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disability annuitant retired. The permanent position must be full-time unless the position the disability annuitant occupied immediately before retirement was less than full-time, in which case the permanent position must have a work schedule of no less time than that of the position from which the disability annuitant retired. In this instance, OPM needs no medical documentation to find the annuitant recovered. Disability annuity payments will terminate effective on the first day of the month following the month in which the recovery finding is made under this paragraph.

(e) Recovery based on a voluntary request. OPM will honor a written and signed statement of medical recovery voluntarily filed by a disability annuitant when the medical documentation on file does not demonstrate that the annuitant is mentally incompetent. OPM needs no other documentation to find the annuitant recovered. Disability annuity payments will terminate effective on the first day of the month beginning 1 year after the date of the statement. A disability annuitant can withdraw the statement only if the withdrawal is received by OPM before annuity payments terminate.

(f) When an agency reemploys a recovered disability annuitant at any grade or rate of pay within the 1-year period pending termination of the disability retirement benefit under paragraph (c), (d), or (e) of this section, OPM will terminate the annuity effective on the date of reemployment.

§ 831.1209 Termination of disability annuity because of restoration to earning capacity.

(a) *Restoration to earning capacity*. If a disability annuitant is under age 60 on December 31 of any calendar year and his or her income from wages or self-employment or both during that calendar year equal at least 80 percent of the current rate of basic pay of the position occupied immediately before retirement, the annuitant's earning capacity is considered to be restored. The disability annuity will terminate on the June 30 after the end of the calendar year in which earning capacity is restored. When an agency reemploys a restored disability annuitant at any grade or rate of pay within the 180-day waiting period pending termination of the disability retirement benefit, OPM will terminate the annuity effective on the date of reemployment.

(b) *Current rate of basic pay for the position occupied immediately before retirement.* (1) A disability annuitant's income for a calendar year is compared to the gross annual rate of basic pay in effect on December 31 of that year for the position occupied immediately before retirement. The income for most disability annuitants is based on the rate for the grade and step which reflects the total amount of basic pay (both the grade and step and any additional basic pay) in effect on the date of separation from the agency for disability retirement. Additional basic pay is included subject to the premium pay restrictions of 5 U.S.C. 5545 (c)(1) and (c)(2). A higher grade and step will be established if it results from using either the date of application for disability retirement or the date of reasonable accommodation, as adjusted by any increases in basic pay that would have been effected between each respective date and the date of final separation. Use of these two alternative pay setting methods is subject to paragraph (b)(1) (i) and (ii) of this section. The highest grade and step established as a result of setting pay under the normal method and the two alternative methods is designated as the rate of basic pay for the position occupied immediately before retirement and applies only to restoration to earning capacity decisions. In cases involving use of either of the two alternative pay setting methods, the determination of the rate of basic pay for the position occupied immediately before retirement is made by the employing agency at the time the disability retirement is allowed. OPM must review the rate so determined to establish whether the correct rate has been established, and will inform the employee of the proper rate at the time the disability annuity is awarded. This rate of basic pay becomes the basis for all future earning capacity determinations.

(i) The ''date of application for disability retirement'' is the date the application is signed by the authorized

official of the employing agency immediately before forwarding the application to OPM.

(ii) The ''date of reasonable accommodation'' is the date of the employing agency's notice of reasonable accommodation to an employee's medical condition (as a result of its review of medical documentation) which results in a reduction in the rate of basic pay. The use of the date of reasonable accommodation to establish the rate of basic pay for the position held at retirement is subject to the following conditions:

(A) The date of the employing agency's notice to provide accommodation is no more than 1 year before the date the disability retirement application is signed by the authorized official in the employing agency immediately before forwarding it to OPM; and

(B) A complete record of the date of the personnel decision, the medical documentation substantiating the existence of the medical condition, and the justification for the accommodation is established in writing and included at the time the agency submits the application for disability retirement. OPM will review the record to determine whether the medical documentation demonstrates that the medical condition existed at the time of the accommodation and warranted the accommodation made.

(2) In the case of an annuitant whose basic pay rate on the date determined under paragraph (b)(1) of this section did not match a specific grade and step in a pay schedule:

(i) For those retiring from a merit pay position, a position for which a special pay rate is authorized (except as provided in paragraph (b)(2)(ii) of this section), or any other position in which the rate of basic pay is not equal to a grade and step in a pay schedule, the grade and step will be established for this purpose at the lowest step in the pay schedule grade that is equal to or greater than the actual rate of basic pay payable. This rule will not be applied when the rate exceeds that of the schedule applicable to the organization from which the individual retired, when there is no existing apposite schedule with grades and steps, or in other organizations which are excluded from coverage of schedules with grades and steps, as in the case of pay systems using pay bands.

(ii) For those retiring with a retained rate of basic pay or from a position for which a special pay rate is in effect but whose rate of basic pay exceeds the highest rate payable in the pay schedule grade applicable to the position held, the grade and step is established for this purpose in the grade in the schedule that is closest to the grade of the position held and within which the amount of the retained pay falls. The step is established for this purpose at the lowest step in that grade which equals or exceeds the actual rate of pay payable.

(iii) When the pay system under which an annuitant retired has been either modified or eliminated since the individual retired, the individual will be treated as if he or she had been employed at their retirement grade and step at the time of the system change, and will be deemed to have been placed under the new system using whatever rules would have been applicable at that time. This will only apply when a pay system has been abolished or modified, and not when the grade and step of a position has been modified subsequent to retirement by reclassification or other action, in which case the grade and step in effect at the time of retirement will control.

(iv) If using the above rules it is not possible to set a grade and step for computing the current rate of pay, then if possible the current rate of pay will be set using the relative position in the range of pay applicable to the position from which the individual retired. For example, if at the time of retirement the rate of pay was $75,000 in a range from $70,000 to $90,000, for all future determinations, the current rate of pay would be 25% up the new pay range from the bottom. If the new range was $96,000 to $120,000, then the new current rate of pay would be $102,000 ($96,000 plus 0.25 times $24,000 ($120,000 minus $96,000)).

(v) In those cases, such as of some former Congressional staff employees and others whose pay is not set under a formal system, where none of the above guidelines will yield a current rate of pay, OPM will ascertain the

current rate of pay after consultation with the former employing organization, or successor organization.

(3) For annuitants retiring from the United States Postal Service, only cost-of-living allowances subject to civil service retirement deductions are included in determining the current rate of basic pay of the position held at retirement.

(c) *Income.* Earning capacity for the purposes of this section is demonstrated by an annuitant's ability to earn post-retirement income in a calendar year through personal work efforts or services. The total amount of income from all sources is used to determine earning capacity. This includes income received as gross wages from one or more employers, net earnings from one or more self-employment endeavors, and deferred income that is earned in a calendar year. In determining an annuitant's income for a calendar year, the following considerations apply:

(1) There are two sources of income: wages and self-employment income. All income which is subject to Federal employment taxes (i.e., social security or Medicare taxes) or self-employment taxes constitutes earned income. In addition, any other income as described in this section also constitutes earned income. The determination of whether a disability annuitant earns wages as an employee of an organization or earns income as a self-employed person is based on the usual common law rules applicable in determining the existence of an employer-employee relationship. Whether the relationship exists under the usual common law rules will be determined by OPM after the examination of the particular facts of each case.

(2) Income earned from one source is not offset by losses from another source. Income earned as wages is not reduced by a net loss from self-employment. The net income from each self-employment endeavor is calculated separately, and the income earned as net earnings from one self-employment endeavor is not reduced by a net loss from another self-employment endeavor. The net incomes from each separate self-employment endeavor are added together to determine the total amount of income from self-employment for a calendar year.

(3) Only income earned from personal work efforts or services is considered in determining earning capacity. All forms of non-work-related unearned income are excluded. Paragraph (f) of this section includes a representative list of the types of unearned income that are not considered.

(4) Income earned in a calendar year may only be reduced by certain self-employment business expenses, as provided in paragraph (e) of this section; job-connected expenses incurred because of the disabling condition, as provided in paragraph (g) of this section; and the return from investment allowance, as provided in paragraph (h) of this section. Once earned, income cannot be reduced by any other means. Thus, income cannot be lowered by such means as leave buy-back provisions, conversion of wages for paid time to leave without pay or a similar non-paid status, reductions in wages attributable to cash shortages or product losses, etc.

(5) For determining annual income from wages or self-employment or both, income is earned in the calendar year the annuitant actually renders the personal work effort or service and either actually or constructively receives the remuneration, except as provided under paragraph (c)(7) of this section. For this purpose, income paid on a regular basis (i.e., on a weekly, biweekly, monthly or similar pay period basis) will be deemed earned in the year in which payment is made in the regular course of business.

(6) Deferred income is included as income in the calendar year in which it is constructively received. Income is constructively received when it is credited, set apart, or otherwise made available so that the annuitant may draw upon it at any time, or could draw upon it during the calendar year if the annuitant had given notice of the intent to do so. Deferred income includes all earnings, whether in the form of cash or property or applied to provide a benefit for the employee, which are subject to the disability annuitant's designation or assignment. Usually, the earnings are set aside by a salary-reduction agreement, a deferred

compensation arrangement, or the designation of specific earnings amounts towards the purchase of non-taxable employee fringe benefits. Thus, any earnings for which the individual has the opportunity to adjust the amount of income received in a calendar year by controlling the remuneration of voluntarily giving up the right to control the remuneration, regardless of whether a written instrument exists, are income for earning capacity purposes.

(7) The Internal Revenue Code provides exceptions to the general rule on constructive receipt for certain deferred compensation plans which, by their design, defer receipt of income for Federal employment tax purposes as of the later of when services are performed or when there is no substantial risk of forfeiture of the rights to such amount. Even though these special deferred compensation plans defer the constructive receipt of the income for tax purposes to future years beyond the year in which the income is actually earned, the income reflects earning capacity. Therefore, employer contributions and employee payments to these special deferred compensation plans are considered income in the calendar year in which the services are performed, even though the Internal Revenue Code may exclude these contributions and payments from income for tax purposes.

(d) *Wages.* For purposes of earning capacity determinations, the term ''wages'' means the gross amount of all remuneration for services performed by an employee for his or her employer, unless specifically excluded herein, before any deductions or withholdings.

(1) The name by which the remuneration for services is designated is immaterial. Remuneration includes but is not limited to one-time or recurring—

(i) Base salary or pay; tips; commissions; professional fees; honoraria; bonuses and gift certificates of any type; golden parachute payments; payments for any non-work periods, such as vacation, holiday, or sick pay; pay advances; overtime pay; severance pay; dismissal pay; termination pay; and back pay;

(ii) Deferred income, within the meaning of paragraphs (c) (6) and (7) of this section, or other employer contributions or payments in an arrangement in which the employee has the opportunity (whether exercised or not) to adjust income by recovering the contributions or payments during the calendar year in which earned, for general discretionary income purposes;

(iii) Non-cash wages or payment of in-kind benefits, such as shares of stock in the business, real or personal property, stock in trade, inventory items, goods, lodging, food, and clothing. The valuation for all non-cash wages or other in-kind benefits is determined in a manner consistent with the fair value standards that appear in the Social Security Administration's regulations at 20 CFR 404.1041(d).

(2) Any amount offset or deducted under 5 U.S.C. 8344 is treated as wages if the annuity continues while the annuitant is reemployed by the Federal Government.

(3) As a general rule, remuneration as wages does not include any contribution, payment, benefits furnished, or service provided by an employer in any of the following areas:

(i) The general retirement system established by the employer for its employees, usually either a qualified pension, profit-sharing, stock bonus plan, or a qualified annuity contract plan;

(ii) Medical or hospitalization health benefit plans;

(iii) Life insurance plans;

(iv) Sickness or accident disability pay beyond 6 months of illness, or workers' compensation payments;

(v) The value of meals and lodgings provided at the convenience of the employer;

(vi) Moving expenses;

(vii) Educational assistance programs;

(viii) Dependent care assistance programs;

(ix) Scholarships and fellowship grants;

(x) De minimis fringe benefits, such as items of merchandise given by the employer at holidays which are not readily convertible into cash and courtesy discounts on company products offered not as remuneration for services performed but as a means of promoting good will;

(xi) Qualified group legal services plans;

(xii) Uniforms and tools supplied by the employer, including employer-provided allowances for such items, for the exclusive use by the employee on the job; and

(xiii) Amounts that an employer pays the individual specifically, either as advances or reimbursements, for traveling or other ordinary and necessary expenses incurred, or reasonably expected to be incurred in the employer's business.

(4) However, there are two exceptions to this general rule:

(i) When it is provided under circumstances in which either a salary reduction or deferral agreement is used (whether evidenced by a written instrument or otherwise); or

(ii) When the employee had the opportunity (whether exercised or not) to elect to receive the cash value, whether in the form of money or personal or real property, of the employer-provided amount or service.

(e) *Self-employment income.* (1) Self-employment income is the remuneration that is received as an independent contractor, either as

(i) A sole proprietor of a business or farm;

(ii) A professional in one's own practice; or

(iii) A member of a partnership or corporation, as these terms are defined by the Internal Revenue Code, and regardless of whether the business entity is operated for profit.

(2) The term ''net earnings'' from self-employment in a business enterprise means the gross revenue to the business endeavor from all sources before any other deductions or withholdings, minus

(i) Allowable business expenses, as provided in paragraph (e)(3) of this section;

(ii) Any job-connected disability expenses, as provided in paragraph (g) of this section; and

(iii) Any return from investment allowance, as provided in paragraph (h) of this section.

(3) Certain expenses of a self-employed business entity may be offset from the gross revenue from all sources of that self-employed business in determining the amount of net earnings for a particular calendar year. Expenses which may be deducted are only those items and costs which are permitted by the Internal Revenue Code for income tax purposes as ordinary and necessary to the operation of the business. However, expenses incurred on behalf of the disability annuitant may not be deducted, regardless of whether they are permitted by the Internal Revenue Code. These expenses that are incurred but cannot be deducted include the costs for wages paid to the individual, interest earnings, guaranteed payments, dividends, employee benefits, pension plans, and salary reduction or deferral plans. Also, self-employed disability annuitants may not deduct the costs of other withdrawals or expenses which are not used solely for business purposes. Examples of items that cannot be deducted if used at all for personal use by the self-employed disability annuitant include personal property items, such as automobiles and boats; real property, such as vacation property or residences; and memberships, dues, or fees for professional associations or public or private organizations or clubs.

(4) Fees paid to an annuitant as a director of a corporation are a part of net earnings from self-employment.

(f) *Income not included.* Other types of income not considered in determining earning capacity include—

(1) Investment income, such as interest or dividends from savings accounts, stocks, personal loans or home mortgages held, unless the disability annuitant receives the return from capital investment in the course of his or her trade or business;

(2) Capital gains from sales of real or personal property that the disability annuitant owns, unless received in the course of his or her trade or business:

(3) Rents or royalties, unless received in the course of his or her trade or business;

(4) Distributions from pension plans, annuity plans, Individual Retirement Accounts (IRA's), Simplified Employee Benefit-IRA's (SEP–IRA's), Keogh Accounts, employee stock ownership plans, profit sharing plans, or deferred income payments that are received by the annuitant in any year after the calendar year in which the funds were contributed to the plan;

(5) Income earned before the commencing date of civil service retirement annuity payments;

(6) Scholarships or fellowships;

(7) Proceeds from life insurance, inheritances, estates, trusts, endowments, gifts, prizes, awards, gambling or lottery winnings, and amounts received in court actions whether by verdict or settlement, unless received in the course of their trade or business;

(8) Unemployment compensation under State or Federal law, supplemental unemployment benefits, or workers' compensation:

(9) Alimony, child support, or separate maintenance payments received;

(10) Pay for jury duty; and

(11) Entitlement payments from other Federal agencies, such as benefits from the Social Security Administration or the Veterans Administration, Railroad Retirement System retirement pay, or military retirement pay.

(g) *Job-connected expenses incurred because of the disabling condition may be deducted from income.* (1) Job-connected expenses deductible from income for purposes of determining earning capacity are those expenses that are primarily for and essential to the annuitant's occupation or business and are directly connected with or result from the disability for which the disability annuity was allowed.

(2) The determination of whether a job-connected expense may be deducted from income is governed by the following considerations:

(i) The expense must be directly attributable to the disability and must be one which would not have been incurred in the absence of the annuitant working in his or her business or occupation. Expenses incurred for the preservation of the annuitant's health, alleviation of his or her physical or mental discomfort, or other expenses of an employed person cannot be deducted.

(ii) The disability must be of such severity that it requires the annuitant to use special means of transportation, services, or equipment to perform the duties of the occupation or business. Examples of such disabilities include blindness, paraplegia, multiple sclerosis, and cerebral hemorrhage. Claims involving transportation or equipment may be deducted only in the amount normally allowed for business expenses or as depreciation by the Internal Revenue Service for Federal income tax purposes.

(iii) Claims involving services performed by a family member or other individual directly employed by the annuitant may be deducted only if a true employer-employee relationship exists between the annuitant and the employed individual, and the amount claimed as an expense does not exceed the local market rate of payment to individuals who provide similar services. It is the responsibility of the annuitant to provide evidence demonstrating that an employer-employee relationship exists, and what the local market rate is for such services. For the purpose of this paragraph, to establish that a true employer-employee relationship exists, the annuitant must provide evidence that all statutorily mandated employment requirements are met, including (but not limited to) income tax withholdings, FICA tax deductions and payments, and unemployment insurance. If the annuitant fails to provide evidence of the local market rate for such services, payments may be deducted only if the amount claimed does not exceed the Federal minimum hourly rate in effect on December 31 of the calendar year in which claimed. Absent evidence that it is customary and regular practice in the local labor market to work more hours per week, payment may not be deducted for services provided by an individual in excess of 40 hours a week.

(3) A job-connected expense can be deducted only in the calendar year in which paid.

(4) Claims for items used for both personal and job-related purposes may be deducted only by the prorated amount attributable to the job-related use.

(5) A job-connected expense may not be deducted from income from self-employment if the expense has already been deducted as a business expense.

(6) It is the responsibility of the annuitant claiming job-connected expense to provide adequate documentation to substantiate the amount claimed. Adequate documentation will

generally include the following information:

(i) Written recommendation of a physician, vocational rehabilitation specialist, occupational health resource specialist, or other similar professional specialist that the retiree should use the transportation, services, or equipment;

(ii) A description of the item and an explanation of its use by the annuitant in the performance of his or her occupation or business;

(iii) A copy of the receipt of purchase, bill of sale, or leasing agreement for the item claimed with the date, duration of the agreement, and agreed upon price clearly specified;

(iv) A complete supporting explanation of how the amount claimed for the job-connected expense has been calculated; and

(v) An explanation of the circumstances and calculation of the prorated cost of the item if used for both personal and business use.

(h) *Return from investment allowance.* A disability annuitant may reduce the net earnings from a self-employed business endeavor (adjusted for any interest paid on borrowed capital) by 6 percent of his or her capital investment in that business, owned or borrowed. The capital investment's value is its fair-market value as of December 31 of the year for which the income is being reported.

(i) *Requirement to report income.* All disability annuitants who, on December 31 of any calendar year, are under age 60 must report to OPM their income from wages or self-employment or both for that calendar year. Each year as early as possible, OPM will send a form to annuitants to use in reporting their income from the previous calendar year. The form specifies the date by which OPM must receive the report. OPM will determine entitlement to continued annuity on the basis of the report. If an annuitant fails to submit the report, OPM may stop annuity payments until it receives the report.

§ 831.1210 Annuity rights after a disability annuity terminates.

(a) An individual is entitled to an immediate annuity when the disability annuity stops because of recovery or restoration to earning capacity if the individual is not reemployed in a position subject to civil service retirement coverage and—

(1) Is at least age 50 when the disability annuity stops and had 20 or more years of service at the time of retirement for disability; or

(2) Had 25 or more years of service at the time of retirement for disability regardless of age.

(b) An individual whose annuity stops because of recovery or restoration to earning capacity and who is not eligible for an immediate annuity under paragraph (a) of this section, is eligible for a deferred annuity upon reaching age 62.

(c) The disability annuity of an individual whose annuity stopped because of recovery or restoration to earning capacity may be reinstated under § 831.1212 of this part.

§ 831.1211 Reinstatement of disability annuity.

(a) When a disability annuity stops, the individual must again prove that he or she meets the eligibility requirements in order to have the annuity reinstated.

(b) When a recovered disability annuitant under age 62 whose annuity was terminated because he or she was found recovered on the basis of medical evidence (§ 831.1208(b)), is not reemployed in a position subject to civil service retirement coverage, and, based on the results of a current medical examination, OPM finds that the individual's medical condition has worsened since the finding of recovery and that the original disability on which retirement was based has recurred, OPM will reinstate the disability annuity. The right to the reinstated annuity begins with the date of the medical examination showing that the disability recurred.

(c) OPM will reinstate the disability annuity of a recovered disability annuitant under age 62 whose annuity was terminated because he or she was found recovered on the basis of Federal reemployment (§ 831.1208(c)) when—

(1) The results of a current medical examination show that the disabling medical condition that was the basis of