

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

P.S.

Medicare Part B Premium:
Income-Related Monthly
Adjustment Amount

(Appellant)

(Beneficiary)

(HIC Number)

SSA Southeast Program Service
Center (SEPSC)

(Contractor)

(ALJ Appeal Number)

The Medicare Appeals Council has carefully considered the request for review of the Administrative Law Judge's (ALJ) decision dated July 30, 2009. The ALJ's decision concerns the determination that the appellant should pay the additional monthly Medicare Part B premium or "income-related monthly adjustment amount" (IRMAA) assessed by the Social Security Administration (SSA) for 2009. The ALJ concluded that the calculation of the appellant's IRMAA was correct based on the reported modified adjusted gross income (MAGI) on the appellant's 2007 tax return. The ALJ determined the appellant failed to prove that her circumstances constituted a "major life-changing event," as specified in the SSA regulations, to justify using a more recent tax year to calculate her IRMAA.

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 grants the request for review because there is new and material evidence. The Council adopts the ALJ's recitation of the procedural history, findings of fact, and legal standards. The Council reverses the ALJ's conclusion that the appellant has not demonstrated a life changing event in a later taxable year which resulted in a significant reduction in the MAGI.

ANALYSIS

The appellant's 2007 MAGI was \$167,395.00. Therefore, the SSA determined that the beneficiary owed an additional IRMAA of \$154.10, for her Medicare Part B premium, based on her 2007 tax return. The appellant argues that the beneficiary's 2008 tax year's MAGI should be utilized to calculate her IRMAA because the beneficiary experienced a major life-changing event, namely the theft of "the bulk of her life savings, the main property from which she received income." Request for Review.

The regulations specify that SSA will use a more recent tax year's MAGI to calculate an IRMAA if the beneficiary experiences one of several major life-changing events and provides evidence of the event. 20 C.F.R. §§ 418.1201, 418.1205(e). 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). In relevant part, the POMS states:

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 she is asking SSA to use.

POMS at HI 01120.035 (emphasis in original).¹

During the June 16, 2009, ALJ hearing, the appellant acknowledged that due to certain circumstances, the appellant had not yet filed a 2008 tax return or IRS form 4684-Casualties and Thefts as required. The ALJ noted that even if the appellant submitted the required proof of a life changing event, the only relief that can be granted is the use of a more recent tax return (i.e. the 2008 tax return) in determining the MAGI.

With the request for review, the appellant submitted a copy of the 2008 tax return and IRS form 4684 - Casualties and Thefts as required by POMS HI 01120.035. The appellant's 2007 tax return indicates that \$147,496.00 of the appellant's \$167,395.00, MAGI consisted of taxable income derived through Bernard L. Madoff. Specifically, \$13,445.00, in ordinary dividends and \$134,051.00, in capital gains was derived by investments made through Mr. Madoff. The appellant's 2008 tax return does not include any taxable income from investments with Mr. Madoff, and reflects casualty or theft loss of \$1,463,838.00. The Council takes judicial notice of the conviction of Bernard L. Madoff of eleven felony counts including securities fraud and investment advisor fraud.² Thus, the Council finds acceptable proof of the investment fraud which caused the appellant a major life changing event which resulted in a significant reduction in her MAGI. 20 C.F.R. § 418.1201.

The appellant further argues that the tax loss carried back to 2003, and requests that "all payments in excess of the basic Medicare Part B premium should be refunded." Request for Review. However, the issue before the Council is whether the appellant should pay the IRMAA assessed by the SSA for 2009; the previous years are not before the Council. The Council notes that section 1839(i) of the Social Security Act (creating the reduction in premium subsidy based on income) established that IRMAA assessments would begin in 2007. Social Security Act § 1839(i). However, the appellant may contact the SSA regarding requested retroactive adjustment for other years.

¹ This POMS section is available online at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0601120035!opendocument> (last visited October 15, 2009).

² The Bernard L. Madoff guilty plea proceeding transcript of March 12, 2009, is available at <http://www.usdoj.gov/usao/nys/madoff/madoffhearing031209.pdf> (last visited October 15, 2009).

DECISION

It is the decision of the Medicare Appeals Council that the appellant had a major life changing event in 2008 which resulted in a significant reduction in her MAGI. The appellant is entitled to use the 2008 tax year in computing any IRMAA. No IRMAA is due for 2009 based on the 2008 MAGI. Any 2009 surcharges already received shall be refunded.

MEDICARE APPEALS COUNCIL

/s/ Clausen J. Krzywicki
Administrative Appeals Judge

/s/ M. Susan Wiley
Administrative Appeals Judge

Date: November 16, 2009