DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-210086 **DATE:** July 28, 1983

MATTER OF: Social Security Administration--Debt Collection

DIGEST: 1. Social Security Administration is not bound by Federal Claims Collection Standards (FCCS) requiring administrative offset "in every instance in which this is feasible," in light of section 8(e) of the Debt Collection Act of 1982, 31 U.S.C. § 3701(d). The FCCS, 4 C.F.R. Chapter II, to the extent they implement the 1982 legislation do not govern the use of administrative offset to collect debts arising under the Social Security Act. However, Social Security Administration may continue to use administrative offset to collect such debts when authorized by other statutes or principles of common law, and should look to FCCS for guidance to the extent it has not issued its own offset regulations.

2. Whether collection by administrative offset under the Federal Claims Collection Standards, 4 C.F.R. Chapter II, is "feasible" lies within the agency's exercise of sound discretion, on a case-by-case basis. The term is not synonymous with "possible." Agencies should consider not only whether administrative offset can be accomplished, both practically and legally, but also whether it is best suited to further and protect the Government's interests. In certain circumstances, agencies may give due consideration to the debtor's financial condition, and are not required to use offset in every instance in which there is an available source of funds, for example, where those funds are payments under a benefit program designed to avoid or alleviate financial hardship.

3. Under the Federal Claims Collection Standards, 4 C.F.R. Chapter II, when determining whether to compromise claims, or suspend or terminate collection activity, agencies should exercise sound discretion, and may consider, among other factors, the financial condition of the debtor. The fact that the debtor is receiving Government benefits is merely one more factor to be considered when determining whether compromise, suspension, or termination (or some other action) best serves and protects all of the Government's interests.

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The Associate Commissioner for Management, Budget and Personnel, Social Security Administration (SSA), Department of Health and Human Services, has requested an interpretation of those provisions of the Federal Claims Collection Standards (FCCS), 4 C.F.R. Parts 101-105, which relate to the suspension or termination of collection action on claims arising under the Social Security Act. The specific question presented is whether suspension or termination is authorized where an individual is in "current benefit status," regardless of the hardships created by making deductions from his benefits. The issue arises because section 102.3 of the FCCS requires collections by administrative offset in every instance in which this is feasible. For the reasons discussed below, we think SSA does have that authority, because SSA is not subject to the administrative offset section of the FCCS.

BACKGROUND

SSA recently published proposed amendments to its regulations implementing its statutory authority (e.g., 42 U.S.C. § 404(b)) to waive the recovery of overpayments. 48 Fed. Reg. 6354, February 11, 1983. The proposed regulations, which would amend 20 C.F.R. Parts 404, 410, and 416, would impose a 60-day time limit on requesting waiver. Untimely requests would be considered only upon a showing of good cause for the lateness. According to SSA's Supplementary Information statement:

> "In the event that the individual does not request waiver timely or a timely waiver request is denied, the individual will no longer be entitled to relief pursuant to the waiver provisions. If his or her financial situation changes for the worse, relief from repayment may be considered under the general rules regarding collection of Federal debts (Federal Claims Collection Standards), through suspension or termination of collection activity, reduction of the rate of recovery, or by compromise of the amount to be repaid." 48 Fed. Reg. 6355.

The above passage reflects the approach the SSA Debt Management Staff would like to follow. The Debt Management Staff believes that "temporary suspension or termination of collection activity would be possible under the FCCS so long as the rights and interests of the Government are protected, even if the individual is currently receiving benefits."

However, internal SSA deliberations in connection with the proposed waiver regulations have generated some doubt as to whether the FCCS permit the approach desired. The doubt stems from two factors. First, 4 C.F.R. § 102.3 provides that "collections by offset

will be undertaken administratively * * * on claims which are liquidated or certain in amount in every instance in which this is feasible." If "feasible" is construed as "possible," then offset is arguably required whenever there is a source of funds available, and this will always be the case when the debtor is in current payment status under a benefit program, regardless of the debtor's financial condition. Second, it is possible to read the regulations as precluding suspension or termination of collection action based on financial "hardship," and as precluding even the consideration of suspension or termination if there is an available source of funds for offset. Although this portion of the FCCS does not apply to SSA debts, this decision will attempt to clarify these issues as guidance to SSA in developing its own regulations.

CLAIMS COLLECTION LEGISLATION AND REGULATIONS

The first attempt to legislatively establish a Government-wide debt collection program was the Federal Claims Collection Act of 1966, now codified at 31 U.S.C. § 3711. The 1966 legislation (1) directed Federal agencies to pursue the collection of debts owed or referred to them, (2) authorized compromise, suspension, and termination within limits, and (3) authorized the General Accounting Office and the Department of Justice to jointly issue implementing regulations. The joint regulations (FCCS) are found at 4 C.F.R. Parts 101-105.

In October 1982, Congress enacted the Debt Collection Act of 1982 (Pub. L. No. 97-365, 96 Stat. 1749) to give the Government increased authority in the debt collection area and to ensure basic due process protections for debtors. However, by virtue of section 8(e) of the 1982 Act, codified at 31 U.S.C. § 3701(d) (Pub. L. No. 97-452, January 12, 1983, 96 Stat. 2467, 2470), the authorities newly granted by the Debt Collection Act of 1982, with a few exceptions, do not apply to claims arising under or amounts payable under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States.

The 1982 Act necessitated substantial amendments to the FCCS. The proposed revision to the FCCS was published for comment on May 24, 1983 (48 Fed. Reg. 23249). In view of 31 U.S.C. § 3701(d), supra, some portions of the FCCS will apply to debts arising under the Social Security Act, while others will not. See proposed 4 C.F.R. § 102.19, 48 Fed. Reg. 23254. (The proposed regulations are, of course, subject to change upon being issued as final regulations.) References to the FCCS will be to the 1982 edition, unless otherwise specified.

ADMINISTRATIVE OFFSET

It has long been the Government's position, even prior to any of the debt collection legislation, that except for offset against the salary of Government employees and certain other exceptions not relevant to this discussion, the common law right of offset available to a private creditor applied equally to the Government. E.g., United States v. Munsey Trust Co., 332 U.S. 234, 240 (1947); 1 Comp. Gen. 605 (1922); 3 Comp. Gen. 1006 (1924). In apparent recognition of this, the Federal Claims Collection Act of 1966 did not mention offset. The FCCS, statutory regulations under the 1966 legislation, included administrative offset as a key element of the Government's debt collection program. Thus, 4 C.F.R. § 102.3(a), noted previously, directed agencies to use offset whenever "feasible."

The Debt Collection Act of 1982 includes a provision, section 10, codified at 31 U.S.C. § 3716, dealing with administrative offset. Section 10, however, does not apply to claims arising under the Social Security Act. 31 U.S.C. § 3701(d), supra. This does not mean that SSA lacks offset authority. We view section 10 as not creating new authority but as merely adding certain requirements and safeguards to authority that already existed. See B-209669, December 17, 1982 (letter to Justice Department). Also, section 10 (and therefore the FCCS to the extent they implement section 10) would not apply to SSA when acting under its common law authority or its separate statutory offset authority such as 42 U.S.C. § 404(a). See 31 U.S.C. § 3716(c)(2). Thus, 31 U.S.C. § 3716 and the FCCS do not govern the use of administrative offset to collect debts arising under the Social Security Act,[1/] and SSA is free to develop its own regulations dealing with administrative offset.

Nevertheless, the FCCS are of some relevance and SSA should look to them for guidance to the extent it has not developed its own offset regulations. 4 C.F.R. § 101.4. See 62 Comp. Gen. ____ (B-210998, June 22, 1983). Therefore, while the directive to use administrative offset "whenever feasible," retained in the proposed FCCS revision, no longer applies to debts arising under the Social Security Act, a brief discussion of our approach under that provision may be useful.

In our opinion, the term "feasible," as used in 4 C.F.R. § 102.3, should not be construed as synonymous with "possible." We

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[1/] One provision of the proposed administrative offset regulations, 4 C.F.R § 102.3(e), 48 Fed. Reg. 23252, dealing with offset against judgments, will remain applicable because it is based on independent statutory authority.

have held that the determination of whether collection by offset is "feasible" lies within the agency's exercise of sound discretion. B-167635, November 18, 1975. When determining whether setoff is feasible, agencies should consider not only whether offset can be accomplished, both practically and legally, but also whether it is best suited to further and protect the Government's interests. Id.

In making this determination, we think it is legitimate for the agency to take the debtor's financial condition into consideration, especially where the debtor is a beneficiary of a Government program designed to avoid or alleviate financial hardship and there is no indication of fraud or willful misconduct. We do not believe that agencies are required to use administrative offset against Government beneficiaries if to do so would tend to substantially interfere with or defeat the purposes of the applicable benefit program. Cf., B-209669, December 17, 1982; B-171019, December 14, 1976; B-182423, November 25, 1974. See also, Bell v. New Jersey, No. 81-2125, slip op. at 9 n.8 (U.S. May 31, 1983). Normally, agencies should determine whether administrative offset is feasible and in the Government's best interests on a case-by-case basis. Moreover, agencies should also exercise some degree of reasonable discretion in setting the amount and duration of the deductions to be made, if and when it is determined by the agency that offset should be effected. Cf., 43 Comp. Gen. 524 (1964); 34 Comp. Gen. 504, 509 (1954).

SUSPENSION, COMPROMISE, AND TERMINATION

The preceding discussion of the offset requirement is important because if offset were required whenever "possible," there would never be an occasion to consider suspension, compromise, or termination when the debtor is in current payment status under an SSA benefit program.

In contrast with administrative offset, SSA's authority to compromise, or to suspend or terminate collection action on debt claims derives from the Federal Claims Collection Act of 1966 and is not affected by the Debt Collection Act of 1982. Therefore, the FCCS, as they relate to these three items, will continue to apply to Social Security Act debts. SSA recognizes this, as evidenced by the Supplementary Information statement to its proposed waiver regulations, quoted earlier in this decision.

A major area of concern to SSA is its authority to temporarily suspend collection action or enter into repayment agreements which provide for deferred payment by resort to mutually agreeable periods of little or even no payment, followed by the initiation and completion of repayment in more substantial installment or lump-sum

amounts. Such suspensions and repayment agreements would be undertaken based upon a reasonable expectation in the particular case that the financial condition of the indebted beneficiary will significantly improve in the not-too-distant future.

In our opinion, the FCCS do not preclude the suspension of collection activity based on the temporary financial condition of the debtor. The FCCS provide that "[c]ollection action may be suspended temporarily on a claim when the debtor owns no substantial equity in realty and is unable to make payments on the Government's claim or effect compromise thereof at the time, but his future prospects justify retention of the claim for periodic review and action * * *." 4 C.F.R. § 104.2. In our view, this section authorizes agencies to temporarily suspend collection activity due to the hardship condition of the debtor, in conjunction with the reasonable anticipation that the debtor's financial condition will improve in the not-too-distant future. This could be authorized even though the debtor is currently receiving Government benefits. Moreover, the FCCS also authorize agencies to enter into deferred payment agreements with debtors. Section 102.10 of the FCCS specifically provides that "[t]he size and frequency of such installment payments should bear a reasonable relationship to the size of the debt and the debtor's ability to pay." Cf. 34 Comp. Gen. 504, 509 (1955); 43 Comp. Gen. 524 (1964). Therefore, repayment agreements like those described above are within the scope of agency discretion as contemplated by the FCCS. The proposed amendments to the FCCS are more specific in this regard. See proposed 4 C.F.R. § 104.2, 48 Fed. Reg. 23255-56.

As is always the case, agencies should adhere to a "rule of reason" when exercising discretion under the FCCS. Whatever action is taken must be calculated to adequately protect the Government's interests. For example, we do not believe that it would be appropriate to enter into a repayment agreement or to temporarily suspend collection if the agency lacked reasonable grounds to support the expectation that the debtor's financial condition will improve in the not-too-distant future. Nor should such steps be taken in the absence of the debtor's demonstration that immediate repayment, whether voluntary or involuntary, would impose a real and unreasonable hardship.

At the same time, such activity need not be undertaken when compromise under the FCCS seems more appropriate. Just as explained above with regard to suspension and offset, agencies should not automatically assume that compromise may not be predicated upon the debtor's financial condition just because the debtor is receiving Government benefits. Section 103.2 of the FCCS makes it clear that claims may be compromised if the Government cannot collect the full

amount of the debt because of "the debtor's inability to pay the full amount within a reasonable time." See also 62 Comp. Gen. ___ (B-210998, June 22, 1983). In this regard, that section specifies a variety of economic and non-economic criteria to be considered in determining the debtor's ability to repay the debt. Should the agency conclude that the expectation of improvement in the debtor's financial position is too speculative or too distant in the future to justify a repayment agreement or a temporary suspension of the kind described above, the agency should explore compromise. The fact that the debtor is receiving Government benefits is merely one more factor to be considered, under the criteria given in section 103.2, when determining whether and how much the debtor is reasonably able to repay within a reasonable time, and whether compromise is appropriate in the particular case.

Similarly, although termination of collection action should be viewed as a "last resort," agencies should not construe section 104.3(a) of the FCCS (which states that collection may be terminated when "it becomes clear that the Government cannot collect or enforce collection of any significant sum") to mean that termination is never appropriate when the debtor is receiving Government benefits. Agencies should exercise sound discretion to determine both whether and how much each individual debtor is reasonably able to pay, and how much constitutes a "significant sum." Section 104.3 provides a sampling of the criteria to be used in making those determinations. As noted above with regard to both compromise and suspension, the fact that the debtor is receiving Government benefits is merely one more factor to be considered when ascertaining the "debtor's inability to pay," and whether termination best serves and protects all of the Government's interests. 4 C.F.R. § 104.3(a).

In conclusion, for the reasons discussed above, SSA's proposed approach as reflected in the February 11, 1983, Federal Register is not legally objectionable nor inconsistent with the FCCS. We would suggest that SSA closely monitor its experience under the new waiver regulations. If it is determined that a substantial proportion of untimely waiver requests would qualify for waiver but for the lateness, it might then be desirable to re-examine the time limit.

Milton J. Socolar

for Comptroller General
of the United States