

PAC – MISSOURI DIVISION
INFORMATION
FOR THE MEETING OF COUNCIL OF NATIONAL DIRECTORS
CHICAGO, October 18 – 20, 2018

The right to the obligatory health insurance in Poland for Polish retirees living in the USA

EXPLANATION

The Social Insurance Institution (ZUS) denies the right to obligatory health insurance in Poland for Polish retirees living in the USA when they are vacationing in Poland.

ZUS absurdly interprets the provisions of the Act of 27 August 2004 on health care services financed from public funds by writing: "... persons who receive a Polish retirement benefits ... are not covered due to that retirement benefit ... by the retirement insurance in Poland, and therefore they do not fall within the scope of application of Art. 3. 4) of the Act" (they are not covered by health insurance).

We think, that Polish retirees living in the USA, who are Polish citizens and staying temporarily in Poland, if they want to pay health insurance premiums, according to regulations in force should have the right to the obligatory health insurance in Poland.

We understand that the right to the health insurance for Polish retirees residing in the US results from the following articles of the **Act of 27 August 2004 on healthcare services financed from public funds:**

Art.3.1 The insured are:

4) persons possessing the citizenship of a Member State of the European Union or a Member State of the European Free Trade Agreement (EFTA), not residing in the territory of a Member State of the European Union or a Member State of the European Free Trade Agreement (EFTA), if they are subject to obligatory health insurance on the territory of the Republic of Poland and they are covered by:

a) retirement and disability insurance based on the provisions of the Act of 13 October 1998 on the social insurance system (Journal of Laws of 2007 No. 11, item 74, as amended)

Art. 66.1. The health insurance obligation applies to:

16) persons receiving retirement benefits,

*Art. 72.1. **The health insurance obligation for persons receiving a retirement or disability benefit arises from the date from which the payment of a retirement or disability benefit is due and expires on the date of cessation of the benefit payment.***

*Art. 75.1. **The organizational unit of the Social Insurance Institution, specified in the provisions on the social insurance system, shall report retirement or disability pensioners to health insurance***

Accordingly, the Act of 27 August 2004 on healthcare services financed from public funds, to the extent that concerns Polish retirees (covered by retirement insurance), who are Polish citizens and do not reside in the EU, clearly defines their right to the health insurance (Art. 66.1.) and should therefore be applied to them.

In the light of the aforementioned articles of the Act, the decision of the Social Insurance Institution (ZUS) regarding the refusal of the right to the health insurance in Poland to Polish retirees living in the USA is in our opinion unjustified.

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The right to a proportional benefit

EXPLANATION

The Social Insurance Institution (ZUS) refuses to grant a proportional benefit to retirees who have acquired the right to a full Polish benefit.

If the person receiving the Polish retirement benefit at the same time receives the American benefit from a Social Security, then according to the American law his Social Security benefit is reduced (up to 50% of the value of the Polish benefit) due to the so-called "Windfall Elimination Provision" (WEP), unless the Polish pension is determined proportionally based on the principle of combining work periods in Poland and the USA (totalization agreement).

ZUS incorrectly interprets Art. 9. point 3) and 4) of the Agreement

The Polish benefit for retirees who also have periods of work in the USA should be determined based on the provisions of the social security agreement concluded on 02/04/2008 between the Republic of Poland and the United States of America in accordance with Article 9, points 3 and 4, as follows:

*"3) If, according to the laws of the Republic of Poland, the right to benefits arises without consideration of periods of coverage under the laws of the United States, then the competent institution will grant a benefit and determine its amount based only on the periods of coverage accumulated according to the laws of the Republic of Poland, **unless the amount of the benefit determined according to subparagraph 4 of this Article will be more favorable.***

4) If, according to the laws of the Republic of Poland, the insured person obtains a right to a benefit after totalization of periods of coverage credited under the laws of both Parties, then the competent institution:

- a. shall determine the theoretical amount of the benefit which would be awarded if all periods of coverage were obtained under the laws of the Republic of Poland, and*
- b. based on the theoretical amount of the benefit, as discussed under letter a. of this subparagraph, shall determine the actual amount of the benefit based on the ratio of periods of coverage accumulated under the laws of the*

Republic of Poland to the sum of all periods of coverage under the laws of both Parties."

For the People who meet the conditions of Art.9. point 3) ZUS refuses to award a smaller but more favorable (desirable) proportional benefit calculated on the basis of the principle of combining periods according to Art. 9. Point 4) (exempting from WEP deductions). **ZUS justifies the refusal by saying that according to the above-mentioned Agreement, it must grant a higher benefit** (full - based only on the insurance period in Poland). **ZUS is guided solely by the quota criterion, misinterpreting the words "more favorable" as "higher" instead of "more favorable as "desirable."**

Please note that **the words "more favorable" should not be used in the meaning "higher"**, because these words are not synonyms.

ZUS is not complying with Article 95. 1. of the Act on retirements

As it is apparent from Art.9. point 3) and 4) of the agreement on social security between Poland and the US, **ZUS is obliged to calculate two benefits**, a full benefit (based only on Polish law and Polish insurance periods) and a proportional benefit (based on combining insurance periods in Poland and the USA).

In connection with the above, **we are dealing with a coincidence of two Polish benefits, of which the interested party has the right to choose one and not necessarily a higher benefit.**

The right to choose one of two or more coincided benefits clearly follows from Article 95.1 of the retirement Act.

Art. 95. 1. says: *"In the event of a coincidence of the right to several benefits provided for one person in the Act, **one of these benefits is paid - higher or selected by the person concerned.**"*

Art. 7. 2. of the Agreement - Joint Provisions

Art. 7. 2. Of the Agreement in the "Joint Provisions" says: *"Events affecting the law, reduction, suspension or amount of benefits that have occurred in the territory of one Party, are considered as if they were in the territory of the other Party."*

Thus, according to Art. 7.2, events that take place in the Republic of Poland (Art. 95.1.) and which affect the entitlement, reduction, suspension or amount of benefits, will be considered as if they were in the United States and vice versa.

The Polish side cannot change WEP regulations, but also the American side cannot influence the provisions of the Polish Act on retirements, which

allows interested parties to choose one of the two coincided Polish benefits (Art. 95.1.).

Article 4 of the Agreement - Equal treatment

A person who is subject to the law of one or both Parties *"... residing in the territory of the Party, is treated equally with the citizens of the other Party in the application of the law of the other Party regarding the acquisition or payment of benefits"*.

Based on the Agreement, Poland and the United States should consider and respect the right of Polish retirees to choose the proportional benefit not only based on the proper meaning used in the Agreement words "more favorable" as "desirable" but also based on Art. 95.1. of the Act on retirements, **which gives Polish retirees living in the US the equal right to choose the retirement benefit as Polish retirees living in Poland.**

The right to a proportional benefit in the light of the rulings of the Polish courts

It should be emphasized that **the right to a proportional benefit for Polish retirees living in the US has been confirmed by the rulings of seven (7) Appellate Courts** (see below), which changed the decision of the Social Insurance Institution (ZUS) by agreeing with the persons applying for a proportional benefit under the Polish-American agreement on social security.

- Sygn. act III AUa 2095/14 of 06/05/2016
- Sygn. act III AUa 1706/14 of 13/05/2016
- Sygn. act III AUa 206/15 of 08/09/2016
- Sygn. act III AUa 94/16 of 09/05/2017
- Sygn. act III AUa 105/16 of 18/05/2017
- Sygn. act III AUa 402/16 of 19/07/2017
- Sygn. act XIV U 972/17 of 14/09/2017

The right to a proportional benefit was also fully confirmed in the ruling of the Supreme Court (SC) of 12/04/2018. (Sygn. Act II UK 53/17) in which the Supreme Court dismissed the cassation appeal of the ZUS, maintaining a ruling of the Court of Appeal, favorable for the retiree concerned, allowing for the selection of the proportional benefit. **The case was ended with a final ruling of the Supreme Court.**

ZUS versus ZUS – what is the whole truth?

In order to find out the truth about the whole problem complicated by ZUS and related to the proportional benefit, it is enough to refer to the original interpretation by ZUS of the Art. 9.3) and 4) of the agreement, which could be found today in the following information on the website of the Polish Consulate in Chicago:

"Information on the implementation of the Polish-American agreement on social security"

"It should be noted that the choice by the Social Insurance Institution (ZUS) the benefit more favorable in amount (higher) from the benefits established under the Agreement in full amount (benefit on the basis of only Polish insurance periods) or in a partial amount (proportional benefit on the basis of combined periods of insurance in Poland and USA), does not limit the recipient's right to choose another benefit if he / she considers it more favorable for other reasons. "

It appears, based on ZUS clarification that they know very well what the true intention of the legislator was and what the meaning of the words "more favorable" used in Article 9. 3. should be.

Why did ZUS change its position? Why is the current position of ZUS contrary to its original interpretation of the disputed Article 9. point 3) and 4)?

Statistics

Currently, in 2018 based on the MRPiPS information 2,641 full benefits and 939 proportional benefits are paid to Polish retirees living in USA.

The average monthly retirement benefit paid to USA is PLN 1,317 (~ \$ 350)

The deduction of WEP - max 50% from \$ 350 = \$ 175.

If all of the 2,641 full benefit recipients would choose a proportional benefit based on Polish laws and their WEP deduction (with full benefit) would be the maximum, then due to the avoidance of the WEP deduction the SSA would pay out additional \$5,546,100 annually.

Conclusion

We believe that **ZUS wrongly interprets the above-mentioned Agreement, and unreasonably refuses to grant so-called proportional benefit, which exempts WEP deduction from the Social Security benefit.**

In our opinion, the proceedings of ZUS are inconsistent with the provisions of the aforementioned Agreement.

***Also, our request should be applied to those born after December 31, 1948 (so-called new portfolio) whom ZUS too unreasonably denies the right to the proportional benefit.**

Presently, all people eligible for the retirement benefit are born after December 31, 1948., which means that ZUS is denying the proportional benefit to all of them.

* ZUS refuses to grant a proportional benefit to retirees born after December 31, 1948 (so-called new portfolio) because they acquired the right to a Polish benefit without the long insurance periods like in so-called old portfolio, for born before January 1, 1949. However, based on the Art.9.2. of the agreement they must work in Poland at least for one year in order to be eligible for the retirement benefit.

ZUS erroneously refers to Art. 7.1. in common provisions of the agreement as the only case when proportional benefit should be calculated. In reality, accordance with the Agreement, the Art. 7.1. should be applied only when the concerned person did not collect the required periods of the insurance and has too few Polish or American periods to receive a full benefit from the given party. In that case his benefit must be calculated based on "totalization agreement".

The old or new portfolio case does not appear in the Article 9.3. of the agreement. And yet according to the Art.9.3. the Polish side must to establish two benefits (full and proportional). The concerned person decides about the choice of the benefit (ruling of the Supreme Court dated 12/04/2018).

The only difference between the old and the new portfolio, based on the Agreement, results from the requirements of the different insurance periods - 15/20 years in the old portfolio, (1) year (based on Art 9.2 of the agreement) in the new portfolio.

The Art.9.3. of the agreement always obliges ZUS to calculate two benefits whenever the right to the benefit is acquired based on the Polish law. Thus, the Art. 7.1., in the sense indicated by ZUS must not be applied regardless of the new or old portfolio.