Investment to invest said moneys in such securities and other evidences of indebtdness as are detailed in the Act.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JOSEPH LANIGAN
Deputy Attorney General

JL:MG

JANUARY 23, 1956

MR. WILLIAM F. DITTIG, *Superintendent*
Disability Insurance Service
20 West Front Street
Trenton 10, New Jersey

MEMORANDUM OPINION—P-2

DEAR MR. DITTIG:

You have requested an opinion in regard to the application of a decision of the New Jersey Supreme Court in the case of *Deaney* v. *The Linen Thread Company, Inc.*, 19 N. J. 578, decided on November 7, 1955, affirming a decision of the Board of Review of the Division of Employment Security, dated April 18, 1955 and mailed on May 9, 1955, on other claimants who are requesting reimbursement for the amounts deducted from their temporary disability benefits equivalent to the amount that they received concurrently under the Federal Social Security Law.

In the case of Khanan Chodorowsky (Charles Chodorow), S.S. No. 151-18-8438, you have requested a decision where the claimant became sick on April 30, 1953 and received benefits for the period May 8, 1953 to November 5, 1953, inclusive, and his benefits for the last twenty-two weeks of this period were reduced by $18.62 per week because he received social security benefits for the same weeks. You have stated that he made no appeal until November 10, 1955.

In the case of Antonio Cucci, S.S. No. 149-10-8651, disability payments were reduced for the compensable weeks from February 3, 1955 through May 4, 1955 because he became entitled to social security payments for this period of time. Mr. Cucci's first request for restoration of the deductions was incorporated in a letter dated November 9, 1955.

N.J.S.A. 43:21-30 provided expressly for the reduction of benefits in the amount of any primary insurance benefits being paid to the claimant as federal old age insurance benefits.

An amendment, P.L. 1952, c. 190, effective July 1, 1952, provided as follows:

> " * * * Disability benefits otherwise required hereunder shall be reduced by the amount paid concurrently under any governmental or private retirement, pension or permanent disability benefit or allowance program to which his most recent employer contributed on his behalf."

The administrative ruling of the Disability Insurance Service in regard to the 1952 amendment was that the amendment did not change the prior Act in regard to the deduction of the amount of benefits received under the Federal Social Security Act from benefits received under the Temporary Disability Benefits Law.

In a decision dated April 18, 1955 and mailed on May 9, 1955, *Deaney* v. *The Linen Thread Co. Inc.*, BR-DS 426-C, the Board of Review of the Division of Employment Security held that the payments received under the Federal Social Security Act were not deductible from temporary disability benefits.

The Supreme Court of New Jersey in *Deaney* v. *The Linen Thread Co. Inc.*, 19 N. J. 578, decided on November 7, 1955, affirmed the decision of the Board of Review.

The functions of the Board of Review of the Division of Employment Security are quasi-judicial. *Carbone v. Atlantic Yachting Co.*, 14 N.J. Super. 269 (App. Div. 1951); *Adolph* v. *Elastic Stop Nut Corp., America,* 18 N.J. Super. 543 (App. Div. 1952); *Borgia* v. *Board of Review,* 21 N.J. Super. 462 (App. Div. 1952); *Krauss* v. *A. & M. Karagheusian, Inc.,* 24 N.J. Super. 277, (App. Div. 1953). The term quasi-judicial is used to describe governmental officers, boards and agencies which, while not a part of the judiciary, nevertheless perform functions of a judicial character. *Adolph* v. *Elastic Stop Nut Corp., America,* supra.

A decision of the Board of Review controls a prior inconsistent ruling of the agency. See *Henry A. Dreer, Inc.* v. *Unemployment Compensation Commission,* 127 N.J.L. 149 (Sup. Ct. 1941).

After the receipt of the Board of Review decision in the *Deaney* case on May 9, 1955, the Disability Insurance Service ceased to deduct from their payments the amounts received concurrently by the claimants from federal social security.

A regulation of an administrative agency out of harmony with a statute is mere nullity. Since the original rule could not be applied, the amended regulation becomes the primary and controlling rule. Neither an amended regulation nor a judicial determination stating that a prior administrative ruling was incorrect are retroactive in operation. Cf. *Manhattan General E. Co.* v. *Commissioner of Int. Rev.,* 297 U.S. 129, 56 S. Ct. 397 (1936).

A change in an authoritative rule of law resulting from a decision in an independent case announced subsequent to a judgment previously entered, neither demonstrates an error of law apparent upon the face of the judgment, nor constitutes new matter in pais, justifying a review of the judgment. *John Simmons Co.* v. *Grier Bros., Co.,* 258 U.S. 82, 42 S. Ct. 196 (1922); *Miller* v. *McCutcheon,* 117 N.J.E. 123 (E & A 1934); *Lockwood* v. *Walsh,* 137 N.J.E. 445 (Prerog Ct. 1946). But see *In re O'Mara,* 106 N.J.E. 311 (Prerog. Ct. 1930). The same rule should be applied to the decisions of a quasi-judicial administrative agency.

Since neither the opinion of the Board of Review nor of the Supreme Court are retroactive, the question then arises as to the effective date of the decisions as a precedent.

R.S. 43:21-6(h), as amended, provides:

> "Any decision of the board of review shall become *final* as to any party *upon the mailing* of a copy thereof to such party or to his attorney, * * *." (Italics added).

R.R. 1:3-1 provides:

> "Where an appeal is permitted, it shall be taken to the appropriate appellate court within the following periods of time after the entry of the judgment, order or determination appealed from:
>
> "(b) 45 days-final judgments of all courts except municipal courts;

judgments nisi in matrimonial matters; and *final state agency decisions or actions, except here the time shall run from the date of the service of the decision of the agency or of notice of the action taken, as the case may be.*" (Italics added).

The operative date of the decision would appear to be the date of notification and mailing, May 9, 1955.

The provision of the Temporary Disability Benefits Law providing for review, R.S. 43:21-50(b), as amended, states:

"Individuals claiming benefits under the State Plan shall be entitled to review hearing and determination as provided in unemployment compensation cases."

The provision of the Unemployment Compensation Act governing appeals is R.S. 43:21-6(b)(1)(C), as amended, which provides:

"Any claimant or any interested entity or person may file an appeal from any determination * * * within five calendar days after the delivery of notification, or within seven calendar days after the mailing of notification, of such determination. *Unless such an appeal is filed such determination shall be final* and benefits shall be paid or denied in accordance therewith. * * *" (Italics added).

"It is sound jurisprudence and public policy as well that there should be finality to judgments of courts of competent jurisdiction which parties let go unchallenged, by failing to exercise their right of appeal." *Miller* v. *McCutcheon*, supra, at p. 130.

Our opinion is that the appeals of Khanan Chodorowsky (Charles Chodorow) and Antonio Cucci were not timely and additional payments under the Temporary Disability Benefits Law should be denied to them.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: ROBERT E. FREDERICK
Deputy Attorney General

JANUARY 23, 1956

MR. GEORGE M. BORDEN, *Secretary*
Public Employees' Retirement System
48 West State Street
Trenton, New Jersey

MEMORANDUM OPINION—P-3

DEAR MR. BORDEN:

You have asked our opinion to whether a member of the Public Employees' Retirement System who was granted a six months leave of absence from his position as Senior Clerk in the Division of Employment Security on December 1, 1955 in order to assume temporary duties as Economist with the Department of Conservation