

(Petitioner) is a student working toward an Associates Degree at Community College of Vermont. He expects to graduate in the fall of 1990 and hopes to use his degree and skills to become self-supporting.

The full amount of Mr. (petitioner's) SSI check is set aside and deposited in a checking account at the Merchants Bank in (town), Vermont pursuant to a Plan For Achieving Self Support (PASS). See Exhibit #1, attached. The Social Security Act provides that this money, approved by the Secretary, is to be excluded from income countable under the SSI Program. 42 U.S.C. § 1382a(b). This money is segregated from all other money of Mr. (petitioner's) family and, pursuant to the PASS agreement, is used only for expenses outlined in the PASS Plan. See Exhibit #2, attached.

The only alteration to the above "facts" the Board must find is that the exhibits submitted by the petitioner indicate that he sets aside the full amount of his monthly Social Security (SSDI) check of \$315--not his SSI check (which appears to be only \$117 a month)--for his PASS account.

Copies of the pertinent SSI PASS regulations (20 C.F.R. §§416.1180 - 416.1182), the petitioner's PASS Plan, and information regarding the petitioner's plan submitted by Social Security to DSW are attached hereto.

ORDER

The Department's decision is reversed.

REASONS

In general, under the food stamp program all Social Security and SSI benefits are considered unearned income. See Food Stamp Manual (F.S.M.) § 273.9(b)(2). However, F.S.M. § 273.9(c) sets out certain "exclusions" to income

that will not be considered for food stamp purposes.

Included in this section is a provision defining

"reimbursements". id. § 273.9(c)(6). In pertinent part, it provides:

Reimbursements for past or future expenses, to the extent they do not exceed actual expenses, and do not represent a gain or benefit to the household. Reimbursements for normal household living expenses such as rent or mortgage, personal clothing, or food eaten at home are a gain or benefit and, therefore, are not excluded. To be excluded, these payments must be provided specifically for an identified expense, other than normal living expenses, and used for the purpose intended. When a reimbursement, including a flat allowance, covers multiple expenses, each expense does not have to be separately identified as long as none of the reimbursement covers normal living expenses. The amount by which a reimbursement exceeds the actual incurred expense shall be counted as income. However, reimbursement shall not be considered to exceed actual expenses, unless the provider or the household indicates the amount is excessive.

(i) Examples of excludable reimbursements which are not considered to be a gain or benefit to the household are:

(A) Reimbursements or flat allowances for job-or-training-related expenses such as travel, per diem, uniforms, and transportation to and from the job or training site.

. . .

As indicated in the above findings, the petitioner in this case is a disabled individual who receives a monthly Social Security benefit of \$315 that he sets aside in a separate bank account pursuant to the PASS provisions of the Social Security Act. He uses this money strictly and exclusively to pay specific and pre-approved (by the Social Security Administration) expenses related to his education.

Because of this, SSA does not count this money as "income"

in determining the petitioner's eligibility for SSI. The petitioner maintains that in order to fully achieve the remedial intent of the PASS provisions of the Social Security Act, this income should be considered "excluded" for food stamp purposes as a "reimbursement" under § 273.9(c)(6), supra. The Department maintains that this money does not qualify as "excluded income" under § 273.9(c)(6), and that it should be counted along with the household's other earned and unearned income in determining the household's eligibility for food stamps.

As in most, if not all, cases of this nature, inquiry must begin with an examination of the "plain meaning" of the regulation in question. Grenafege v D.E.S., 134, VT 288 (1976). As the Department points out, "reimbursement" means a paying back or a restoration of something expended. As a matter of basic semantics, however, the Board cannot agree with the Department that a "magical transformation" must take place if one is to consider the money in the petitioner's PASS account to constitute a reimbursement. To the contrary, it appears that the precise purpose of the PASS program is to "reimburse--if not in so many words, then certainly in effect--disabled individuals for their actual and specific expenses incurred as part of pre-approved and regularly-monitored "plans" to become self-supporting. Moreover, there is no question that, at least for SSI purposes, this money was not to be considered or treated as ordinary "income". The petitioner would not receive SSI at

all but for the fact that he sets aside his SSDI benefits for educational purposes.

As does F.S.M. § 273.9(c)(6), supra, the PASS regulations specifically refer to "training programs", and they emphasize that the money to be spent for this purpose must be "separated from other funds". 20 C.F.R. § 416.1181.

Given these limitations, this money cannot be considered "a gain or benefit to the household". See F.S.M. § 273.9(c)(6), supra. The money is not available either to the petitioner or to any other household member to purchase food or to meet any other "normal living expenses". Id. To the contrary, by law and by actual agreement between the petitioner and the Social Security Administration it is in fact "provided specifically for an identified expense, other than normal living expenses, and used for the purpose intended." Id. Finally, F.S.M. § 273.9(c)(6) expressly provides that a "reimbursement" can be "for past or future expenses" (emphasis added).

In light of the above, it is difficult to see how the structure of the PASS program could fit more exactly into the Food Stamp definition of "reimbursement" in F.S.M. § 273.9(c)(6) than it already does. The Board finds nothing vague or ambiguous about the wording of this regulation as it applies to the petitioner's situation. Therefore, it must be concluded that for food stamp purposes, the petitioner's PASS income constitutes a "reimbursement" under

§ 273.9(c)(6). Sanders v St. Paul Mercury Insurance Co. Inc., 148 VT 496, 504 (1987).

Given the "plain meaning" of § 273.9(c)(9), the only other factor that could be considered is whether the Department's "interpretation" of the regulation is entitled to some, or any, "deference". See Grenafegé, id. In this regard, it must be noted at the outset that the food stamp program is "remedial", and that, therefore, no person should be excluded from its benefits unless the law clearly demonstrates an intent to make an exclusion. Adams v D.E.T., 139 VT 413 (1981). However, the Department, citing the equally-well-established principle that an interpretation of a regulation by the agency that promulgated it is entitled to great weight (see e.g., Cronin v D.S.W., 145 VT 187 (1984)), has proffered several documents purporting to demonstrate the position of the United States Department of Agriculture (U.S.D.A.), which administers the federal food stamp program.

However, despite the department's apparent sincerity in advancing its position, there is still no indication whatsoever that the "interpretations" offered by the Department are anything but ad hoc, informal, and arbitrary.

Worse, it is clear from the memorandum of the regional FNS Chief of Program Operations and the recent letters from the regional FNS Chief of State Operations Section that those officials simply do not understand the issue in this matter.

In light of these patent deficiencies, these

"interpretations" are entitled to virtually no weight or deference. Bowen v. Georgetown Hospital Et. Al., 102 L.Ed.2d 493 (1988); Doe v. Reivitz, 830 F2d 1441, amended 842 F2d 194 (7th Cir., 1987); Ottman v. Fisher, 319 A2d 56 (Me., 1974).

Legislative history demonstrates that Congress intended the provisions of the PASS program "to be liberally construed . . . to provide every opportunity and encouragement to the blind and disabled to return to gainful employment." 1972 U.C. Code Cong. and Adm. News 4989. See also, 20 C.F.R. § 416.1180. Although legislative history also demonstrates that Congress intended to "cast the broadest net possible" regarding food stamp income,¹ it seems incongruous that Congress would allow and encourage disabled individuals to earmark for education a portion of their meager income for SSI purposes, but would require another federal program (food stamps) to count this income in full--thus significantly reducing the overall income available to that individual and his family to meet basic (i.e., non-educational) needs. The department's "interpretation" of the regulations clearly results in less income being available to the petitioner to meet the basic needs of himself and his family than there would be if the petitioner "opted" not to attempt to become self-supporting, and instead merely continued to receive public assistance indefinitely. Therefore, the department's assertion, that "the inclusion or exclusion of petitioner's PASS account as

income in the Food Stamp program has no affect whatsoever on the petitioner's SSA PASS program", is either misleading or uncomprehending of the interplay between the SSI and food stamp programs as they affect individual recipients.

Inasmuch as a "plain reading" of the regulation in question fully supports the treatment of this income as a "reimbursement" for "training-related expenses" (see id . 273.9(c)(6)(i)(A), supra), and inasmuch as the Department has proffered no legally-sufficient basis to read these "remedial" provisions otherwise, it must be concluded that the money the petitioner spends for specific education-related purposes pursuant to his PASS agreement with SSA constitutes "exempt" income under the food stamp regulations.² The Department's decision is, therefore, reversed.

FOOTNOTES

¹See McCoy v. Bergland, 519 F.Supp. 796, 800 (D.C.N.Y., 1980), quoting 1977 U.S. Code Cong. and Adm. News at p 2001.

²Of course, any item (e.g. child care, transportation, etc.) for which the petitioner is specifically "reimbursed" pursuant to this PASS plan cannot also be "deducted" from his income pursuant to income deduction provisions of the food stamp regulations (see F.S.M. 273.9 (d)).

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