

interim regulations. The interim regulations allow agencies to re-open a claim only if the agency head determines that new and material evidence is available that, despite due diligence, was not available before the decision was issued. Therefore, if an employee has new, previously unavailable evidence bearing on his or her case, the employee should address the matter to the agency where the service was performed. However, the interim regulations made no substantive change in the criteria that must be used to evaluate claims, and we therefore believe that the delegation of authority to agencies does not justify re-opening denials of coverage that the individual did not appeal within the time limits established by the Merit Systems Protection Board.

Other commenters suggested eliminating or limiting OPM's oversight role. Oversight under these regulations—like the delegation of authority itself—is designed to parallel the oversight role given to OPM under the FERS regulations since 1987. We believe that oversight of a delegatee's use of an authority is an inherent element in the process of delegation, which necessarily assumes that the delegation can be withdrawn in the event that the authority is misapplied.

Another commenter suggested that OPM rescind its regulations altogether and allow each unit of the Government to interpret the special benefits statute. However, section 8347(a) of title 5, United States Code, requires OPM to prescribe regulations that are necessary and proper to carry out the Civil Service Retirement law. This commenter suggested that, after rescinding its regulations, OPM should then be responsible for monitoring each agency's compliance with the statute. However, the existing regulations set out OPM's interpretation of the statute and provide minimal Government-wide procedures. Therefore, if OPM is to continue to monitor the agencies' implementation of the law, we believe our interpretation of the law, and minimal implementing procedures, should be set out in uniform, published form in the Code of Federal Regulations, which is open to both agencies and affected employees, as well as the general public.

The same commenter asked for clarification about claims for special benefits coverage filed before October 1, 1989, because claims filed after that date are subject to a limitation: except in the case of an individual who shows good cause for a late request, the employing agency will not consider service performed more than 1 year before the

individual's request is received. Old claims, those filed before October 1, 1989, are not subject to this limitation.

Another commenter suggested that the regulations allow for blanket determinations that a position is a law enforcement officer position. The regulations do this in §§ 831.903 and 831.904. The commenter also suggested that the regulations allow a group of employees, through a representative, to request a blanket approval of their position and that a denial of the request should be appealable to the Merit Systems Protection Board. The interim regulations basically adopted the FERS approach to individual rights where an agency determines that the official position description does not show that the position satisfies the definition of law enforcement officer or firefighter. In this case, any individual may request the employing agency to review his or her actual primary duties to determine whether they meet the definition. The employee may appeal a denial to the Merit Systems Protection Board. We believe that this system adequately protects individual rights, whereas blanket determinations based on actual duties of individuals would not be conducive to a full review of each individual employee's actual duties where the position description is claimed to be inaccurate. If one or more employees believe that their position description (for which the employing agency or OPM has denied coverage) is accurate, but that it should be considered to meet the definition of law enforcement officer or firefighter, we believe that the administrative approach should be determined by the employing agency head, depending on the circumstances, to provide for efficient administration without sacrificing individual rights to review of an agency decision that denies special benefits coverage.

This commenter also suggested that OPM's oversight authority should be limited so as to make any reversal of a coverage approval determination prospective only. Under a statutory benefits program, such as the CSRS, the right to benefits flows from an individual's meeting the statutory criteria for benefits. Therefore, OPM is not limited to prospective-only corrections of coverage approval errors, just as corrections of coverage denial errors are not prospective only, subject to certain limits that require individuals to make timely claims. In any event, if OPM were limited to prospective-only denials of coverage in its exercise of oversight, the result would in most cases be harmful to the employees involved, because the statute does not

provide special benefits unless the employee completes 20 years of special-category service. If, as suggested, a correction to show that an employee was not a firefighter, for example, could be effected prospectively only, the employee would be considered a firefighter for past service for which he or she would have been subject to the additional salary withholding, but by law would not qualify for a refund of that additional amount, even if he or she had completed less than 20 years of service and therefore qualified for no additional benefits as a firefighter.

The same commenter also suggested that we amend the regulations to establish that, in exercising oversight, OPM will accept additional evidence from the employee and his or her collective bargaining representative. The regulations require each agency to establish a file on each coverage determination, which must include all background material used in making the determination. See § 831.911(b). This file is the subject of OPM's oversight and we do not see any need for additional evidence for OPM to use in determining whether the file adequately documents that the decision made by the employing agency was correct. If OPM makes a decision, or instructs the employing agency head to issue a new decision affecting an individual's rights under the CSRS or FERS, that decision would be subject to *de novo* review by the Merit Systems Protection Board.

Another commenter correctly pointed out that § 831.907(c) of the interim regulations, and § 842.805(d) of the FERS regulations, should not bar an employing agency from paying interest in cases involving overwithholding of salary. When an employing agency finds that it has erroneously withheld from an employee's salary the additional 1/2 percent of basic pay required for law enforcement officers and firefighters, the agency must retroactively correct its records and refund the erroneous withholdings to the individual. The interim regulations stated that the refund is to be paid without interest. However, the Back Pay Act provides authority (see subpart H of part 550 of title 5, Code of Federal Regulations) for the employing agency to pay interest on the erroneous withholdings under certain circumstances. Accordingly, the restriction on interest payments by employing agencies stated in § 831.907(c) and § 842.805(d) is being eliminated. These paragraphs have also been rewritten to clarify that the employing agency or former employing agency is responsible for refunding the erroneous additional withholding. In the case of a refund of the erroneous