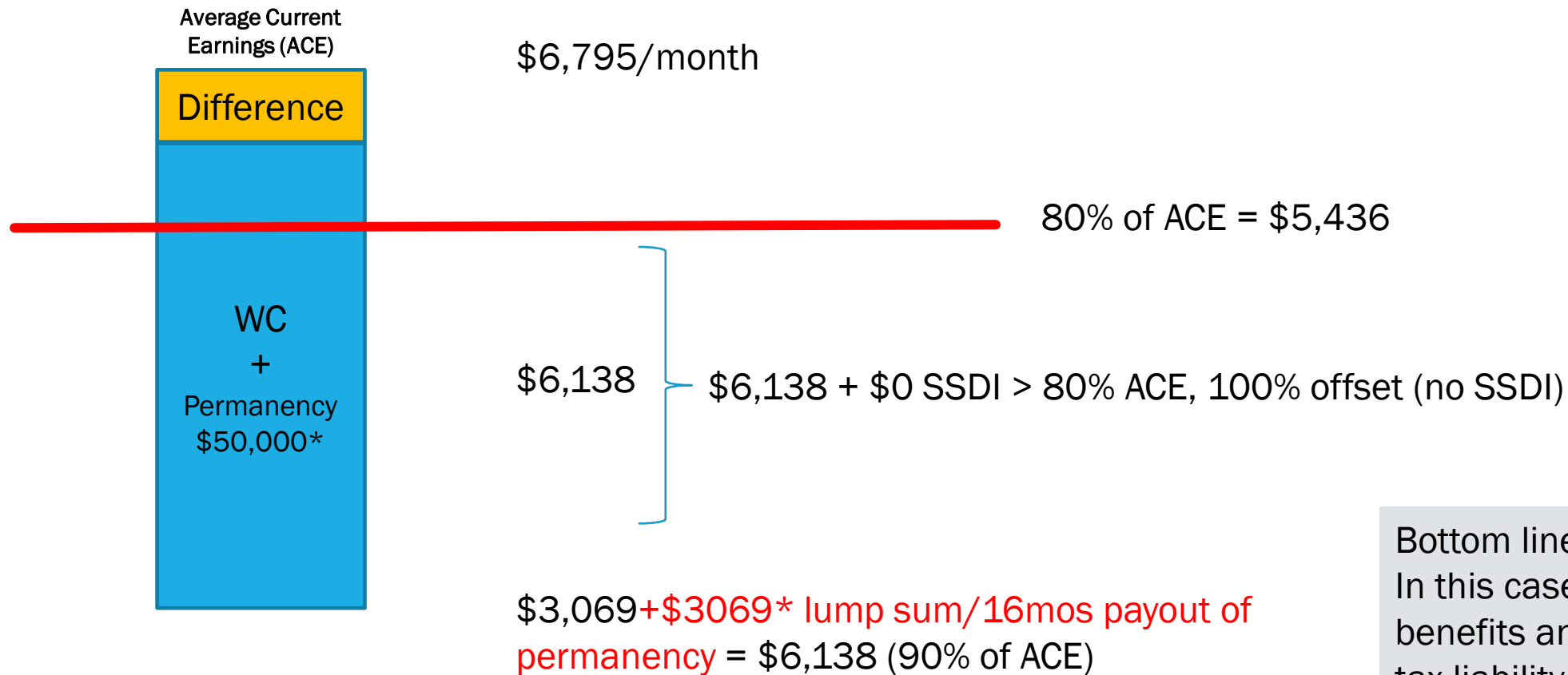
# LET'S RUN THE MONTHLY NUMBERS FOR JOE WITH SSDI WITH PERMANENCY SPREAD OUT OVER LIFETIME



Bottom line:  
Even with WC + permanency,  
Joe is getting 100% of his SS  
benefits.

# LET'S RUN THE MONTHLY NUMBERS FOR JOE

## WITH PERMANENCY NOT SPREAD OUT OVER LIFETIME



Bottom line:  
In this case, Joe loses all SS benefits and faces potential tax liability.

## SUMMARY

- Applying for Social Security Disability at the beginning of a Workers' Compensation claim can provide greater benefits for your client.
- It pays to run the numbers!





# APPENDIX

## CALUCULATIONS



Calculations			
77,149.00	52	1,483.63	
1,483.63	0.67	994.03	>mox
713.65	4.3	3,068.70	
81,548.00	12	6,795.67	
6,795.67	80%	5,436.54	
50,000.00	3,069.00	16.29	
50,000.00	390	128.21	
300,000.00	3069	97.75	
3,069.00	3069	6,138.00	
5,436.00	6138	(702.00)	
2,195.00	12	26,340.00	
2,195.00	16	35,120.00	
2,195.00	97	212,915.00	

# NUMBERS FOR JOE WITH SSDI WITHOUT PERMANENCY

Mo./Yr.	WC/TT	DIB	WC+DIB	80%ACE	F-G
Dec-18	3,069		0 3,069	5,437	2,368
Jan-19	3,069		0 3,069	5,437	2,368
Feb-19	3,069		0 3,069	5,437	2,368
Mar-19	3,069		0 3,069	5,437	2,368
Apr-19	3,069		0 3,069	5,437	2,368
May-19	3,069	2,195	5,264	5,437	173
Jun-19	3,069	2,195	5,264	5,437	173
Jul-19	3,069	2,195	5,264	5,437	173
Aug-19	3,069	2,195	5,264	5,437	173
Sep-19	3,069	2,195	5,264	5,437	173
Oct-19	3,069	2,195	5,264	5,437	173
Nov-19	3,069	2,195	5,264	5,437	173
Dec-19	3,069	2,195	5,264	5,437	173
Jan-20	3,069	2,195	5,264	5,437	173
Feb-20	3,069	2,195	5,264	5,437	173
Mar-20	3,069	2,195	5,264	5,437	173
Apr-20	3,069	2,195	5,264	5,437	173
May-20	3,069	2,195	5,264	5,437	173
Jun-20	3,069	2,195	5,264	5,437	173
Jul-20	3,069	2,195	5,264	5,437	173
Aug-20	3,069	2,195	5,264	5,437	173
Sep-20	3,069	2,195	5,264	5,437	173
Oct-20	3,069	2,195	5,264	5,437	173
Nov-20	3,069	2,195	5,264	5,437	173
Dec-20	3,069	2,195	5,264	5,437	173
Jan-21	3,069	2,195	5,264	5,437	173
Feb-21	3,069	2,195	5,264	5,437	173
Mar-21	3,069	2,195	5,264	5,437	173
Apr-21	3,069	2,195	5,264	5,437	173
May-21	3,069	2,195	5,264	5,437	173
Jun-21	3,069	2,195	5,264	5,437	173
Jul-21	3,069	2,195	5,264	5,437	173
Aug-21	3,069	2,195	5,264	5,437	173
Sep-21	101,267	61,460.00	162,727		



<b>WITH INSTRUCTIONS TO SPREAD LUMP SUM PAYMENT OVER CLIENT'S LIFE EXPECTANCY</b>								
<b>Workers' Compensation + Disability Insurance + Permancy</b>								
	<b>Mo./Yr.</b>	<b>WC/TT</b>	<b>Perm.</b>	<b>Comm.</b>	<b>DIB</b>	<b>W+P+C+D</b>	<b>80%ACE</b>	<b>Delta</b>
1	Dec-18	3,069			0	3,069	5,437	2,368
2	Jan-19	3,069			0	3,069	5,437	2,368
3	Feb-19	3,069			0	3,069	5,437	2,368
4	Mar-19	3,069			0	3,069	5,437	2,368
5	Apr-19	3,069			0	3,069	5,437	2,368
6	May-19	3,069			2,195	5,264	5,437	173
7	Jun-19	3,069			2,195	5,264	5,437	173
8	Jul-19	3,069			2,195	5,264	5,437	173
9	Aug-19	3,069			2,195	5,264	5,437	173
10	Sep-19	3,069			2,195	5,264	5,437	173
11	Oct-19	3,069			2,195	5,264	5,437	173
12	Nov-19	3,069			2,195	5,264	5,437	173
13	Dec-19	3,069			2,195	5,264	5,437	173
14	Jan-20	3,069			2,195	5,264	5,437	173
15	Feb-20	3,069			2,195	5,264	5,437	173
16	Mar-20	3,069			2,195	5,264	5,437	173
17	Apr-20	3,069			2,195	5,264	5,437	173
18	May-20	3,069			2,195	5,264	5,437	173
19	Jun-20	3,069	128		2,195	5,392	5,437	45
20	Jul-20	3,069	128		2,195	5,392	5,437	45
21	Aug-20	3,069	128		2,195	5,392	5,437	45
22	Sep-20	3,069	128		2,195	5,392	5,437	45
23	Oct-20	3,069	128		2,195	5,392	5,437	45
24	Nov-20	3,069	128		2,195	5,392	5,437	45
25	Dec-20	3,069	128		2,195	5,392	5,437	45
26	Jan-21	3,069	128		2,195	5,392	5,437	45
27	Feb-21	3,069	128		2,195	5,392	5,437	45
28	Mar-21	3,069	128		2,195	5,392	5,437	45
29	Apr-21	3,069	128		2,195	5,392	5,437	45
30	May-21	3,069	128		2,195	5,392	5,437	45
31	Jun-21	0	128	98	2,195	2,421	5,437	3,016
32	Jul-21	0	128	98	2,195	2,421	5,437	3,016
33	Aug-21	0	128	98	2,195	2,421	5,437	3,016
34	Sep-21	0	128	98	2,195	2,421	5,437	3,016
35	Oct-21	0	0	98	2,195	2,293	5,437	3,144
36	Nov-21	0	0	98	2,195	2,293	5,437	3,144
37	Dec-21	0	0	98	2,195	2,293	5,437	3,144

**Numbers for Joe  
with SSDI  
and  
permanency  
spread out over  
lifetime**

# NUMBERS FOR JOE WITH PERMANENCY NOT SPREAD OUT OVER LIFETIME

<b>WITHOUT INSTRUCTIONS TO SPREAD LUMP SUM PAYMENT OVER CLIENT'S LIFE EXPECTA</b>							
<b>Workers' Compensation + Disability Insurance + Permancy + Commutation</b>							
	<b>Mo./Yr.</b>	<b>WC/TT</b>	<b>Perm.</b>	<b>DIB</b>	<b>W+P+D</b>	<b>80%ACE</b>	<b>Delta</b>
1	Dec-18	3,069		0	3,069	5,437	2,368
2	Jan-19	3,069		0	3,069	5,437	2,368
3	Feb-19	3,069		0	3,069	5,437	2,368
4	Mar-19	3,069		0	3,069	5,437	2,368
5	Apr-19	3,069		0	3,069	5,437	2,368
6	May-19	3,069		2,195	5,264	5,437	173
7	Jun-19	3,069		2,195	5,264	5,437	173
8	Jul-19	3,069		2,195	5,264	5,437	173
9	Aug-19	3,069		2,195	5,264	5,437	173
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13	Dec-19	3,069		2,195	5,264	5,437	173
14	Jan-20	3,069		2,195	5,264	5,437	173
15	Feb-20	3,069		2,195	5,264	5,437	173
16	Mar-20	3,069		2,195	5,264	5,437	173
17	Apr-20	3,069		2,195	5,264	5,437	173
18	May-20	3,069		2,195	5,264	5,437	173
19	Jun-20	3,069	3,069	2,195	8,333	5,437	(2,896)
20	Jul-20	3,069	3,069	2,195	8,333	5,437	(2,896)
21	Aug-20	3,069	3,069	2,195	8,333	5,437	(2,896)
22	Sep-20	3,069	3,069	2,195	8,333	5,437	(2,896)
23	Oct-20	3,069	3,069	2,195	8,333	5,437	(2,896)
24	Nov-20	3,069	3,069	2,195	8,333	5,437	(2,896)
25	Dec-20	3,069	3,069	2,195	8,333	5,437	(2,896)
26	Jan-21	3,069	3,069	2,195	8,333	5,437	(2,896)
27	Feb-21	3,069	3,069	2,195	8,333	5,437	(2,896)
28	Mar-21	3,069	3,069	2,195	8,333	5,437	(2,896)
29	Apr-21	3,069	3,069	2,195	8,333	5,437	(2,896)
30	May-21	3,069	3,069	2,195	8,333	5,437	(2,896)
31	Jun-21	3,069	3,069	2,195	8,333	5,437	(2,896)
32	Jul-21	3,069	3,069	2,195	8,333	5,437	(2,896)
33	Aug-21	3,069	3,069	2,195	8,333	5,437	(2,896)
34	Sep-21	3,069	3,069	2,195	8,333	5,437	(2,896)
35	Oct-21	3,069	0	2,195	5,264	5,437	173
36	Nov-21	3,069	0	2,195	5,264	5,437	173
37	Dec-21	3,069	0	2,195	5,264	5,437	173

# NUMBERS FOR JOE WITH PERMANENCY NOT SPREAD OUT OVER LIFETIME, PLUS COMMUTATION

WITHOUT INSTRUCTIONS TO SPREAD LUMP SUM PAYMENT OVER CLIENT'S LIFE EXPECTANCY								
Workers' Compensation + Disability Insurance + Permancy + Commutation								
	Mo./Yr.	WC/TT	Perm.	Comm.	DIB	W+P+C+D	80%ACE	Delta
1	Dec-18	3,069			0	3,069	5,437	2,368
2	Jan-19	3,069			0	3,069	5,437	2,368
3	Feb-19	3,069			0	3,069	5,437	2,368
4	Mar-19	3,069			0	3,069	5,437	2,368
5	Apr-19	3,069			0	3,069	5,437	2,368
6	May-19	3,069			2,195	5,264	5,437	173
7	Jun-19	3,069			2,195	5,264	5,437	173
8	Jul-19	3,069			2,195	5,264	5,437	173
9	Aug-19	3,069			2,195	5,264	5,437	173
10	Sep-19	3,069			2,195	5,264	5,437	173
11	Oct-19	3,069			2,195	5,264	5,437	173
12	Nov-19	3,069			2,195	5,264	5,437	173
13	Dec-19	3,069			2,195	5,264	5,437	173
14	Jan-20	3,069			2,195	5,264	5,437	173
15	Feb-20	3,069			2,195	5,264	5,437	173
16	Mar-20	3,069			2,195	5,264	5,437	173
17	Apr-20	3,069			2,195	5,264	5,437	173
18	May-20	3,069			2,195	5,264	5,437	173
19	Jun-20	3,069	3,069		2,195	8,333	5,437	(2,896)
20	Jul-20	3,069	3,069		2,195	8,333	5,437	(2,896)
21	Aug-20	3,069	3,069		2,195	8,333	5,437	(2,896)
22	Sep-20	3,069	3,069		2,195	8,333	5,437	(2,896)
23	Oct-20	3,069	3,069		2,195	8,333	5,437	(2,896)
24	Nov-20	3,069	3,069		2,195	8,333	5,437	(2,896)
25	Dec-20	3,069	3,069		2,195	8,333	5,437	(2,896)
26	Jan-21	3,069	3,069		2,195	8,333	5,437	(2,896)
27	Feb-21	3,069	3,069		2,195	8,333	5,437	(2,896)
28	Mar-21	3,069	3,069		2,195	8,333	5,437	(2,896)
29	Apr-21	3,069	3,069		2,195	8,333	5,437	(2,896)
30	May-21	3,069	3,069		2,195	8,333	5,437	(2,896)
31	Jun-21	0	3,069	3,069	2,195	8,333	5,437	(2,896)
32	Jul-21	0	3,069	3,069	2,195	8,333	5,437	(2,896)
33	Aug-21	0	3,069	3,069	2,195	8,333	5,437	(2,896)
34	Sep-21	0	3,069	3,069	2,195	8,333	5,437	(2,896)
35	Oct-21	0	0	3,069	2,195	5,264	5,437	173
36	Nov-21	0	0	3,069	2,195	5,264	5,437	173
37	Dec-21	0	0	3,069	2,195	5,264	5,437	173

## Thompson v. Comm'r

Decided May 12, 2016

T.C. Summary Opinion 2016-20 Docket No.  
3094-14S.

05-12-2016

JOHN THOMPSON, JR., AND DESREE  
THOMPSON, Petitioners v. COMMISSIONER  
OF INTERNAL REVENUE, Respondent

John Thompson, Jr., and Desree Thompson, pro  
se. Paul W. Isherwood, Peter R. Hochman, and  
John Chinnapongse, for respondent.

ASHFORD, Judge

John Thompson, Jr., and Desree Thompson, pro  
se. Paul W. Isherwood, Peter R. Hochman, and  
John Chinnapongse, for respondent. SUMMARY  
OPINION

ASHFORD, Judge: This case was heard pursuant  
to the provisions of section 7463 of the Internal  
Revenue Code in effect when the petition was  
filed.<sup>1</sup> \*2 Pursuant to [section 7463\(b\)](#), the decision  
to be entered is not reviewable by any other Court,  
and this opinion shall not be treated as precedent  
for any other case.

<sup>1</sup> Unless otherwise indicated, all section  
references are to the Internal Revenue  
Code in effect for the year at issue, and all  
Rule references are to the Tax Court Rules  
of Practice and Procedure. Monetary  
amounts are rounded to the nearest dollar.

Respondent determined a deficiency of \$7,147 in  
petitioners' Federal income tax and an accuracy-  
related penalty pursuant to section 6662(a) of  
\$1,429 for the 2011 taxable year. After  
concessions,<sup>2</sup> the issue for decision is whether,

pursuant to [section 86\(d\)\(3\)](#), petitioners had  
taxable Social Security income of \$30,519 for  
2011 as a result of the worker's compensation  
payments that petitioner John Thompson, Jr.,  
received during that year. We hold that they did.

<sup>2</sup> Petitioners failed to address in their  
pleadings and at trial respondent's  
determination that they received income of  
\$3,148 from cancellation of indebtedness.  
We thus deem petitioners to have conceded  
this issue. See Rule 34(b)(4). Respondent  
conceded the accuracy-related penalty in  
its entirety at trial.

### Background

Some of the facts have been stipulated and are so  
found. The stipulation of facts and the attached  
exhibits are incorporated herein by this reference.  
Petitioners resided in California at the time they  
filed their petition with the Court. Hereafter,  
references to petitioner in the singular shall denote  
John Thompson, Jr. \*3

In 2009 petitioner suffered an injury while  
performing services as a postal worker for the U.S.  
Postal Service, which necessitated several  
surgeries and resulted in his temporary inability to  
work. Petitioner received worker's compensation  
benefits for this injury under the Federal  
Employees Compensation Act, [5 U.S.C. secs.  
8101-8193](#) (2012), through the Department of  
Labor Office of Workers' Compensation Programs  
from July 19, 2009 to December 23, 2013.

On February 14, 2011, petitioner applied to the  
Social Security Administration (SSA) for  
Supplemental Security Income (SSI) disability

benefits. In a notice of disapproved claim dated March 10, 2011, SSA initially denied his application because he had "too much income to be eligible for SSI". However, three months later, SSA approved his application for disability benefits, effective February 2010, in a notice of award dated June 5, 2011. The notice of award further states:

We have to consider workers' compensation and/or public disability payments when we figure a Social Security benefit. The following will explain how these payments affect Social Security benefits. For more information, please read the enclosed pamphlet, "How Workers' Compensation and Other Disability Payments May Affect Your Social Security Benefit."

The pamphlet explains how we reduce your Social Security disability checks if the money which you would receive from Social Security and workers' compensation payments add up to more than 80 percent

4 \*4

of your monthly average current earnings. We found that 80 percent of your average current earnings is \$3,457.60.

We have to take into account your workers' compensation payment of \$3,794.60 when we figure your Social Security benefits. Because you receive this payment, we are withholding the benefits you are due.

We are withholding your monthly Social Security checks beginning February 2010, which is the first month when you were entitled to both Social Security disability benefits and workers' compensation payments.

Petitioner never actually received SSI disability benefits in 2011. Nevertheless, SSA issued petitioner a Form SSA-1099, Social Security Benefit Statement, which reflected benefits paid in 2011 of \$35,905 attributable to "Workers' compensation offset". Petitioners did not report any of this amount on their 2011 Form 1040, U.S. Individual Income Tax Return.

Respondent determined that \$30,519 (or 85%) of the worker's compensation offset reported on petitioner's Form SSA-1099 should have been included as taxable Social Security income.<sup>3</sup> The notice of deficiency mailed to petitioners on December 2, 2013, reflects that determination. Petitioners timely petitioned this Court disputing respondent's determination, contending that (1) \*5 SSA never paid petitioner the reported SSI disability benefits; (2) Social Security benefits are not a component of worker's compensation benefits; and (3) the worker's compensation benefits petitioner received from the Department of Labor are otherwise not taxable.

<sup>3</sup> Married taxpayers filing a joint return whose modified adjusted gross income, plus one-half of their Social Security benefits, exceeds \$44,000 must include up to a maximum of 85% of their Social Security benefits in their gross income. See sec. 86(a), (b), and (c). -----

## Discussion

Gross income includes "all income from whatever source derived", unless specifically excluded. Sec. 61(a). Generally, gross income does not include "amounts received under workmen's compensation acts as compensation for personal injuries or sickness". Sec. 104(a)(1). However, section 86 provides for the inclusion of Social Security benefits in gross income and defines those benefits as any amount received by the taxpayer by reason of entitlement to a monthly benefit under the Social Security Act. Sec. 86(d)(1)(A).

In addition, [section 86\(d\)\(3\)](#) provides that where a taxpayer receives less in Social Security benefits because he is instead receiving worker's compensation benefits, then the amount of worker's compensation benefits that causes the reduction (the so-called offset amount) is treated as though it were a Social Security benefit for purposes of determining gross income. In other words, taxable Social Security benefits include the amount of worker's compensation payments to the extent that they reduce, or offset, the total Social

6 Security benefits \*6 to which the recipient is entitled; such offsets do not reduce the taxable amount of Social Security benefits despite SSA not actually paying such benefits. This result was specifically contemplated by Congress. See, e.g., Moore v. Commissioner, T.C. Memo. 2012-249; Mikalonis v. Commissioner, T.C. Memo. 2000-281; Willis v. Commissioner, T.C. Memo. 1997-290.

[Section 86\(d\)](#) is unambiguous, and its application to the undisputed facts of this case is clear. Petitioners stipulated that during 2011, petitioner received worker's compensation benefits and that the SSI disability benefits that he was otherwise entitled to receive in 2011 were entirely offset on account of petitioner's receipt, since July 2009, of worker's compensation benefits. We acknowledge that if petitioner had not applied to SSA for SSI disability benefits, then petitioners would not find themselves in the situation they are in now. Petitioners' frustration is thus understandable, but our role is to apply the tax laws as written. See Eanes v. Commissioner, 85 T.C. 168, 171 (1985).

Accordingly, pursuant to [section 86\(d\)\(3\)](#), we sustain respondent's determination that for 2011 petitioners had \$30,519 of taxable Social Security

7 income. \*7

To reflect the foregoing,

Decision will be entered for respondent as to the deficiency and for petitioners as to the accuracy-related penalty under [section 6662\(a\)](#).



# **SSI/Social Security Overpayments, Appeals, and Waivers**

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John S. Whitelaw, Esquire  
*Community Legal Aid Society, Inc.*



# SSI/Social Security Overpayments, Appeals, and Waivers

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# Community Legal Aid Society, Inc. (Delaware)

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



# What We'll Cover

- Overpayments Overview
- Scenario 1: Michael Smith (Appeal)
- Scenario 2: Jane Williams (Waiver)
- Scenario 3: James Johnson (Change of Repayment Rate)



# Where are the rules?

- C.F.R.
- POMS – Program Operations Manual System

<https://secure.ssa.gov/apps10/poms.nsf/Home?readform>

OR – just “google” SSA POMS

# Overpayments

- What is an overpayment?
- Usually SSA withholds benefits to repay
  - SSI: Up to 10% of full check (\$79.40 max for 2021)
  - Title II: Up to the entire check



# Why Do Overpayments Happen?

- Over income limit/fluctuating income
  - Over resource limit: inheritances; settlements etc
  - Marriage
  - In-kind support and maintenance
  - Outside U.S. for more than 30 days (including Puerto Rico)
  - Institutionalized for more than 30 days (nursing home, prison)
- 
- Work issues
  - Workers' Comp offsets



# Overpayment Options

- Appeal the overpayment
  - Request a waiver
  - Negotiate a lower repayment amount
  - Do nothing
- 
- Outside of SSA administrative process: bankruptcy



# Overpayment Appeal vs. Suspension/Reduction Appeal

Looking Back –  
Overpayment

**vs.**

Looking Forward –  
Current Eligibility  
(Suspension/Reduction)





# Scenario 1: Michael Smith – Overpayment Appeal



# Michael Smith

- 60 years old, receiving SSI for 12 years
- October 10, 2021 Notice of Planned Action
  - SSI benefits suspended for being over the resource limit
- Feb 14, 2021 Notice of Overpayment
  - Overpaid \$15,689
  - Over the resource limit because he owns “non-home real property”



## POLL: What Should Mr. Smith Do?

- A. Appeal the overpayment
- B. Request a waiver
- C. Both
- D. Neither



# Appeal the Overpayment

- File Request for Reconsideration (Form 561)
- Appeal of merits (disputing fact or amount) of overpayment
- Deadline: 60 days (plus 5 for mailing)
- Don't forget: Appeal Notice of Planned Action too
  - Deadline: 10 days (plus 5 for mailing) to get benefit continuation; benefit continuation only available through Reconsideration determination



# Good Cause for Late Filing

Any good reason why appeal not filed within deadline

20 C.F.R. § 416.1411

POMS GN 03101.020

Concept of “finality” is flexible

“Good cause” determination cannot be appealed



# Appeal Rights

*Goldberg v. Kelly* protections

case review, informal conference, formal  
conference

POMS SI 02220.017, SI 04020.030

Written notice of reconsideration determination



# iAppeals

- Can now file overpayment appeals **online**
- Go to [secure.ssa.gov/iAppINMD/start](https://secure.ssa.gov/iAppINMD/start)



## Scenario 2: Jane Williams – Waiver





# Jane Williams

- SSI recipient
- 52 years old, started working in April 2021
  - 10 hours per week as home health aide
- Submits copies of paystubs monthly in person, receives receipts from SSA
- Benefits stay the same for several months
- October 10, 2021 Notice of Overpayment
  - Overpaid \$3,876
  - As result of earned income



# POLL: What Should Ms. Williams Do?

- A. Appeal the overpayment
- B. Request a waiver
- C. Both
- D. Neither



# Appeal or Waiver?

- Can do either or BOTH
- Considerations:
  - **Appeal** – subject to 60 + 5 day deadline
  - **Waiver** – can file at any time
  - When in doubt – **DO BOTH**



# Overpayment Waiver

- Separate from merits of overpayment
  - Not making a statement on correctness of overpayment
- Asking that overpayment be forgiven
- File at any time (no deadline)
- Recoupment stops while pending
- **Revised overpayment waiver form (Form 632)**
  - Very detail oriented



20

# Overpayment Waiver

- **Requirements:**

- Without Fault **AND**
- Defeat Purpose of the Act (Financial hardship); **OR**
- Against Equity and Good Conscience



# Overpayment Waiver Requirements – STEP 1

## **“Without Fault”**

- Term of art: “blameless in creation of overpayment”
- Watch out for “knew or should have known”
- Individualized, everyone’s situation is different.

POMS SI 02260.010, .015



# Examples of “Without Fault”

- Failure on the part of former representative payee to report change in income/resources
- Client was working and dutifully reported wages each month, but reports not processed timely by SSA
- Retroactive suspensions/termination resulting from work activity
- Client received SSI benefits while incarcerated or institutionalized
- Client received inheritance or other financial settlement



# Overpayment Waiver Requirements – STEP 2A

## **“Defeat the Purpose of the Act”**

- Construed as financial hardship
- Presumed met for current SSI recipients and recipients of other public assistance

POMS SI 02260.020





# Overpayment Waiver Requirements – STEP 2B

## **“Against Equity and Good Conscience”**

- Alternative to showing financial hardship.
- For situations where it would be unfair to require repayment.
- Did the individual relinquish a valuable right or change position for the worse?

POMS SI 02260.025



# Overpayment Waiver

## **Procedural Steps:**

1. File Request for Waiver (Form 632) – new version.
2. Request that SSA cease recoupment while waiver pending.
3. Right to personal conference before waiver denied.
4. Right to written decision.
5. Full appeal rights if denied.



# Administrative Waiver

Administrative waiver of overpayments \$1,000.00 or less

POMS SI 02260.030



# Scenario 3: James Johnson – Change of Repayment Rate



# James Johnson

- 70 years old, living with brother rent free
- Notice of Planned Action
  - In-kind support and maintenance (1/3 reduction)
- Notice of Overpayment
  - Overpaid by \$2,752



# POLL: What Should Mr. Johnson Do?

- A. Request a waiver
- B. Request change in repayment rate
- C. Nothing



# Request Repayment Plan

- **Use new form:** Form 634, Request for Change in Overpayment Recovery Rate
- Provide financial documentation re: income, assets, and expenses



# \$10/Month Repayment Rate

\$10/month withholding for those receiving Medicare Part D Low-Income Subsidy (LIS)

Receipt of any form of Medicaid qualifies for Full LIS

NOT required to complete Form 634 or document financial hardship

POMS GN 02210.030 (C): **Exception**





# Special Rules for certain Overpayments during COVID – March – September 2020 only

- Published in the Federal Register  
August 27, 2020, 85 Fed. Reg. 52909,
- Only for those overpayment resulting from workload suspensions. Excluded from the new process are many other overpayments caused by the pandemic, such as any resulting from any difficulties or the inability to visit a local office or report information. The usual waiver process remains available for overpayments that SSA has not identified as eligible for the new streamlined procedure.
- SSA identifies what OPs it thinks are covered
- A day late and a dollar short!

# Tips for Resolution

- Persistence pays off.
- Put requests in writing and provide support with documentation.
- Follow up with phone calls.
- Local office personnel have a lot of discretion in deciding “without fault” in waivers.
- Develop good working relationship with field office staff/supervisor.
- Get decisions in writing.
- Grovel, beg. . . and cut a deal.



# If All Else Fails

- Bankruptcy
- Unsecured debt

John S. Whitelaw, CLASI, October 2021



# Additional Resources

- **Regulations**

- 20 C.F.R. §§ 416.550 – 590

- 

- **Program Operations Manual System (POMS)**

- SI 02201.000 et seq.

- 

- **SSA FAQ:** What can I do if I get an overpayment?

- <https://faq.ssa.gov/link/portal/34011/34019/Article/3810/What-can-I-do-if-I-get-an-overpayment>



# NCLER: The National Center on Law and Elder Rights

## <https://ncler.acl.gov/>

- **Legal Training/Economic Security/Overpayments and Appeals**
- <https://ncler.acl.gov/Legal-Training/Economic-Security.aspx>
- **SSI Overpayment: Walk Through a Case**
  - [Recording](#)
  - [PowerPoint](#)
  - [Chapter Summary](#)
- **SSI Self-Help for Overpayments: Administrative Waivers and More**
  - [Recording](#)
  - [PowerPoint](#)
  - [Chapter Summary](#)
  - [FAQ Sheet](#)
- **Social Security Reconsideration Appeals**
  - [Recording](#)
  - [Chapter Summary](#)
  - [PowerPoint](#)
- **Social Security Overpayments and Low-Income Clients**
  - <https://ncler.acl.gov/Legal-Training/Economic-Security.aspx>Recording
  - [Chapter Summary](#)

John S. Whitelaw, CLASI, October 2021



# Questions?

