

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

**ACTION AND ORDER OF MEDICARE APPEALS COUNCIL
ON REQUEST FOR REVIEW**

In the case of

Claim for

B.A.

(Appellant)

Medicare Part B Premium:
Income-Related Monthly
Adjustment Amount

(Beneficiary)

(HIC Number)

SSA Mid-Atlantic Program
Service Center

(Contractor)

(ALJ Appeal Number)

The Medicare Appeals Council (Council) has carefully considered the request for review of the Administrative Law Judge (ALJ) decision dated August 5, 2009. The ALJ's decision concerns the Social Security Administration's assessment of an additional monthly Medicare Part B premium or "income-related monthly adjustment amount" (IRMAA) for 2009. The ALJ found that the calculation of the appellant's IRMAA was correct based on the reported modified adjusted gross income (MAGI) on the appellant's 2007 Internal Revenue Services (IRS) tax return. Further, the ALJ determined the appellant's circumstances did not constitute a "major life-changing event," as specified in Social Security Administration (SSA) regulations to justify using a more recent tax year to calculate her IRMAA for 2009. The appellant, through her representative, has asked the Medicare Appeals Council to review these actions.

The regulations provide that the Medicare Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the ALJ; (2) there is an error of law; (3) the ALJ's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may affect the general public interest.

The regulations also provide that if new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Council finds that the ALJ's action, findings or conclusion is contrary to the weight of the evidence currently of record. See 20 C.F.R. § 404.1350 and 20 C.F.R. § 404.970, by reference of 42 C.F.R. § 405.801(c).

The Medicare Appeals Council has considered the contentions received in connection with the request for review. Before the Council, the appellant asserts that the increase in her income was due to the withdrawal of funds from her individual retirement account (IRA) and that withdrawal of the principal from her IRA should not be deemed taxable income under the circumstances of her case. She explains that she was a victim of investment fraud; that she reached a settlement of this matter in the amount of \$250,000, which represents a recoupment of only a fraction of the loss she incurred due to investment fraud; that the fraud loss prompted her to withdraw funds from her IRA to meet her living expenses and to help family members financially. She asserts that these extenuating circumstances qualify as a "life-changing event." See Request for Review. The Council concludes that there is no basis under the regulations for granting the request for review.

In 2003, Congress enacted section 811 of the Medicare Prescription Drug Improvement and Modernization Act (MMA) (Pub. L. 108-173), establishing a Medicare Part B premium subsidy reduction, effective January 1, 2007. Under this authority, IRMAA is added to the beneficiary's standard monthly Medicare Part B premium based on the MAGI as reported on a beneficiary's Federal income tax return for the tax year two years prior to the IRMAA year. SSA issued final regulations governing the implementation of IRMAA determinations on October 27, 2006. The regulations implement the statutory requirement that a beneficiary's MAGI be based on the tax year return two years prior to the effective year of the IRMAA determination. 20 C.F.R. § 418.1135(a).

The appellant's reported 2007 MAGI was \$146,360.00. See Exh. 5, at 30. SSA calculated this amount based upon the appellant's 2007 IRS tax return, which indicated that the appellant had an adjusted gross income of 146,360.00 with no additional tax-exempt interest income. *Id.* at 29. Accordingly, SSA determined that the appellant was required to pay a monthly IRMAA of \$96.30 in 2009. *Id.*

SSA will consider using the MAGI reported in a more recent tax year if: (1) the beneficiary experiences a "major life-changing event" and (2) that event results in a significant reduction in the MAGI for the tax year requested. The beneficiary must provide evidence that both requirements are met. 20 C.F.R. § 418.1201. SSA "will not consider events other than those described below to be major life-changing events." 20 C.F.R. § 418.1210. As cited by the ALJ, the regulations at 20 C.F.R. § 418.1205 define a "major life-changing event" as:

- (a) Your spouse dies;
- (b) You marry;
- (c) Your marriage ends through divorce or annulment;
- (d) You or your spouse stop working or reduce the hours of your work;
- (e) You or your spouse experience a reduction in your income due to a loss of income-producing property, provided that the loss is not at your direction (e.g., due to the sale or transfer of the property). Examples of the type of property loss include, but are not limited to, loss of income from real property with a Presidentially or Gubernatorially-declared disaster area, destruction of livestock or crops by natural disaster or disease, or loss of income from real property due to arson;
- (f) You or your spouse experiences a reduction in or loss of income from an insured pension plan due to termination or reorganization of the pension plan or a scheduled cessation of pension.

20 C.F.R. § 418.1205.

As noted, the appellant asserts that an investment advisor committed fraud by taking unspecified funds out of the appellant's IRA, and that a financial settlement was reached with the advisor and the advisor's employer. Request for Review. The SSA's Program Operations Manual System (POMS) specifically addresses situations in which the reduction of income due to a loss of income-producing property may qualify as a life changing event (LCE).¹ In relevant part, the POMS states:

¹ The SSA POMS can be located through the link to "Programs Operation Manual System" found in the "Employee Operating Instructions" section of the SSA website at <http://www.ssa.gov/regulations/>.

A significant reduction of income due to a loss of income-producing property beyond the beneficiary's control (e.g. natural disaster, arson or criminal theft) which ordinarily generates income used in MAGI may qualify a beneficiary to request and qualify for a new initial determination using a more recent tax year.

* * *

Ordinary risk of loss taken at the time of investment in income-producing property is considered at the beneficiary's discretion. Examples of circumstances beyond a beneficiary's control are losses caused by:

- o Natural disasters (such as flood, hurricane, tornado, fire, earthquake, volcano eruption)
- o Disease (affecting crops, livestock or other animals)
- o Arson
- o Buy-out of the property by a government under Eminent Domain
- o Theft (including the taking of money or property by blackmail, burglary, embezzlement, extortion, larceny, robbery, fraud, investment fraud or other criminal activity)

NOTE: Loss of dividend income does not qualify as a loss of income from income producing property unless the loss is due to criminal theft. See HI 01120.005D.

* * *

If the beneficiary experienced a significant loss of income due to destruction or loss of income-producing property, SSA will accept as proof of the loss any evidence that clearly documents the event such as:

- o A filed tax return which documents the loss of income from income-producing property . . .

NOTE: For claims of investment fraud (theft) a tax return with IRS form 4684-Casualties and Thefts and proof of a conviction of the theft are required and the only acceptable proof.

A beneficiary must also provide MAGI and tax filing status information for the tax year he is asking SSA to use.

POMS at HI 01120.035 (emphasis in original).²

In this case, the ALJ did not consider this POMS provision and determined that the appellant's situation did not qualify as a life changing event. Dec. at 9. However, the Council finds this to be harmless error, as this determination does not affect the ultimate outcome of this case. The administrative record does not contain any documentation of the appellant's asserted loss or any adjustments to her income associated with the fraud loss. Without such evidence, the Council cannot grant the appellant the relief she seeks.

However, the Council notes that this action does not preclude the appellant from taking further remedial action to amend her 2009 IRMAA. For example, the appellant may wish to file an amended 2008 tax return with the Internal Revenue Service demonstrating her losses. The appellant may also wish to seek a new initial determination of her IRMAA from the SSA, pursuant to the regulation at 20 C.F.R. § 418.1310(a)(4). In doing so, the appellant may wish to bring a copy of this action, as well as documentation of any amended 2008 income or estimated 2009 income statements and the POMS provisions cited above to her local Social Security office. Further, the appellant may wish to seek a retroactive adjustment to her 2009 IRMAA pursuant to the regulation at 20 C.F.R. §§ 418.1110, 418.1150.

As for the appellant's assertion that withdrawal of the principal from her IRA should not be deemed taxable income, neither the ALJ nor the Council has the authority to modify what Section 1839(i) of the Act directs SSA to use to determine the amount of the beneficiary's income in a given year.³

² This POMS section is available online at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0601120035!opendocument> (last visited October 23, 2009).

³ Subsection (i) was added to section 1839 of the Act by Congress in the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108-173).

Accordingly, the request for review is denied, and the ALJ's decision, dated August 5, 2009, stands as the final decision of the Secretary.

MEDICARE APPEALS COUNCIL

/s/ Susan S. Yim
Administrative Appeals Judge

Date: October 27, 2009