



Pension Benefit Guaranty Corporation  
1200 K Street, N.W., Washington, D.C. 20005-4026

December 13, 2013



Re: Appeal 2012- [REDACTED] Case #196603, Bethlehem Steel Corporation Pension Plan

Dear [REDACTED]

The Appeals Board has reviewed your appeal of PBGC's August 24, 2010 determination of your PBGC-payable benefit under the Bethlehem Plan. For the reasons discussed below, we found no basis for changing PBGC's determination that the Plan's Surviving Spouse Benefit must be taken into account in determining your Maximum Guaranteeable Benefit. We further found no basis for changing your PBGC-payable benefit amounts. However, we did change PBGC's methodology for computing any amounts payable to your surviving spouse under the Plan's separate Surviving Spouse Benefit.

**PBGC's Determinations and Your Appeal**

On August 12, 2010, PBGC determined that you are entitled to a PBGC benefit of \$1,706.96 per month, payable as a Straight Life Annuity with a Five-Year Certain feature and a separate Surviving Spouse Benefit. PBGC's letter also said that (1) although the amount you are entitled to receive is higher than the estimated benefit you had been receiving (\$1,659.59), you were previously overpaid (then equal to \$53,094.61), and (2) your future monthly payment will be reduced to \$1,536.26 until you have repaid the overpayment, without interest. PBGC included a benefit statement showing the information PBGC used to calculate your benefit.

On August 24, 2010, PBGC issued a corrected determination that changed your overpayment balance from \$53,094.61 to \$33,593.07.

After receiving a number of filing extensions so that you could obtain additional information about your PBGC-payable benefit under the Freedom of Information Act ("FOIA"), you filed your appeal on December 22, 2011. You specifically disagreed with PBGC's recoupment of the pension benefits paid to you in the months immediately after PBGC terminated the Bethlehem Steel Plan and took over as trustee. You stated that the eight-year delay in determining your final benefit amount is unreasonable.

You also disagreed with PBGC's treatment of the "free surviving spouse benefit" as a joint and survivor annuity that results in a reduction to your benefit and to the benefit payable to your wife after your death. You further noted that, while it is understandable that PBGC must take surviving spouse benefits into account in determining its potential liability, calculating benefits actually payable to participants is a different matter. You said, in particular, that after an eight-year delay, PBGC should have used then-current ages for you and your spouse, instead of your ages as of the Plan's 2002 termination date, to adjust for the surviving spouse benefit. For these reasons, you believe both the recoupment and free surviving spouse benefit calculations are contrary to PBGC's fiduciary obligations under ERISA and are arbitrary and capricious. You also cited a number of Federal court decisions you believe support your appeal.

Lastly, you discussed a prior Appeals Board decision that provided a participant in the Northwestern Steel and Wire Company Plan the opportunity to waive that Plan's Surviving Spouse Benefit. Your appeal asked for the same opportunity.

### **Background**

The Bethlehem Plan terminated, effective December 18, 2002, without sufficient assets to provide all benefits PBGC guarantees under Title IV of ERISA. PBGC became the Plan's trustee on April 30, 2003. Because of legal limits under ERISA and PBGC's regulations, the benefits PBGC guarantees may be less than the benefits a pension plan would otherwise pay. One of these limits, the "Maximum Guaranteeable Benefit" limit, applies to your benefit.

The records PBGC's auditors obtained from the former Plan administrator show that (1) you were born [REDACTED] (2) your wife was born [REDACTED] (3) you were hired by Bethlehem Steel on [REDACTED] 1979, and (4) you were actively employed there when the Plan terminated on December 18, 2002. As of that date, you had [REDACTED] years of continuous service and average monthly earnings of \$12,417.60. Effective [REDACTED] 2003, you retired under the 70/80 Retirement provisions of the 1999 Steel Division component of the Bethlehem Plan (nonrepresented salaried employees). You elected, with your wife's consent, to receive your benefit in the Plan's Straight Life Annuity form, which includes a Five-Year Certain feature and a separate Surviving Spouse Benefit.

The records further show that you received a "Special Payment" of \$27,801.72 from the Bethlehem Plan in [REDACTED] 2003, covering the period from [REDACTED] 2003 through [REDACTED] 2003. Beginning [REDACTED] 2003, the Plan began paying you a regular Plan benefit of \$3,706.69 as a Straight Life Annuity with a Five-Year Certain feature and a separate Surviving Spouse Benefit.

### **Your Bethlehem Plan Benefit**

Under the 1999 Steel Plan for nonrepresented salaried employees, your benefit is the highest of the amounts calculated under four different formulas: the Percent Pension formula, the Minimum Pension formula, the Total Retirement Benefit ("TRB") formula and the Lifetime Minimum Pension formula. Also, because you elected to receive your Retirement Account Balance in a lump sum, your monthly Plan benefit must be reduced by the \$126.08 per month annuity value of your Retirement

Account Balance (the "RAB offset"). The calculations below show your Plan benefit under each formula as a Straight Life Annuity with a Five-Year Certain feature and a separate Surviving Spouse Benefit:

*Percent Pension Formula:*

$$(1.2\% \times \text{yrs.} \times \$12,417.60) + (1.5\% \times \text{yrs.} \times \$12,417.60) = \$3,600.48$$
$$\$3,600.48 \text{ per mo} - \$126.08 \text{ [RAB offset]} = \$3,474.40 \text{ per month}$$

*Minimum Pension Formula:*

$$(\$26.50 \times \text{yrs.}) + (\$28.00 \times \text{yrs.}) = \$630.74$$
$$\$630.74 \text{ per mo} - \$126.08 \text{ [RAB offset]} = \$504.66 \text{ per month}$$

*TRB before age 62:*

$$(1.575\% \times \text{yrs.} \times \$12,417.60) = \$4,562.82$$
$$\$4,562.82 \times 0.8400 \text{ [early retirement]} = \$3,832.77$$
$$\$3,832.77 - \$126.08 \text{ [RAB offset]} = \$3,706.69 \text{ per month}$$

*TRB after age 62:*

$$\$4,562.82 - \$126.08 \text{ [RAB offset]} = \$4,436.74$$
$$\$4,436.74 - \$559.19 \text{ [Social Security Offset]} = \$3,877.55 \text{ per month}$$

*Lifetime Minimum Formula:*

$$\$2,000 - \$126.08 \text{ [RAB offset]} = \$1,873.92 \text{ per month}$$

Your Plan benefit is highest under the TRB Pension Formula both before and after age 62.

**Surviving Spouse Benefit ("SSB")**

Under the provisions of Plan section 4 that apply to nonrepresented salaried employees, an eligible surviving spouse is entitled to a separate Surviving Spouse Benefit beginning the first of the month following the participant's death and continuing for the life of the spouse. If an eligible surviving spouse is younger than age 60 at the participant's date of death, the SSB payable until he or she reaches age 60 is equal to the greater of 50% of the participant's benefit, or \$140.00 per month (Plan section 4.2). When an eligible spouse is or reaches age 60, Plan section 4.3(d) requires that the pre-age 60 monthly SSB amount "be reduced by 50% of the amount of the widow's or widower's benefit ['Widow's Benefit'] to which the surviving spouse is, or upon application would be, entitled for such month based on the [Social Security] law in effect at the time the Surviving Spouse Benefit first becomes payable . . ." but not below \$90 per month. PBGC generally refers to the post-age 60 reduction described above as the "Social Security Offset."

Please note that the Social Security Widow's Benefit used to determine the post-age-60 offset to the Plan's SSB is calculated in accordance with Plan provisions and based on the participant's earnings with Bethlehem.

Maximum Guaranteeable Benefit (MGB)

Section 4022(b)(3) of ERISA provides that PBGC's guarantee of a participant's plan benefit cannot exceed a specified dollar amount payable in the form of a Straight Life Annuity at age 65. For a plan like the Bethlehem Plan with a termination date in 2002, the MGB is \$3,579.55 per month in the form of a Straight Life Annuity for a participant who is age 65 on the Plan's termination date. Please note that PBGC can guarantee no more than a participant's MGB. The value of the MGB payable to a particular participant whose benefit form includes a survivor benefit and a Five-Year Certain feature is equivalent to the value of the MGB payable to that participant if his or her benefit form were a Straight Life Annuity with no survivor benefits.

Because you began receiving your benefit before age 65 and your regular Plan benefit is in the form of a Straight Life Annuity with a Five-Year Certain feature and a separate Surviving Spouse Benefit ("SSB"), PBGC must adjust the \$3,579.55 amount to take into account your age and your benefit form. PBGC's benefits regulation (*Benefits Payable in Terminated Single-Employer Plans*, 29 Code of Federal Regulations §§ 4022.22 and 4022.23) sets forth the rules for adjusting the MGB.

Age Adjustment Factor

The MGB for a participant who begins receiving a benefit before age 65 must be reduced to reflect the number of whole months between (A) the later of the participant's age at the Plan's termination date and his age at retirement, and (B) age 65. In your case, the later date in (A) is your retirement date, [REDACTED] 2003. On that date, you were age [REDACTED] years, [REDACTED] months and [REDACTED] days, with [REDACTED] whole months remaining until you reached age 65. Under PBGC's benefits regulation, this reduction is equal to 7/12 of 1% for each of the first 60 months, 4/12 of 1% for each of the next 60 months, and 2/12 of 1% for each of the next 120 months. Thus, your age adjustment factor is equal to:

[REDACTED] 0.5200

Form Adjustment Factor

As you noted in your appeal, the Bethlehem Plan does not reduce your benefit to provide for the Five-Year Certain feature or the separate SSB. However, PBGC's benefits regulation requires PBGC to account for their values in the calculation of the MGB. PBGC's Actuarial Technical Manual establishes procedures for adjusting an SSB and accounting for the value it adds to a participant's Straight Life Annuity.

Five-Year Certain Feature

To adjust for the Certain feature, the MGB must be reduced by 1/24 of 1% for each of the first 60 months and 1/12 of 1% for each month beyond 60 months for each whole month remaining in the certain period after the later of the Plan termination date or the participant's retirement date. Under the Bethlehem Plan, your Five-Year Certain benefit ended [REDACTED] 2008, which is 60

whole months after your [REDACTED] 2003 retirement date. Your period-certain adjustment factor is:

$$1.0 - (1/24 \times 0.01 \times 60) = 1.0 - 0.0250 = 0.9750$$

### Surviving Spouse Benefit

To adjust the MGB for the Plan's SSB, PBGC must compute an equivalent Joint and Survivor Annuity. As you know, PBGC uses the Weighted Average Method ("WAM"), which calculates the ratio of the SSB to the total benefit payable to the participant. To determine this ratio (which PBGC calls the "p%"), PBGC relies on actuarial factors such as age and mortality for three periods of the spouse's lifetime. As instructed by the Actuarial Technical Manual, PBGC applies these actuarial factors from the later of the Plan's termination date and the participant's retirement date, and adjusts the participant's MGB accordingly.

Because PBGC's benefits regulation requires that PBGC calculate your MGB as of your date of retirement, the value of the SSB is necessarily calculated before the amount of the SSB that would actually be paid to your spouse under the Plan can be determined. This is because the Social Security Offset in the SSB formula increases during your retirement because the Offset amount depends on (1) an early-retirement factor that is calculated as of the date the Widow's Benefit is first payable, and (2) the cost-of-living adjustments ("COLAs") the Social Security Administration applies each year to your Social Security benefit. As a consequence, the Social Security Offset increases each month between a participant's retirement and his or her death.

An SSB is first payable on the first day of the month following a participant's death. Under the WAM, PBGC calculates a weighted-average SSB that looks at three time intervals. The First Interval includes all SSB start dates before the spouse reaches age 60 (i.e., the earliest age a Widow's Benefit is payable under the Social Security Act). The Second Interval includes all SSB start dates between the spouse's age 60 and the age at which an unreduced Widow's Benefit is first payable (age 66 for [REDACTED]). The Third Interval includes all SSB start dates after the age at which an unreduced Widow's Benefit is first payable.

PBGC uses the GAM83 Unisex Mortality table specified in Rev. Rul. 95-5, 1995-1 C.B. 80, to calculate the probability that your spouse will start receiving her SSB (in other words, the probability that you will die) in each of the three intervals. Thus, "Prob1" is the probability she starts receiving her benefit during the First Interval; "Prob2" is the probability she starts receiving her benefit during the Second Interval; and "Prob3" is the probability she starts receiving her benefit during the Third Interval.

Under PBGC's WAM, after calculating the above probabilities, PBGC calculates the median SSB that would be payable to an eligible spouse if the spouse's SSB started during the each of the three intervals. Thus, "Med1" is the median benefit your wife would receive during her lifetime if she started receiving her benefit during the First Interval; "Med2" is the median benefit she would receive during her lifetime if she started receiving her benefit during the Second Interval; and

"Med3" is the median benefit that she would receive during her lifetime if she started receiving her benefit during the Third Interval.

The weighted-average SSB is the numerator of the p% ratio and is calculated as follows:

$$\text{Weighted-average SSB} = (\text{Prob1} \times \text{Med1}) + (\text{Prob2} \times \text{Med2}) + (\text{Prob3} \times \text{Med3})$$

As discussed above, in order to calculate the median SSB payable during each of the three intervals, PBGC must make an assumption regarding the COLAs that the Social Security Administration ("SSA") will apply to your Social Security benefit between your date of retirement and your date of death. For purposes of calculating the weighted-average SSB, PBGC predicted that all future annual COLAs would be 1.4%, which was the COLA in effect in December 2002 (the month in which the Plan terminated).

According to your appeal, PBGC should have determined your p% based on actuarial factors that applied at the time you received your benefit determination, which was several years after PBGC became the Plan's trustee. However, the p% represents the percentage that the SSB constitutes of a participant's *total* benefit payable after the later of a plan's termination date and a participant's retirement date. As a percentage of your total benefit, the p% must be based on actuarial factors and assumptions that applied when you began receiving benefit payments.

For a participant like you whose spouse is [REDACTED] years younger (based on "age nearest birthday" as of [REDACTED] 2003), a Straight Life Annuity with a Five-Year Certain feature and a separate SSB is actuarially equivalent to a Joint and 24.63% Survivor Annuity. The form adjustment factor for a Joint and 24.63% Survivor Annuity with 60 months' certain is 0.9029. Note that the 0.9029 form adjustment factor includes the period certain adjustment discussed on page 4 of this decision.

Using the factors shown above, your MGB is:

$$\begin{aligned} & \$3,579.55 \text{ [age-65 MGB]} \times 0.5200 \text{ [age adjustment]} \times 0.9029 \text{ [form adjustment]} \\ & = \$1,680.63 \text{ per month, as a Straight Life Annuity with a Five-Year Certain feature and SSB} \end{aligned}$$

### **SSB Payable To Your Spouse**

As discussed above, the Board found no basis for changing PBGC's determination that the SSB must be taken into account in determining your MGB. However, during the course of reviewing your appeal, the Board discovered a programming error in PBGC's formula for calculating the weighted-average SSB for participants whose benefits are affected by the MGB. Because of this programming error, PBGC's methodology for *paying* the SSB would produce SSB payments (as shown on the ARIEL print-out you received under FOIA) that result in a total benefit with an actuarial value that is less than the actuarial value of the MGB in the J&24.63%SA form.

Due to the programming error, when PBGC calculated your spouse's weighted-average SSB, PBGC effectively assumed that the SSA's future COLAs would be 1.4% per year until your spouse's

age 66 (the beginning of the Third Interval) and 0% thereafter, instead of 1.4% throughout the period between your date of retirement and your date of death. As a result of the programming error, PBGC used assumptions that resulted in a higher value for the weighted-average SSB.

We note that for persons like you whose benefit is affected by the MGB, PBGC would pay you and your spouse benefits that are actuarially equivalent to your MGB regardless of which COLA assumptions PBGC uses so long as it uses the same COLA assumption to calculate both your spouse's weighted average SSB and the actual SSB that your wife will receive if you die first.

Accordingly, to correct for the programming error in your case, the Appeals Board decided that PBGC will calculate the actual SSB your wife will receive using the same assumptions PBGC used to calculate your spouse's weighted-average SSB, namely, an annual 1.4% COLA from your retirement date to your spouse's age 66, and 0% from your spouse's age 66 to your date of death. Therefore, your spouse will receive a higher SSB than she would receive if the programming error were not corrected.

### **Your PBGC-Guaranteed Benefit**

To determine the PBGC-guaranteed benefit for a participant like you whose Plan benefit is not a level amount for life, PBGC must "levelize" or express the Plan's benefit amounts as a single unchanging monthly amount that includes the value of any survivor benefits. Your levelized Plan benefit is \$3,817.75 per month. The ratio of your MGB to your levelized benefit determines your PBGC Guarantee Ratio as follows:

$$\$1,680.63 \text{ [MGB]} \div \$3,817.75 \text{ [levelized benefit]} = 0.440214 \text{ [Guarantee Ratio]}$$

Thus, your PBGC-guaranteed benefit as a Straight Life Annuity with a Five-Year Certain feature (since expired) is:

- **\$1,631.74** per month (\$3,706.69 times 0.440214) from your retirement date through [REDACTED] 2008 (age 62), and
- **\$1,706.96** per month (\$3,877.55 times 0.440214) from [REDACTED] 2008 forward.

### **Your Benefit Form**

As discussed above, the benefit form you and your spouse elected when you retired is a Straight Life Annuity with a Five-Year Certain feature and a separate SSB. You said you and your spouse elected the Straight Life Annuity because it was the Plan's only higher-paying alternative to the Plan's automatic form for married participants (which is a Qualified Joint and 50% Survivor Annuity with a Five-Year Certain feature and a separate SSB). Now that the Plan is terminated and the SSB is no longer subsidized, you believe it is unfair to reduce your benefit to pay for a survivor benefit that neither you nor your spouse want.

You asked that, in the event the Appeals Board upholds your PBGC benefit determination, you be permitted to waive the SSB, with the consent of your spouse, and re-elect the Plan's Straight Life Annuity form without an SSB. You noted that the Board has granted such requests in the past. In particular, you cited a July 29, 2005 Appeals Board decision (the "NS&W Decision") for a participant in the Northwestern Steel & Wire Company Pension Plan (the "NS&W Plan").<sup>1</sup>

The NS&W Decision addressed an appeal by a participant who retired on June 1, 2001. Subsequent to that date, PBGC promulgated a regulation that provides that "once payment of a benefit starts, the benefit form cannot be changed."<sup>2</sup> The "change in benefit form" regulation became effective April 8, 2002. It has been PBGC's consistent practice to not allow participants with retirement dates after April 8, 2002 to change their benefit form after retirement. As noted above, you retired effective [REDACTED] 2003.

PBGC's policy allows participants to change their form of benefit in certain very limited circumstances.<sup>3</sup> None of the exceptions apply in your case. There is no exception that allows for waivers of the SSB by participants, such as you, whose PBGC benefit is affected by the MGB. Additionally, as discussed above, PBGC has clear procedures for determining the MGB when a benefit form includes the SSB common to many PBGC-trusted plans in the steel, chemical and auto industries. PBGC's procedures do not provide the participant the opportunity, with spousal consent, to waive the SSB.

The Appeals Board decided, based on PBGC's regulation, policies, procedures and its practice, that you should not be allowed to waive your SSB. The Appeals Board, in reaching this decision, concluded that its 2005 NS&W Decision is distinguishable from your appeal. While we are sympathetic to your situation, the Board found no basis for providing you the opportunity to change a benefit form that you validly elected.

### **Special Payment**

Section 3.2(a) of the 1999 Steel Plan (nonrepresented salaried employees) provides for a "Special Payment" to a 70/80 retiree as follows:

The amount of the Special Payment of a Participant who was entitled to receive a Vacation (hereinafter defined in paragraph 3.2(d)) in the year of retirement or who

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<sup>1</sup> The NS&W decision is published on PBGC's website at <http://www.pbgc.gov/Documents/apbletter/Decision--Northwestern%20Steel%20and%20Wire%20Co%202005-07-29.pdf>.

<sup>2</sup> PBGC has uniformly applied the rule in subsection 4022.8(d) both (1) to participants who went into pay status after their plan's termination date and (2) to participants who were in pay status on their plan's termination date and who requested a benefit form change from PBGC after the termination date.

<sup>3</sup> PBGC's Operating Policy 5.5-7 ("Annuity Benefit Forms") allows participants to change their benefit elections under certain limited circumstances. These limited circumstances, however, do not apply in your case.



would have been entitled to receive a Vacation in the year of retirement except for his retirement shall be calculated as follows:

- (1) The Participant's Vacation Pay (hereinafter defined in paragraph 3.2(d)) shall be multiplied by 13 (14 in the case of a Participant who is eligible for more than four (4) weeks of Vacation in the year of retirement).
- (2) The amount calculated in (1) above shall be reduced by all Vacation Pay the Participant received for such year of retirement.

Plan section 3.2(c)(2) provides that --

The Special Payment shall be payable with respect to the first three (3) full months following the month in which retirement occurs. Such Special Payment shall be made in a lump sum within the first full calendar month following the month in which retirement occurs . . .

Thus, the Special Payment is a single payment payable for the first three calendar months following the month in which retirement occurs.

Section 4022.3 of PBGC's benefits regulation provides that PBGC will guarantee the amount, as of the termination date, of a benefit provided under a plan if, among other things, the "benefit qualifies as a pension benefit as defined in § 4022.2 . . ." That section defines *pension benefit* as a "benefit payable as an annuity, or one or more payments related thereto, . . . which payments . . . provide a substantially level income to the recipient."

The Special Payment does not qualify as a pension benefit under the benefits regulation because it does not provide a "substantially level income." Consequently, although the Special Payment provision has been in the Bethlehem Pension Plan for more than five years, PBGC cannot guarantee it. However, PBGC can pay your PBGC benefit amount for each month of the 3-month Special Payment period. PBGC must recover as an overpayment the difference between the portion of your Special Payment paid from Plan funds (\$27,801.72) and your PBGC-payable benefit of \$1,631.74 per month for the 3-month Special Payment period.

### **Recoupment of Overpayments**

When PBGC becomes trustee of a terminated plan, PBGC continues to pay retirees on an estimated basis until PBGC can collect plan records, audit plan data and determine the benefits it can legally pay. This process can be complex and time-consuming, especially in a Plan like Bethlehem's with eight component plans, complex Plan provisions and more than 90,000 participants. If the estimated benefit amounts are too high, PBGC must recover the overpayments and does so by reducing the participant's future benefit, generally by not more than 10%, until the overpayment is repaid. PBGC does not charge interest.

Under section 4022.81(c)(1) of the benefits regulation, overpayments made on and after December 18, 2002, the date the Bethlehem Plan terminated, must be repaid. In calculating the \$33,593.07 overpayment amount shown on your August 24, 2010 benefit determination, PBGC assumed your benefit would decrease to the final amount on December 1, 2010. The table below shows that calculation. Please note that your final overpayment amount will be slightly lower because PBGC continued to pay you the \$1,659.59 per month estimated benefit while your appeal has been pending.

<i>When Paid</i>	<i>Amount Paid</i>	<i>PBGC-Payable Benefit</i>	<i>Monthly Over/(Under) payment</i>	<i>Months Paid</i>	<i>Overpayment/ Underpayment</i>
	\$27,801.72	\$1,631.74	\$26,169.98	1	\$26,169.98
	\$ 0	\$1,631.74	(\$ 1,631.74)	2	(\$ 3,263.48)
	\$3,710.71	\$1,631.74	\$ 2,078.97	7	\$14,552.79
	\$1,586.46	\$1,631.74	(\$ 45.28)	54	(\$ 2,445.12)
	\$1,659.59	\$1,706.96	(\$ 47.37)	30	(\$ 1,421.11)
<i>Net Overpayment through 11/12/2010</i>					\$33,593.06

As explained above, PBGC must reduce your future PBGC payments by not more than 10% until the overpayment is repaid (without interest). For your information, the Appendix to this decision more formally explains the legal basis for this requirement.

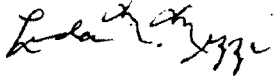
**Decision**

Having applied the terms of the Plan, the provisions of ERISA and PBGC regulations and policies to the facts in this case, the Appeals Board found no basis for changing PBGC's August 24, 2010 determination that (1) the Plan's Surviving Spouse Benefit must be taken into account in determining your Maximum Guaranteeable Benefit and (2) you are entitled (before recoupment) to a PBGC-payable benefit of \$1,631.74 per month from your [REDACTED] 2003 retirement date through [REDACTED] 2008 (age 62), and to \$1,706.96 per month (before recoupment) from [REDACTED] 2008 forward, payable as a Straight Life Annuity with a Five-Year Certain feature (since expired) and a separate Surviving Spouse Benefit. The Board further found that, in the event you predecease your spouse, PBGC will calculate the Social Security Widow's Benefit offset to her Surviving Spouse Benefit using an annual COLA assumption of 1.4% until her age 66, and 0% thereafter. This is the Agency's final decision on this matter and you may, if you wish, seek court review of this decision.

We will forward a copy of this decision to PBGC's Benefits Administration and Payment Department (BAPD), the group responsible for determining and paying benefits. BAPD will correct its records and implement this decision.

Thank you for your patience while we completed our review. If you have questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,



Linda M. Mizzi  
Member, Appeals Board

## LEGAL BASIS FOR RECOUPING OVERPAYMENTS

A primary PBGC mission is to provide timely and uninterrupted pension payments to participants and beneficiaries in terminated pension plans trustee by PBGC. To accomplish that mission, PBGC pays benefits on an estimated basis after a plan terminates and until final determinations of guaranteed benefits can be made. PBGC is committed to issuing its determinations of guaranteed benefits as quickly as possible. Nevertheless, the processes associated with trusteeship of a terminated plan and calculation of benefits are often time-consuming, not always smooth, and may result in the underpayment or overpayment of guaranteed benefits to some participants. The delays that sometimes occur, however, do not give rise to claims that recoupment of overpayments should be waived, as is explained below.

PBGC has determined that it is authorized to recoup payments that exceed a participant's or beneficiary's entitlement, and it is PBGC's policy to do so. Recoupment is made in accordance with PBGC's regulation 29 CFR § 4022, Subpart E, PBGC Recoupment and Reimbursement of Benefit Overpayments and Underpayments. The regulation provides that PBGC may recoup overpayments as future benefit reductions if the participant has received, at any time, benefits in excess of those which he or she is entitled to receive under Title IV of ERISA. The reduction in future benefit payments is determined actuarially and is generally limited to not more than 10 percent of the monthly guaranteed benefit. According to the regulation, benefit reductions will cease when the amount (without interest) of the net overpayment is recouped, and recoupment (as provided under the regulation) constitutes full repayment of the overpayment.

PBGC's recoupment regulation is consistent with the agency's authority under ERISA and a government agency's general authority to recover money owed to it. In U.S. V. Wurts, 303 U.S. 414, 416 (1938), the Supreme Court held that a government agency may recover funds owed to it after several years and stated, "The Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has "clearly manifested its intention" to raise a statutory barrier." Id. With respect to PBGC, Congress has not manifested any intent in ERISA or other statutes to bar the agency from collecting overpayments it has made to participants in terminated pension plans.

Courts have consistently upheld PBGC's recoupment authority. Most recently, in *Davis v. PBGC*, 2012 WL 1942678 (D.D.C. 2012), the United States District Court for the District of Columbia rejected a claim that PBGC was not permitted to recoup overpayments it issued to participants in the Retirement Income Plan for Pilots of US Airways, Inc. In upholding PBGC's authority to recoup overpayments, the court cited *Bechtel v. PBGC*, a previous case in which the court stated the following:

[I]t was inevitable under this statutory scheme that between the plan termination date and the date by which guaranteed levels had been calculated, payments would be made at a level other than the guaranteed level. By imposing limits on the amount the PBGC may pay, the statute necessarily anticipates that such overpayments will be recouped . . . Thus, finding no persuasive evidence to the contrary, we conclude that PBGC may recoup payments in excess of guaranteed levels. 781 F.2d 906, 907 (D.C. Cir. 1986).

As this statement indicates, the statutory scheme Congress created under Title IV of ERISA envisions that PBGC may collect overpayments it issues to participants. Furthermore, even when PBGC has delayed in issuing formal benefit determinations and recouping overpayments, "Congress did not intend such delays . . . to create a windfall for some ERISA beneficiaries at the expense of others and the guaranty system as a whole." *Id.* Therefore, PBGC may recoup benefit overpayments, even years after they have been made.

Some participants have questioned whether PBGC may recoup benefit overpayments after periods of substantial delay. For example, in *Pineiro v. PBGC*, 318 F. Supp.2d 67 (S.D.N.Y. 2003), a group of plan participants claimed that PBGC's recoupment of their benefits violated the agency's fiduciary duties under ERISA. The court rejected the participants' claim. It noted that PBGC is "trustee of hundreds of terminated plans" and must balance scarce resources in administering those plans. *Id.* at 90. Therefore, the court did not find that PBGC's eight year delay in issuing formal benefit determinations "was necessarily unreasonable in light of the multitude of complex tasks involved," and it held that PBGC's delay was not a breach of fiduciary duty under ERISA. *Id.*

In *Szydlowski v. PBGC*, 2006 WL 903246 (E.D. Mo. 2006), a participant raised a similar claim that PBGC's recoupment of his benefit was a breach of fiduciary duty under ERISA. The court rejected the participant's argument. Since PBGC recoups a maximum of ten percent of a participant's monthly benefit payments, without interest, the court concluded that PBGC's recoupment was the equivalent of providing the participant with a no interest loan for several years. It found that such actions do not harm the participant, and therefore, could not constitute a fiduciary breach. *Id.* at \*8.

Based on the above, PBGC has authority to recoup overpayments made to participants and beneficiaries.