

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Phyllis Harris,

Petitioner.

v.

Social Security Administration.

Docket No. C-11-532

Decision No. CR2466

Date: November 23, 2011

**DECISION**

Petitioner, Phyllis Harris, is indebted to the United States in the amount of \$3,745.40, plus any interest, penalties, fees, and costs and less any amounts already collected. The debt may be collected by administrative wage garnishment (AWG), by administrative offset, or in any other manner permitted by law.

**I. Jurisdiction**

On behalf of the Department of the Treasury (Treasury),<sup>1</sup> Progressive Financial Services, Inc. (Progressive) issued a "Notice of Intent to Initiate Administrative Wage Garnishment Proceedings," dated April 28, 2011 (Notice), informing Petitioner that she was indebted to SSA in the amount of \$6,721.41. The Notice advised Petitioner that, if she did not pay her debt or enter a repayment plan by May 28, 2011, Treasury would issue a wage garnishment order to Petitioner's employer and deduct up to 15 percent from her disposable pay, per pay period, until the debt is paid in full. The Notice advised Petitioner that she had the right to inspect records related to the debt and to request a

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<sup>1</sup> Progressive is a debt collection company used by Treasury to collect this debt.

hearing by May 13, 2011. SSA Exhibit (SSA Ex.) 9. On May 25, 2011, Petitioner requested a hearing. SSA Ex. 10.

On June 20, 2011, the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB) received Petitioner's hearing request. Edwina Bailey, Financial Management Analyst of SSA's Debt Management Team forward the hearing request to CRD, attached to a letter dated June 6, 2011. SSA Ex. 11. The request for hearing was forwarded to the DAB for hearing and decision, pursuant to an interagency agreement (IAA) under which SSA refers cases involving the collection of debt from certain current SSA employees not represented by the American Federation of Government Employees (AFGE) and separated SSA employees (IAA ¶ I.B).

The matter was assigned to me for hearing and decision on June 21, 2011. On June 23, 2011, I issued an Order to File Evidence and Written Argument. I advised the parties that it was not clear from the documents that SSA submitted whether Petitioner was a current or former SSA or federal employee. I ordered SSA to answer, by July 9, 2011, five questions regarding Petitioner's status, as well as answer whether Petitioner's hearing request was timely filed. I required SSA to file, by July 25, 2011, any documents upon which it relied to show the existence of the debt that Petitioner owed. Petitioner was given until August 25, 2011, to respond and submit documents and argument regarding the existence of the indebtedness or any other defense.

On July 8, 2011, SSA timely responded that on July 6, 2011, Petitioner represented to SSA counsel in a telephone conversation that she was not currently a federal employee, an SSA employee, or a member of a collective bargaining unit represented by AFGE. SSA also responded that Petitioner's hearing request was not timely filed. SSA alleges that the letter from Progressive instructed Petitioner to request a hearing on or before May 13, 2011, and Petitioner did not request a hearing until May 25, 2011. SSA did not address the issue of untimely filing in its brief or otherwise assert that untimely filing deprived me of jurisdiction. The IAA (¶ II.A.12), requires that I apply the SSA debt collection regulations at 20 C.F.R. Part 422, when reviewing requests for hearing related to debt collections from former SSA employees, excluding Social Security program debt which is not within my jurisdiction under the IAA. Pursuant to SSA debt collection regulations governing administrative offset and AWG, the debtor has 60 days to request review of an alleged debt, except when offset against federal salary is proposed, in which case review must be requested in 30 days. 20 C.F.R. §§ 422.425(a), 422.310(c)(3)(ii), (c)(6). SSA proposed AWG rather than administrative offset, and the 60-day period applies. The Progressive Notice is dated April 28, 2011 and Petitioner's hearing request was faxed to Progressive on May 25, 2011, well within the 60 days provided by SSA regulations for collection of a debt from a former government employee. Accordingly, I conclude that Petitioner's request for hearing was timely filed. If Petitioner's request for hearing was not timely filed, SSA regulations require that the debt be reviewed, but the regulation does not require that SSA stay its collection action pending completion of my

review. 20 C.F.R. §§ 422.317(a)(2), 422.425(a). I conclude, based upon evidence submitted by SSA, that Petitioner is a former SSA employee, and this case is not subject to the requirements of 5 U.S.C. § 5514 (which applies only to offset of the federal salary of a current federal employee). I also conclude that this case is properly subject to my review pursuant to the IAA.

On July 25, 2011, SSA timely filed its brief with SSA Exs. 2 through 11 (SSA Ex. 1 was filed with SSA's July 8, 2011 response). No response has been received from Petitioner. Therefore, on September 6, 2011, I issued an order for Petitioner to show cause by September 21, 2011 why her request for hearing should not be dismissed for abandonment, or why I should not proceed to a decision based upon SSA's filings. No response has been received from Petitioner. I proceed to a decision based upon the current record. SSA Exs. 1 through 11 are admitted without objection from Petitioner.

## **II. Discussion**

### **A. Issues**

Whether Petitioner is indebted to the government and, if so, in what amount;  
and

Whether collection of any debt may be accomplished by AWG or  
administrative offset?

### **B. Law Applicable**

The IAA provides that 20 C.F.R. Part 422 governs debt collection cases against separated SSA employees. Administrative offset procedures are at 20 C.F.R. §§ 422.310, .315, and .317. AWG procedures are at 20 C.F.R. §§ 422.401 through .445.

Before collection of any debt by administrative offset, the alleged debtor must be given written notice, which explains: (1) the nature and amount of the debt; (2) that SSA has determined the debt is overdue; (3) that the debt will be referred to Treasury for offset after either 30 days from the date of the notice in the case of proposed federal salary offset or 60 calendar days from the date of the notice for all other proposed offsets, unless the debt is paid in full, the debtor enters an installment payment plan, or the debtor requests review of the debt; and (4) that the debtor has the right to review SSA records related to the alleged debt. The regulations recognize that 5 U.S.C. § 5514 controls in a case involving administrative offset against the federal salary of a current federal employee. 20 C.F.R. § 422.310(c). If SSA seeks to recover a debt using AWG, the debtor must be notified: (1) of the nature and amount of the debt; (2) that SSA has determined the debt is past due; (3) of the payment schedule or the amount the employer may withhold from disposable pay each payday; (4) that the debtor's employer will be

ordered to withhold money from the debtor's pay not sooner than 60 days from the date of the notice, unless the debtor enters an installment payment agreement or requests review of the debt or the repayment schedule stated in the notice; and (5) that the debtor may inspect and copy records related to the debt. 20 C.F.R. § 422.405(b).

The debtor is required to submit evidence with the request for review showing that the debt is not owed or that SSA has no right to collect the debt. 20 C.F.R. §§ 422.310(c)(6), 422.405(b)(6), 422.425(a). SSA stays collection of the debt by administrative offset, or AWG, if a request for review is timely filed. 20 C.F.R. §§ 422.317(a)(1), 422.425(a).

### **C. Findings of Fact, Conclusions of Law, and Analysis**

My conclusions of law are set forth in bold followed by a statement of the pertinent facts and my analysis.

- 1. Petitioner is indebted to the government in the amount of \$3,745.40, plus any interest, penalties, fees, and costs, and less any money already collected.**
- 2. Petitioner received adequate notice of the debt and her rights.**
- 3. Collection by administrative offset or AWG is permissible.**

#### a. Facts

The un rebutted evidence shows that Petitioner retired to receive early retirement benefits. A Notification of Personnel Action, with an effective date of September 2, 2005, shows that Petitioner was taking a "Retirement-Special Option." SSA Ex. 3. A Leave and Earning Statement (LES) for the period ending September 3, 2005, the day after Petitioner's retirement, shows that Petitioner had been advanced 176.15 hours of sick leave and 0.15 hours of annual leave. SSA Ex. 4. The evidence shows that Petitioner was advanced leave in pay periods 05, 08, and 14 in 2005; pay periods 02, 08, and 15 in 2004; and pay periods 17 through 21 in 2003. In November 2005, SSA's payroll provider computed the monetary value of Petitioner's 176.30 hours of advanced sick and annual leave to be \$3,745.40. SSA Ex. 5.

The evidence submitted by SSA reflects inconsistent spellings of Petitioner's first name. "Phyllis" appears on the Request for Hearing, the Notification of Personnel Action effective September 2, 2005 (SSA Ex. 3), and the LES from September 3, 2005 (SSA Ex. 4). The name "Phillis" appears on the form used for calculation of the debt by SSA's payroll provider (SSA Ex. 5) and appears on all notices and other documents from SSA and Treasury thereafter. SSA does not discuss the discrepancy. I note that Petitioner's mailing address is the same on all documents. Petitioner clearly received the notice letter

from Progressive as she requested a hearing, though there is a typographical error in the address. SSA Ex. 9. I also note that the last four digits of Petitioner's Social Security Number is consistent in all documents in which it appears. I conclude that the use of the name "Phillis" was a clerical error in the spelling of Petitioner's first name. I further conclude that evidence is sufficient to establish that "Phyllis E. Harris" and "Phillis E. Harris" both refer to Petitioner. Petitioner did not argue in her Request for Hearing that there is an issue of mistaken identity or that she was prejudiced by the misspelling of her first name.

The SSA evidence includes a letter dated June 12, 2006 from SSA to Petitioner at the address listed on her LES from September 3, 2005. The SSA letter advised Petitioner that: she was indebted to SSA in the amount of \$3,745.40; if payment was not made, interest and other charges would be assessed; and collection could be by AWG or administrative offset. The SSA letter offered Petitioner four options to avoid referral of the debt to Treasury for collection, she could: pay the full amount of the debt; enter a repayment plan and repay according to the plan; provide evidence to show she did not owe the debt or that SSA did not have the right to collect it; or request a waiver of the debt. SSA also advised her that she had a right to review of the debt and a right to inspect SSA's records regarding the debt. SSA Ex. 6.

The evidence includes a letter dated August 22, 2006, from SSA to Petitioner, which was also sent to the address listed on Petitioner's LES. The SSA letter advised Petitioner that, because she had not responded to the June 12, 2006 letter her debt was delinquent. The letter advised Petitioner that, if she failed to pay her debt within 15 days, her debt would be referred to Treasury for offset of any future payments that might be due her from the government. SSA Ex. 7. SSA sent Petitioner an agreement to pay and repayment schedule, by letter dated September 13, 2006. SSA Ex. 8. There is no evidence that Petitioner signed the agreement or responded to the SSA notices.

The Progressive Notice of administrative wage garnishment dated April 28, 2011, advised Petitioner that her debt had grown to \$6,721.41. SSA Ex. 9. As of June 30, 2011, the debt was calculated to be \$6,812.11, including the original debt of \$3,745.40 plus accruing interest, penalties, and administrative costs and collection fees. SSA Ex. 2.

#### b. Analysis

Advanced leave is unearned leave. When an employee is separated with advanced leave, the advanced leave is a debt that the employee is required to refund to the government or that must be deducted from any pay due the employee at separation. 5 C.F.R. § 630.209. Petitioner presented no evidence to show that the amount of advanced leave claimed by SSA was in error. The LES for the period that ended September 3, 2005, included the notice that the employee is responsible to verify pay, deductions, and leave. The only evidence before me shows that Petitioner had 176.30 hours of advanced sick and annual

leave when she retired. Petitioner has presented no evidence to show that number is in error. I also have received no evidence that shows that the SSA calculation of the principal amount of the debt was in error.

Petitioner argues in her hearing request and in an April 6, 2011 letter to Treasury, which is attached to her hearing request, that she disputes the amount of her debt; cannot afford to repay her debt because she is not working full-time; and she requests a waiver. Petitioner asserts that she was only made aware that she owed a debt in the amount of 0.25 hours of leave, suggesting she never received SSA's prior notice letters regarding the debt, and that she should only repay the monetary value of 0.25 of an hour of advance leave.<sup>2</sup> SSA Ex. 10.

Petitioner's argument that she was not made aware of the amount of leave she owed and the amount of her debt until she received the Progressive Notice is not grounds for relief, even if true. The SSA notices in evidence from 2006 (P. Exs 6-8) were mailed to the address on Petitioner's last LES and trigger an inference that those letters were mailed and received by Petitioner. The evidence would have been more persuasive had SSA obtained and maintained evidence of actual receipt of the notices, such as certified or registered mail receipts. But, no regulation requires that notices be sent certified or registered mail. Petitioner's mere assertion that she was not aware of the amount of the debt, suggesting the notices were not received by her, is insufficient in this case to overcome the inference that the letters were mailed and received. Petitioner's final LES for the pay period ending on September 3, 2005, clearly shows that she had a negative annual leave balance of 0.15 hours and a negative sick leave balance of 176.15 hours due to advances of leave. SSA Ex. 4. Even if I accept that Petitioner had no knowledge of the amount of her debt or her rights related thereto prior to the Progressive Notice, these are not grounds for any relief for Petitioner. The Progressive Notice satisfies the notice requirement under both the administrative offset regulations and the AWG regulations. SSA has given Petitioner the documents supporting the debt. Petitioner has been accorded the rights to review and contest the debt. Accordingly, I conclude that Petitioner has been accorded all the process due her under the SSA regulations. Any defects in SSA notices caused her no prejudice. Petitioner acknowledged in her hearing request that she was aware of some indebtedness for at least 0.25 hours of leave, but she

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<sup>2</sup> Petitioner's April 6, 2011 letter states also that she was injured at SSA and describes problems she had relating to the injury. The letter refers to a possible workers compensation claim made by Petitioner while an SSA employee. The only information relevant to my decision is Petitioner's assertion that she owed only 0.25 hours of leave. There is no evidence of record, and Petitioner has produced no evidence, that she retired due to a disability, which might affect whether or not Petitioner was obligated to repay the debt. 5 C.F.R. § 630.209(b).

failed to follow-up with SSA to protect herself from accruing interest and penalties. Treasury Department regulations specify the process to be accorded debtors by an agency before effectuation of either AWG or administrative offset. 31 C.F.R. §§ 285.11, 901.3. I conclude that the process accorded in this case satisfies the SSA regulations regarding AWG and administrative offset and the more extensive requirements of the Treasury Department regulations.

Based upon the foregoing facts, I conclude that Petitioner is indebted to the government in the amount of \$3,745.40 for negative leave balances at the time of her retirement, which total 176.30 hours due to advances of sick and annual leave. Petitioner has presented no credible evidence that she repaid any portion of the debt. Petitioner has also presented no evidence or argument that would support a conclusion that SSA has no right to collect the debt. Petitioner's debt is subject to accruing interest, penalties, fees, and costs. The total debt, here with interest, penalties, and fees, was calculated as \$ 6,721.41 on April 28, 2011 (SSA Ex. 9) and \$6,812.11 on June 30, 2011 (SSA Ex. 2). Petitioner has presented no evidence or argument to show that the calculated totals are in error.<sup>3</sup>

Petitioner argues that she is unable to repay her debt and requests that it be waived. With regard to AWG, the amount collected from disposable pay may be adjusted due to financial hardship. 20 C.F.R. § 422.415. The regulation requires that the individual requesting relief give evidence of his or her financial resources and expenses. The regulation also provides that an individual may ask at "any time to reduce the amount [of AWG] due to financial hardship," although at no time will it be reduced below \$10 per payday. The Progressive Notice did not state the amount to be deducted from monthly disposable pay by AWG, as it was a notice of intent to initiate AWG and not the AWG order itself. The notice informed Petitioner that, if she did not pay her debt or enter into a repayment plan or request a hearing, an AWG order might issue to her employer that could require her employer to deduct up to 15 percent from her disposable pay each pay period until her debt is paid in full. If Petitioner has an issue of financial hardship, she should address that issue with SSA and Treasury or its agent Progressive. Financial hardship is not a basis for me to relieve Petitioner of her debt.

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<sup>3</sup> There is evidence that AWG and offset may have been initiated but then suspended in this case. Agency's Response to June 3, 2011 Order, at 2; SSA Ex. 1. If so, any amounts collected must be applied to reduce the total debt.

