

Brathovd, Ivan

SCOPE OF REVIEW

Time-loss compensation

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Time-loss compensation

The fact that the Department is in the process of determining an issue regarding social security offset does not deprive the Board of jurisdiction to hear an appeal from an order determining the basis for the time-loss compensation benefits. ...*In re Ivan Brathovd*, BIIA Dec., 08 22251 (2010)

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: IVAN A. BRATHOVD**) **DOCKET NO. 08 22251**
2)
3 **CLAIM NO. AD-42339**) **ORDER VACATING PROPOSED DECISION**
4) **AND ORDER AND REMANDING THE APPEAL**
5) **FOR FURTHER PROCEEDINGS**

5 **APPEARANCES:**

6 Claimant, Ivan A. Brathovd, by
7 Law Offices of James Rolland, P.S., per
8 Carroll G. Rusk, Jr.

9 Employer, Looker & Associates, Inc., by
10 K-Solutions Law, PLLC, per
11 Karen Galipeau Forner

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Leslie V. Johnson, Assistant

14 The claimant, Ivan A. Brathovd, filed an appeal with the Board of Industrial Insurance
15 Appeals on December 24, 2008, from an order of the Department of Labor and Industries dated
16 October 28, 2008. In this order, the Department affirmed the provisions of orders dated August 14,
17 2008, and August 29, 2008. In its August 14, 2008 order the Department determined that
18 Mr. Brathovd's monthly rate of time-loss compensation benefits was based on his status as a single
19 individual who had no dependents, and whose monthly earnings were in the sum of \$2,270.20. In
20 its August 29, 2008 order the Department closed Mr. Brathovd's claim with time-loss compensation
21 benefits as paid through March 9, 2008, and without compensation for permanent partial disability.
22 The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

23 **DECISION**

24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and
26 Order issued on October 28, 2009, in which the industrial appeals judge reversed and remanded
27 the order of the Department dated October 28, 2008. We grant review, and remand this matter to
28 the hearing process for scheduling of proceedings on the underlying issues.

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The facts in this matter are simple and we set them forth for clarity. On May 29, 2008, the Department issued an order in which it calculated the claimant's social security offset. On July 25, 2008, the claimant protested that order, and on August 28, 2008, the Department issued an order in which it affirmed the May 29, 2008 order. On October 27, 2008, the claimant appealed the August 28, 2007 order, and on November 7, 2008, the Department reconsidered the order of August 28, 2008. On January 29, 2009, the Department affirmed the orders of May 29, 2008, and August 28, 2008. On March 13, 2009, the claimant appealed the order dated January 29, 2009, and on March 25, 2009, the Department again reconsidered the order of January 29, 2009. Finally, on May 7, 2009, the Department affirmed the orders of May 29, 2008 and January 29, 2009.

In the meantime, on August 14, 2008, the Department issued an order in which it set the claimant's wage rate. On August 29, 2008, the Department issued an order in which it ended time loss compensation benefits as paid through March 9, 2008, and closed the claim. On October 10, 2008, the claimant filed a protest of the August 14, 2008 (wage rate) order, and on October 13, 2008, the claimant filed an application to reopen his claim. On October 28, 2008, the Department issued an order in which it affirmed both the August 14, 2008 (wage rate) order and the August 29 (closing) order. On December 24, 2008, the claimant filed a Notice of Appeal of the October 28, 2008 order. On January 21, 2009, the Board issued an order in which it granted the appeal, and assigned it Docket No. 08 22251. This is the appeal currently before the Board.

Shortly after the Department issued the order affirming the wage rate and closing orders, it issued an order in which it took back the August 28 order encompassing the social security offset issue. Thus, at the time the claimant filed the Notice of Appeal of the order encompassing the wage rate and closing, the issue of social security offset was still at the Department.

Our industrial appeals judge reversed and remanded the Department order of October 28, 2008, directing the Department to further consider the matter. He reasoned that if the issue of the social security offset was still at the Department, then the Board lacked the jurisdiction to hear any other issues.

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2 In *In re Randy Jundul*, BIIA Dec., 98 21118 (1999), we held that a closing order determines
3 the totality of the claimant's entitlement to all benefits of whatever form as of the date of claim
4 closure. Further, in *In re Betty Wilson*, BIIA Dec., 02 21517 (2004), we determined that while
5 litigation on a segregation order was pending, the Department could not logically decide whether
6 the claimant was able to work or needed more treatment, because those determinations were
7 inextricably bound to the decision the Department made in its segregation order. Of note, we held
8 that the facts of the *Wilson* case did not present a question of subject matter jurisdiction; rather, the
9 focus of the analysis is whether the Department could logically adjudicate termination of benefits
10 and claim closure while a prior order segregating cervical spondylosis remained on appeal.

11 Thus, the question here is whether the Department determination(s) on appeal are
12 inextricably bound to the decision the Department made regarding the social security offset. We do
13 not believe that this is the case in this matter. The social security offset order determines only how
14 much of Mr. Brathovd's time loss compensation benefits would be paid by the Department, and how
15 much by the Social Security Administration. It does not change how much Mr. Brathovd would
16 receive. Moreover, the calculation done for purposes of the social security offset is not the same as
17 that for wage rate. This is a decision that can be made regardless of whatever decision is made
18 relative to wage rate or even closure. There may later be a determination that Mr. Brathovd owes
19 money to the Department, but that would be only because he "double dipped" from the Department
20 and the Social Security Administration—it is an overpayment, money he has already received.

21 When the Department reassumed jurisdiction over the August 28, 2008 order, the
22 Department opted to reconsider the amount of time loss compensation benefits it paid to
23 Mr. Brathovd through the date it closed his claim, and because of this, it could change the amount
24 of wage replacement benefits it has paid the claimant. To be sure, that may accordingly change
25 the calculation for the Social Security offset, but that does not mean that the Department
26 determination as to the Social Security offset is "inextricably bound" to the wage rate order or the
27 closing order. We believe that this issue is independent of the issues relative to wage rate and
28 claim closure. Even if the social security offset changes, that difference will not change
29 Mr. Brathovd's basic time loss compensation benefits.

30 Finally, we observe that this does not "piece-meal" the litigation. There is no overlap in the
31 issues or witnesses between a closing order and a wage order, and a social security offset order.
32 Litigation relative to the appeal of the Department order of October 28, 2008, should proceed.

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The Proposed Decision and Order of October 28, 2009, is vacated. This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

This appeal is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order. Unless the matter is dismissed or resolved, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, pursuant to RCW 51.52.104.

Dated: January 11, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
THOMAS E. EGAN Chairperson

/s/
LARRY DITTMAN Member