

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME C. BERGER,
[REDACTED]

Plaintiff,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL
SECURITY,
Altmeyer Building, 6401 Security Boulevard
Baltimore, MD 21235

Defendant.

Civil Action No. _____

COMPLAINT FOR APPEAL OF A DECISION BY THE
COMMISSIONER OF SOCIAL SECURITY

Through his counsel, Plaintiff Jerome C. Berger makes the following representations to this Court for the purposes of obtaining judicial review of a decision of the Defendant adverse to the Plaintiff:

PARTIES

1. The Plaintiff, Jerome C. Berger, was born on [REDACTED]
[REDACTED]
2. Mr. Berger's Social Security Number is [REDACTED]
3. Mr. Berger is a resident of Jerusalem, Israel.
4. Defendant Jo Anne B. Barnhart is sued in her official capacity as the Commissioner of the United States Social Security Administration.

JURISDICTION AND VENUE

5. The Plaintiff has exhausted his administrative remedies in this matter, and this Court therefore has jurisdiction over, and is the proper venue for resolution of, Plaintiff's claim pursuant to 42 U.S.C. § 405(g) and 20 C.F.R. § 422.210.

BACKGROUND

6. Mr. Berger became eligible for Retirement Insurance Benefits under the Social Security Act in August 2000.

7. At that time, and until January 1, 2001, Mr. Berger received approximately [REDACTED] per month from Israel. Approximately 2/3 of the monthly payment was for Mr. Berger's Old Age Allowance, and the remaining 1/3 of the payment was for Mr. Berger's Survivor's Benefit, to which he became entitled after the death of his wife in 1989. Mr. Berger continues to receive an Old Age Allowance of approximately [REDACTED] per month.

8. Mr. Berger filed an application for Retirement Insurance Benefits on November 29, 2000.

9. On March 3, 2001, the Social Security Administration ("SSA") granted Mr. Berger's application, indicating that Mr. Berger would receive [REDACTED] around March 9, 2001, for money due for August 2000 through February 2001, and would receive a payment of [REDACTED] monthly thereafter.

10. On April 20, 2001, Mr. Berger requested reconsideration as to the payable amount of Retirement Insurance Benefits, because, based upon Mr. Berger's U.S. earnings, he was entitled to receive [REDACTED] per month. Mr. Berger requested the SSA provide the basis for this reduction in benefits.

11. On May 14, 2001, the SSA informed Mr. Berger that his benefits had been reduced on the purported basis that Mr. Berger received a pension from Israel based upon work which is not covered by Social Security.

12. Mr. Berger responded on July 20, 2001, and explained that although he did receive a payment from Israel, the payment is an "Old Age Allowance," provided "regardless of a person's employment history," so long as the person made insurance contributions to Israel's National Insurance Institute, "providing the same basic payment, uniformly, regardless of the amount of an employee's earnings or the amount he paid to the Israel National Insurance." As a result, Mr. Berger concluded, the Old Age Allowance was not properly characterized as a pension, and as such should not have served to reduce Mr. Berger's Retirement Insurance Benefits. Accordingly, Mr. Berger asked that the SSA's decision in that regard be reviewed.

13. On March 14, 2002, SSA informed Mr. Berger that it had received Mr. Berger's request for a review of the decision to reduce Mr. Berger's Retirement Insurance Benefits on September 24, 2001, nearly two months after Mr. Berger had sent his request.

14. Regardless, SSA indicated that it had reviewed that decision, and concluded that the decision to reduce Mr. Berger's benefits was correct, again on the basis of receipt of a "pension from Israel." SSA provided no basis for its apparent conclusion that Mr. Berger's Old Age Allowance was properly characterized as a pension based on work such that a reduction in benefits would be appropriate under Section 215 of the Social Security Act.

15. On May 8, 2002, the Director of The Old Age and Survivor's Branch of Israel's National Insurance Institute, responsible for administering Israel's Old Age Allowance program, among other Israeli benefits programs, stated unequivocally in a letter provided to SSA that "entitlement to [the] old-age allowance is based on the insured person's residence in Israel, not

on employment.” The old-age allowance is provided to the elderly upon reaching retirement age, including non-wage earners. Mr. Berger’s Old Age Allowance was based upon his 29 years of residence in Israel and Mr. Berger’s payment of contributions to the National Insurance Institute, as the Director explained. *See Exhibit 1.*

16. On May 14, 2002, Mr. Berger again requested reconsideration of the decision to reduce his Retirement Insurance Benefits, seeking review of the decision before an administrative law judge (“ALJ”).

17. On May 15, 2002, Mr. Berger wrote to SSA, explaining that there remained no apparent basis for characterizing Israel’s Old Age Allowance as a pension based upon work. As Mr. Berger indicated in his letter, both Mr. Berger and Congressman Jerrold Nadler had previously requested from SSA an explanation of the basis for this conclusion, but no such information was provided. Mr. Berger again stressed that the Old Age Allowance is not based “on work not covered by Social Security” and therefore was not a proper basis upon which to reduce Mr. Berger’s Retirement Insurance Benefits.

18. Mr. Berger waived his right to appear before the ALJ at a hearing, because he could not afford to travel to the United States at his own expense, as would be required to attend the hearing. Mr. Berger proceeded without counsel in this matter throughout the appeal process. Undersigned counsel first became aware of this case in January 2004 and thereafter in March 2004 agreed to represent Mr. Berger on a *pro bono* basis after he had received an extension to file this Complaint.

19. On February 10, 2003, the ALJ, Eugene M. Bond, issued his decision. The decision adversely affects Mr. Berger, and has become the final decision of the Commissioner for purposes of judicial review. The decision bears the following caption:

In the Case of

Claim For

Jerome C. Berger
(Claimant)

Retirement Insurance Benefits

(Wage Earner)


(Social Security Number)

20. The ALJ concluded that Mr. Berger's Retirement Insurance Benefits were properly reduced due to Mr. Berger's receipt of a pension based on employment in Israel.

21. The ALJ reviewed the May 8, 2002 letter from Israel's National Insurance Institute, and concluded that the letter "strongly suggest[s] that his pension is based, at least in part, on earnings." The SSA decision, which the ALJ upheld, reducing Mr. Berger's Retirement Insurance Benefits, was based upon the conclusion that Israel's Old Age Allowance is a pension *entirely* based on employment, not based "*in part*, on earnings." If the SSA had concluded that the Allowance was based only in part on earnings, it would have been required to determine what portion of the Allowance was based upon work and what portion was not, and the SSA did not do so in reducing Mr. Berger's benefits.

22. The ALJ based his conclusion that the letter "suggest[s] that his pension is based, at least in part, on earnings" on the basis that "nowhere does it [the letter] state that the stipend received by the claimant [Mr. Berger] is one received by all citizens in the same amount, regardless of their prior work (or lack thereof)" and that Mr. Berger had "indicated that his pension was based on a period of employment from September 1971 to September 2000." Thus, the ALJ concluded, "the claimant's U.S. Social Security Retirement Insurance Benefits were properly reduced due to his receipt of an Israeli pension based on non-covered employment."

23. Specifically, the ALJ found:

(1) The claimant filed an application for Retirement Insurance Benefits on November 29, 2000.

(2) The claimant became entitled to an Israeli pension on September 1, 2000.

(3) The Israeli pension received is based on non-covered earnings.

(4) The pension received in Israel reduced the claimant's U.S. Social Security retirement benefits.

24. The second through fourth findings of the ALJ are contrary to law and not supported by substantial evidence.

25. On June 3, 2003, the Director of Israel's National Insurance Institute directly addressed the ALJ's concerns regarding the nature of the Old Age Allowance (*i.e.*, the ALJ's concern that the letter from the National Insurance Institute did not indicate that "the stipend received by the claimant [Mr. Berger] is one received by all citizens in the same amount, regardless of their prior work (or lack thereof)") and explained the Allowance's operation in a letter provided to SSA. The Director explained that "[e]arnings 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... [A]ll persons, both employed and unemployed, are entitled to the same amount of benefits." See Exhibit 2.

26. In part on the basis of this letter, Mr. Berger requested the SSA Appeals Council to review the ALJ's decision. On November 19, 2003, in a form letter, the Appeals Council informed Mr. Berger that it had summarily denied his request for review, making the ALJ

decision the final decision of the Commissioner. The Appeals Council apparently disregarded the June 3, 2003, letter.

27. The Appeals Council's refusal to review the ALJ's decision was incorrect, because: (i) the ALJ abused his discretion; (ii) the ALJ committed an error of law; (iii) the ALJ's decision was not supported by substantial evidence; (iv) Mr. Berger's case implicates a broad policy or procedural issue, affecting many elderly persons entitled to both Retirement Insurance Benefits and Israel's Old Age Allowance, that may affect the public interest; and (v) the Appeals Council received new and material evidence making clear that the ALJ's characterization of the Old Age Allowance as a benefit based upon non-covered work is wrong and contrary to the weight of the evidence in the record.

28. On January 19, 2004, Mr. Berger filed with the Appeals Council a request for an extension of time within which to file suit in this Court.

29. On February 11, 2004, Mr. Berger's request was granted, and Mr. Berger was accordingly given an extension pursuant to 20 C.F.R. § 422.210(c) in order to seek judicial review. Mr. Berger received notice that his request for an extension, through at least March 17, 2004, had been granted on February 23, 2004.

COUNT I

42 U.S.C. § 405 (g)

30. Plaintiff repeats and incorporates here by reference the allegations of Paragraphs 1-29.

31. The Commissioner's decision reducing Plaintiff's Retirement Insurance Benefits on the basis of his receipt of an Old Age Allowance from Israel is arbitrary and capricious and not in accordance with law.

32. The Commissioner's decision reducing Plaintiff's Retirement Insurance Benefits on the basis of his receipt of an Old Age Allowance from Israel is not supported by substantial evidence.

33. The Commissioner's decision reducing Plaintiff's Retirement Insurance Benefits on the basis of his receipt of an Old Age Allowance from Israel is not in accordance with SSA's internal directives, as set forth in the agency's Program Operations Manual System.

34. Every elderly person in Israel, regardless of income or work history, is entitled to the basic Old Age Allowance. *See generally* National Insurance Institute, *Old-Age Pensions*, at <http://www.btl.gov.il/English/newbenefits/oldagebenefits.htm> (last visited Mar. 16, 2004) (stating in relevant part "Every elderly person in Israel, regardless of his income or work history, is entitled to a basic old-age pension."). Accordingly, the Allowance received by Mr. Berger is not based, in whole or in part, upon work. Rather, the Allowance is based entirely upon nonwork-related factors such as residence.

35. Mr. Berger's receipt of an Old Age Allowance from Israel is not a lawful basis for reducing Retirement Insurance Benefits.

WHEREFORE Plaintiff seeks judicial review by this Court and the entry of a judgment in accordance with 42 U.S.C. § 405(g), that (i) modifies or reverses the decision of the Commissioner of Social Security – without the need to remand the cause for a rehearing – with explicit instructions that the Commissioner of Social Security grant Mr. Berger his full Retirement Insurance Benefits without regard to the Allowance that he has been receiving from the state of Israel based upon his age, and (ii) grants such other relief as may be proper, including costs and attorneys' fees to the extent allowable. Alternatively, this Court should enter judgment that (i) reverses the decision of the Commissioner of Social Security and remand the cause for a

rehearing, and (ii) awards such other relief as may be proper including costs and attorneys' fees to the extent allowable.

March 16, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S.M.A.", is written over a horizontal line.

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Attorneys for Plaintiff Jerome C. Berger



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

May 8, 2002

Re: Jerome Berger, [REDACTED]

To whom it may concern:

The National Insurance Law determines that entitlement to old-age allowance is based on the insured person's residence in Israel, not on employment.

Mr. Jerome Berger receives an old-age allowance from the National Insurance Institute of Israel (NII) since September 1, 2000.

Mr. Berger has been a resident of Israel since July 1971. His old-age allowance includes a seniority increment of 19 years, based on his 29 years' residence in Israel.

The NII provides this allowance to the elderly upon reaching "retirement age", even to a non-wage earner, as in the case of Mr. Berger, who has paid the required insurance contributions to the NII during the qualifying period.

Sincerely yours,


Yafia Maroz, Director

EXHIBIT

1 1



**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 governmental economic and/or budgetary factors.

Explanation of Seniority Increment:

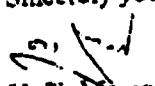
A seniority increment is an additional benefit paid to all insured persons, for each year payments are made after the required initial 10 year payment period.

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,


Yaffi Maroz
Director

EXHIBIT

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