



Department of Health and Human Services to pay monthly interim benefits in an amount equal to what would be received if [petitioner] were eligible for Social Security benefits. Exhibit A, attached hereto, page 15(1). The same order also specifies the following with regard to recoupment of those amounts. That if this Court determines on the merits that the Secretary's denial of benefits should be affirmed, the Secretary may recover the interim benefits paid to claimant through the overpayment and recoupment procedures in 20 C.F.R. § 416.537 et seq. Exhibit A, page 15(4).

4. As a result of this order, the Social Security Administration paid [petitioner] the amount of \$1,770 on November 13, 1990. This amount represents his monthly Social Security benefit of \$590 for the months of September, October and November, 1990. This does not include any of the dependent benefits to which [petitioner's] wife and minor children would also be entitled. The Social Security Administration has refused to pay these dependent benefits under the District Court's order. This is currently a matter of dispute between [petitioner] and the Social Security Administration.
5. [Petitioner] timely reported to the Department of Social Welfare the receipt of the \$1,770.00 from the Social Security Administration. In a notice dated December 18, 1990 the Department of Social Welfare disqualified [petitioner] and his family from receipt of ANFC benefits until February, 1991 under the "lump sum rule" (WAM Section 2250.1).

RECOMMENDATION

The decision of the Department is reversed.

REASONS

The issue in this appeal is whether retroactive interim Social Security benefits ordered by a Court are or should be defined as "income" under Vermont's ANFC program. If such benefits are treated as income, then the retroactive interim amounts are subject to the disqualifications imposed by the lump sum rule. The petitioner argues that interim

benefits are like general loans which he argues do not meet the definition of income in the regulations.

The Department of Social Welfare has promulgated regulations which define income as follows:

Income is defined as any cash payment or equivalent "in kind" which is actually available to the applicant or recipient on a regular and predictable basis. Sources of income include, but are not limited to, earnings from employment or self-employment, and "unearned" income (pensions, benefits, interest, or return on investments, contributions, assistance from other agencies, etc.).

All income except that specifically excluded shall be evaluated to establish net income available to meet need. . .

Future and potential sources of income shall be identified and developed, when feasible. . . State assistance in the amount needed based on currently available income shall, however, continue until such income becomes in fact available, at which time appropriate budgetary adjustment shall be completed.

W.A.M. § 2250

"Unearned income" under a further regulation specifically includes Social Security benefits and provides that "the full amount of available unearned income shall be applied to the payment standard, except for disregards specified under certain Federal programs . . ." W.A.M. § 2252

The lump sum rule itself does not further define income except to say that it includes "windfall payments". W.A.M.

§ 2250.1 Nowhere in the regulations are interim benefits or general loans specifically included as income. The regulations do, however, include in the definition of includable unearned income, "any non-exempt income from

student loans or grants." W.A.M. § 2252 (emphasis added)

Similarly, the Department's regulations do not specifically exclude interim benefits or general loans from the definition of income. Some student loans are specifically excluded as follows:

All income to an undergraduate student (may include parent as well as child in ANFC Grant) from student grants, loans, or work/study if:

- a. such loans or grants are made under a program administered or insured by the U.S. Commissioner of Education; or
- b. the sponsor of the grant or loan precludes its use for maintenance purposes; or
- c. the work/study program is administered by a college or university recognized by educational authorities in which the undergraduate student is enrolled half time or more than half time, as defined in relation to the definition of "full time" used by the school.

Examples of excludable income include: Basic Educational Opportunity Grants, Vermont Student Assistance Corporation grants or loans, National Direct Student Loans, Senatorial Scholarships, Supplemental Educational Opportunity Grants, and College Work Study Program income.

That portion of any Veterans Administration Educational Assistance Program payment that is for the "student: and is actually used for tuition, books, fees, child care services necessary for enrollment, etc., is also excluded.

. . . W.A.M. § 2255.1(3)

The petitioner argues that the interim benefits he received, though not specifically excluded under the regulations, nevertheless do not meet the commonly understood definition of income because the benefits are potentially subject to repayment if he loses his appeal.

The petitioner likens these interim benefits to general loans which he argues represent no gain to the petitioner and, as such, cannot legally be considered income. The Department argues that since its income regulations specifically do include retroactive Social Security benefits and do not specifically exclude interim benefits or loans, they must be included in the definition of income. They argue that this result is consistent with federal law and regulations which they characterize as requiring that all loans not specifically exempted must be included as income.

There is, in fact, very little in the federal statute or regulations which defines income. The federal statute itself merely requires that all "income" be included without further definition. 42 U.S.C. § 602(a)(7). The statutory section describing the lump sum exclusion itself does not define income either except to say that it also includes "windfall" amounts. 42 U.S.C. § 602(a)(17).

The federal regulations are almost equally vague as to what constitutes income although they do specifically include retroactive Social Security benefits, 45 C.F.R. § 233.20(a)(3)(ii)(F) and specifically exclude from income, "loans and grants, such as scholarships obtained and used under conditions that preclude their use for current living costs, and all grants or loans made to undergraduate students for education purposes." 45 C.F.R. § 233.20(a)(3)(iv)(B), and (a)(4)(ii)(d) The federal

regulations include retroactive Social Security benefits and also define "windfall" payments for lump sum purposes but do not mention interim benefits or loans. 45 C.F.R.

§ 233.20(a)(3)(ii)(F)

It is not surprising that none of the federal statutes or regulations or state regulations mentions the treatment of interim benefits because it is a truly unusual situation.

The petitioner argues that the interim benefits he received by Court order are analogous to a loan because they have not finally vested in the petitioner and may never vest but may instead be subjected to repayment, just like a loan. The Department argues that the Court did not characterize the payments as a "loan" but rather as "benefits" which in the Department's view, are unlikely ever to be recouped, even if the petitioner is found to be ineligible in the future because they can only be recouped from someone actually receiving benefits. As Social Security benefits themselves are specifically included as income under the regulations, the Department argues that these Court ordered "benefits" must be included.

The Court's order does characterize the payments to the petitioner as "benefits" but also qualifies those benefits as "interim" and ordered that HHS could recover those benefits through its overpayment and recoupment procedures if the petitioner were ultimately determined to be ineligible. While those procedures do allow for recoupment of overpayments only against monthly benefits and lump sums,

they do not preclude collection of overpayments through ordinary civil channels. 20 C.F.R. § 404.502 The regulations specifically allow HHS to collect overpaid amounts through the Federal Claims Collection Act of 1966 and to compromise or terminate collection of overpayments under certain circumstances. However, there is no guarantee or requirement in the regulations that any particular overpayment will be forgiven. 20 C.F.R. § 404.515 Therefore, it must be concluded that the petitioner has the potential liability of repaying the entire amount of interim benefits. As such, it makes sense to analogize his interim payment to a loan, at least until such time as he is either found eligible for the benefits, or is administratively or judicially determined to have no obligation to repay.

However, the determination that the interim benefits be treated as having characteristics similar to a loan does not itself resolve the question of whether it should be treated as income under the Department's regulations. The Department argues that even if it were like a loan, all loans, except certain student loans specifically exempted under its regulations cited above, should be treated as income based on its own regulations. Although the Department's regulations speak of the evaluation of all income except that specifically excluded, they also require an assessment regarding the actual availability of income and the establishment of a net countable amount. See W.A.M. § 2250, above. From those phrases, it must be concluded

that the Department's regulations themselves do not require the mechanical inclusion of all money coming in to a family as income but rather expect that a real evaluation as to its availability and value to the petitioner will be made.

The Department argues that HHS has interpreted its own regulations (set forth above) as requiring the inclusion of all loans not specifically exempted in its regulations and that the Department is bound by that interpretation. The Department relies on two cases in support of this proposition, Wise v. Iowa Dept. of Human Services, 424 N.W. 432 (1988) and Danner v. Division of Family Services 772 S.W. 2d 868 (1989). In Wise, the Iowa Supreme Court determined that a state regulation requiring the inclusion of all income except that specifically exempted was not inconsistent with federal law and regulation, when it was used to include as income educational loans to a graduate student to the extent that those loans were not used for educational expenses. The Iowa Court concluded that 45 C.F.R. § 233.20(a)(4)(ii)(d) and (a)(3)(iv)(B) cited above, by specifically excluding certain student loans was intended by HHS to specifically include student loans which did not meet that definition. In Danner, a Missouri appeals Court concluded that state policy which included as ANFC income the proceeds of student loans to graduate students after educational expenses were deducted violated the federal regulations (no explanation was given) but that those amounts could be included as a resource because the federal

statutes and regulations at 42 U.S.C. § 602 and 45 C.F.R. § 233.20 have no language excluding all loans of whatever type from consideration in determining eligibility.

While the poorly explained rationale of Danner is of little use in determining the validity of the Department's arguments, the Wise decision is really useful only in determining the treatment of student loans. That decision is limited to interpreting federal regulations which discuss the treatment of loans made for educational purposes and do not purport to deal with loans in general. As neither decision analyzes why loans in general should or should not be excluded as income, those decisions cannot be dispositive of the outcome.

On the other hand, the petitioner relies on a case, Mangrum v. Griepentrog, 702 F. Supp. 813 (1988), in which the Nevada federal district court found an HHS directive to the state of Nevada to consider all non-governmental loans as income to be inconsistent with the statute. HHS in Mangrum had interpreted 20 C.F.R. § 233.20 (a)(3)(iv)(B), cited above, which specifically excludes certain parts of educational loans, as implying that all other loans of any type are included as income. In Mangrum, the petitioner had received personal loans to cover her expenses while awaiting an ANFC eligibility determination. When the petitioner was awarded benefits, the amount of her loans were deducted. The net result of that action was the petitioner had her

benefits reduced and had to immediately repay the loans. The Court characterized this outcome as in effect costing the petitioner twice the amount of the loan. The federal Court decided that HHS's interpretation violated the federal statute and its own regulations which require that income and resources be reasonably evaluated when determining an individual's need. 45 C.F.R. § 233.20(a)(3)(ii)(E). The Court also rejected as mere dicta HHS's contention that the Supreme Court in Lukhard v. Reed 481 U.S. 368 (1987) in fact had adopted a definition of income for ANFC purposes as "anything which comes in" and instead adopted a definition actually used by the plurality and suggested as a standard by the dissent that income actually be that which represents a "financial gain". The federal Court concluded that loans which must be repaid were encumbered and did not represent an increase in income. The Court concluded "Loans, since they must be repaid, are conceptually distinct from income."

In both common and legal usage, the definition of income does not encompass loans. Id. at 818 The Court found that Congress in enacting other legislation has traditionally understood that loans were not income (i.e. for tax purposes) and that nothing in the ANFC statutes explicitly changed that understanding and that it would be unjust to so read the statute. Finally, the Court distinguished the specific different treatment of educational loans by the other state courts as probably being based upon the long term nature of their repayment periods.

Basically what the federal Court has decided in Mangrum is that loans, other than long term educational loans which are specifically dealt with by regulation, must be analyzed in terms of their actual benefit to the ANFC recipient before they can be considered income and used to reduce assistance payments. In reality, the Court's opinion just more precisely defines the meaning of "availability", that time-tested touchstone of income evaluation which is explicitly adopted in Vermont's regulations and approved by State Supreme Court decision. Young v. Department of Social Welfare, 139 Vt 420 (1981) (W.A.M. 2250, above) Any assessment of actual availability under the regulations requires also that money coming in provides a real gain to the family which can assist them in meeting their own needs. Money which can be used for a short time but which must be soon repaid does not provide a real gain to the family or make extra money available in any long term sense to meet real needs. It thus should not be included as income.

Applying that principle to the matter at hand is an impossible task because the amount of financial gain from the interim benefits cannot yet be determined. To be sure, the Court has awarded these interim benefits to the petitioner for the specific purpose of supporting his family and he is free to use the money for that purpose. What is not known yet, however, is whether the petitioner will have to pay that money back in such a way that it will seriously affect his ability to support his family, or whether he will

either be awarded the money permanently or have the debt cancelled or compromised in such a way that repayment poses little financial risk to his family (i.e., small payments over a long term). While speculation may run rampant as to how that will happen, it is unjust to the petitioner to decide that he has or has not received a financial gain until the determination has been finally made. At that time, his situation should be analyzed and the Department should determine, using the above principles, whether income was actually available to him for ANFC purposes. To do so now is premature.

The Department may be absolutely right that a determination of gain at a later time when the money is spent and the petitioner may have no other resources<sup>1</sup> could fall particularly hard on him then. Presumably, the petitioner, who is represented by counsel, understands that risk. However, as long as he has money which could possibly be reclaimed at the conclusion of the Court proceedings, he should have the option of not having that counted to him as income.<sup>2</sup> The Department's decision that the interim benefits are currently countable income is reversed.

FOOTNOTES

<sup>1</sup>For example, if the petitioner is determined to be ineligible for benefits but the Social Security Administration decides to cancel the overpayment, the Department could determine that he had a gain and find that he was overpaid even though the family has spent the interim benefits and has no further benefits coming in.

<sup>2</sup>This might be a different matter if the Department could guarantee to the petitioner that he could receive retroactive ANFC benefits if the loan were called in later. However, the Department is probably without authority to make that guarantee.

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