

**SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review**

DECISION

IN THE CASE OF

G. Z.
(Claimant)

(Wage Earner)

CLAIM FOR

Supplemental Security Income

XXX-XX-XXXX
(Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

This case is before the undersigned on a timely request for hearing dated September 3, 2009 (20 CFR 416.1429 *et seq.*). The claimant appeared and testified at a hearing held on May 27, 2010 in Newark, NJ. Following the hearing, the record was held open in order for the claimant's attorney to submit a letter brief outlining how New Jersey State law supports his theory of the case as well as copies of checks with which the claimant has recently contributed toward his living expenses. The documents were received and entered into the record as Exhibit 19. The claimant is represented by Donald Vanarelli, Esq.

ISSUES

The general issue is whether the amounts of supplemental security income paid monthly to the claimant have been correct. The specific issue is whether the claimant has had countable income in the form of in-kind support and maintenance (ISM).

After careful review of the entire record, the undersigned finds that the claimant has not received ISM. Hence, the payment amounts based upon determinations that he has had countable income of that nature have been incorrect.

APPLICABLE LAW

The amount of income you have is a major factor in determining your benefit amount (20 CFR 416.1100). "Income" is defined in the Social Security Administration regulations as anything you receive in cash or in kind that you can use to meet your needs for food and shelter (20 CFR 416.1102).

"In-kind" income is not cash, but is actually food or shelter, or something you can use to get one of these (20 CFR 416.1102). 20 CFR 416.1130(b) defines in-kind support and maintenance as any food or shelter that is given to you or that you receive because someone else pays for it.

However, money that is borrowed is not income (20 CFR 416.1103(f)). Furthermore, Social Security Administration policy is that an advance of food or shelter in lieu of a cash advance represents a loan, as opposed to ISM, if the loan agreement is recognized as enforceable under

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State law and other criteria for a bona fide loan agreement are satisfied (Social Security Ruling 92-8p and POMS SI 00835.482).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, the undersigned makes the following findings:

1. The claimant has contributed less than his pro-rata share toward the expenses of the household in which he lives.

Since January 2009, the first month in which the claimant met all of the rules to be eligible for supplemental security income payments, the claimant has been living in an apartment rented by his nephew, J.Z., and eating food purchased by J.Z. (Exhibit 1 and Hearing Testimony). J.Z. stated in June 2009 that the average monthly household expenses were \$2,240 – \$950 for rent and the rest covering electricity, gas and food (Exhibit 4). J.Z. subsequently reported that beginning November 2009 the average monthly household expenses had decreased to approximately \$1,600, as a result of drastic curtailment of expenditures for food and gas (Exhibit 12).

Although the Social Security Administration determined that the claimant's pro-rata share would be 50% of the monthly household expenses, based upon the fact that the claimant and J.Z. were the only two individuals in the household (Exhibit 8), the claimant persuasively represents that his pro-rata share of the rent is only \$250 of the \$950 apartment rental. He explained at the hearing that this is because he sleeps in the living room while J.Z. sleeps in the apartment's one bedroom. Therefore, the claimant's pro-rata share of the total household expenses is approximately \$750 per month.

When the claimant filed his application, he was not contributing at all toward the household expenses, reportedly because he did not have any income or any resource that could be sold to make such contributions. Although he had an ownership interest in a residence where he had previously lived with his wife, from whom he was separated (and is currently divorced), his wife was still living in the house and would have faced undue hardship from loss of housing if he were to sell the property (Exhibits 1 and 4). Since February 2009, when he began receiving monthly supplemental security income payments of \$421.82, he has been making payments to J.Z. on a regular basis. His payments have averaged approximately \$400 per month (Exhibits 4, 7, 12, 18 and 19), which is considerably less than the \$750 per month pro-rata share of the household expenses.

2. To the extent that the claimant has received food and/or shelter from J.Z. for which he has not paid, those have been advances under the terms of a bona fide loan agreement.

The claimant maintains that an agreement to repay J.Z. his fair share of the monthly household expenses has been in effect since November 2008, when he moved into J.Z.'s apartment upon separating from his wife. He initially memorialized such an agreement in writing in March 2009, indicating that he would begin repayment as soon as he began

receiving benefits from the Social Security Administration (Exhibit 4, p.2). Furthermore, he testified at the hearing that it had always been his intention to pay J.Z. back when he could.

The claimant and J.Z. both confirmed in writing in June 2009 that they had an agreement whereby the claimant would repay \$750 per month to J.Z. as soon as possible for the food and shelter provided to the claimant, and would use his supplemental security income checks for that purpose (Exhibit 4).

The Social Security Administration determined on reconsideration that the loan agreement was not bona fide because the repayment plan was not feasible, inasmuch as the claimant's only monthly income was supplemental security income payments of \$421.82 per month. The Social Security Administration therefore determined that the claimant was living in the household of J.Z., and that the shelter and food received from J.Z. constituted ISM valued at \$224.00 per month under the rule for an individual in the determined living arrangement (Exhibit 8).

However, the claimant actually has had reasonably foreseeable means of repaying J.Z. for the advanced food and shelter. First, if he were to receive the maximum Federal supplemental security income monthly payment amount plus the maximum New Jersey supplemental security income monthly payment amount, the payments would total more than \$700 per month. Second, he could reasonably foresee that a significant sum of money would be awarded to him in a divorce judgment. In January 2010 he, in fact, was awarded a lump sum payment of \$95,000 in a Dual Final Judgment of Divorce, consisting of \$75,000 in equitable distribution of the value of the principle marital residence and \$20,000 in alimony (Exhibit 16). The award was paid to the trustee of a self-settled special needs trust established for the claimant's sole benefit¹ (Exhibit 17). Counsel represents that, within a month after this decision is issued, the trust will re-pay J.Z. his advances to the claimant of food and shelter that the claimant has not yet repaid.²

Under the circumstances, the loan agreement between the claimant and J.Z. was bona-fide and enforceable under New Jersey State law.

3. The food and shelter that the claimant has received from J.Z. since January 2009 without paying for them have not been countable ISM for purposes of determining the claimant's income (20 CFR 416.1103(f)).

¹ As counsel argues (Exhibit 19 and Hearing Testimony), the lump sum award does not count as a resource for supplemental security income purposes. It was paid to the trustee of a self-settled special needs trust established for the claimant's benefit in order to maintain his eligibility for needs-based government benefits, in accordance with Sections 1613(e)(5) and 1917(d)(4)(A) of the Social Security Act [42 U.S.C. §§ 1382b(e)(5) and 1396p(d)(4)(A)] and N.J.A.C. 10:71-4.11(g)(1) (Exhibit 17). The claimant does not own the trust, and he cannot convert any portion of it (including the lump sum award amount) to cash to use for his support and maintenance (20 CFR 416.1201(a)).

² At the hearing, the claimant alleged that the balance then due was \$6,390.

DECISION

It is the decision of the undersigned that the counting of ISM in the calculations of the claimant's monthly supplemental security income payments has been incorrect. Hence, the appropriate component(s) must re-compute the claimant's supplemental security income payment amounts and determine the amount of any underpayment that has resulted from the incorrect payments.

/s/ Michal L Lissek

Michal L Lissek
Administrative Law Judge

July 22, 2010

Date

LIST OF EXHIBITS

Claimant: G. Z.

SSN: XXX-XX-XXXX

Exh. Part No. No.	Description	No. of Pages
1	Application Summary For Supplemental Security Income Benefits, filed 01/12/2009	4
2	Supplemental Security Income Notice of Award, dated 02/09/2009	14
3	Request for Reconsideration, filed 03/05/2009	1
4	Claimant's Statement About Loan Of Food Or Shelter, dated 06/04/2009	7
5	Redetermination Summary for Determining Continuing Eligibility for SSI Payments, dated 07/27/2009	8
6	Record of Critical Change – Informational Only, dated 07/28/2009	2
7	District Office Report of Contact - Informational, dated 07/27/2009	
8	Supplemental Security Income Notice of Reconsideration, dated 07/27/2009	
9	Request for Hearing By Administrative Law Judge, filed 09/03/2009	
10	Notice of Hearing dated 1/25/10	
11	Acknowledgement of Receipt (NOH) dated 2/17/10	
12	Statement of Living Arrangements, In Kind Support & Maintenance, dated 2/20/10	
13	Letter dated 3/9/10 from attorney	
14	Amended Notice of Hearings, dated 3/30/10	
15	Acknowledgement of Receipt NOH dated 4/7/10	
16	Divorce Judgment dated 01/29/10	
17	Self Settled Special Needs Trust	27
18	Checking Statements Jan 2010 – April 2010 and Summary	
19	Representative Brief dated 6/11/10, w/attachments copy of checks	