

Forsythe, Jeannie

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Limitation on recovery of overpayment (RCW 51.32.220)

Where lump sum payments of time-loss compensation by the self-insured employer were made prior to the Department notifying the worker that it was reducing her benefits, the self-insured employer's recovery of the overpayment is limited to the amount of compensation for six months of total disability preceding the notification. **...*In re Jeannie Forsythe*, BIIA Dec., 09 22899 (2011)** [*Editor's Note*: The Board's decision was appealed to superior court under Mason County Cause No. 11-2-00163-0.]

Scroll down for order.

1 regarding the Social Security Administration's policy on Washington State's workers' compensation
2 program's social security offset policy. Because that exhibit was not presented as part of the
3 evidence during proceedings before our industrial appeals judge, it has not been reviewed or
4 considered as part of this decision.

5 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
6 no prejudicial error was committed. The rulings are affirmed.

7 **ISSUE**

8 This appeal presents the issue of when the Department or a self-insured employer is
9 restricted to recovering only a six-month period of overpayments for total disability benefits when
10 the worker receives social security disability benefits and lump sum payment of industrial insurance
11 benefits for the same period of time. Here, the Department limited BOA to recovering total disability
12 benefits it paid to Ms. Forsythe for the period beginning on July 1, 2009. BOA contends it is entitled
13 to recoup such benefits for a time period beginning on September 13, 2007, due to lump sum
14 payments it made in July and September of 2009.

15 **THE FACTS**

16 The Proposed Decision and Order contains an accurate summary of the facts to which the
17 parties stipulated in this appeal. We will repeat those facts only as necessary.

18 Ms. Forsythe was injured during the course of her employment with BOA on April 20, 2007.
19 The Department allowed the claim and BOA paid benefits, including temporary total disability
20 benefits, to Ms. Forsythe through September 12, 2007. The Department closed the worker's claim
21 on November 7, 2007. Ms. Forsythe appealed the closing order to this Board.

22 On March 4, 2009, we reversed the Department's closing order and remanded the claim to
23 the Department with directions, among other things, to require BOA to pay temporary total disability
24 benefits to Ms. Forsythe for the inclusive period from September 13, 2007, through November 7,
25 2007. BOA appealed the Board's order to Mason County Superior Court, under Cause
26 No. 09-2-00333-9, but it did not obtain an order staying benefits pending the conclusion of the
27 appeal.

28 In June 2009, the Social Security Administration notified the Department that Ms. Forsythe
29 was eligible for social security disability benefits. That same month, the administration paid benefits
30 to the claimant for the period from October 2007, through May 2009. Effective July 2009, she
31 received social security benefits in the monthly sum of \$1,371.

1 On July 30, 2009, and September 4, 2009, BOA paid retroactive temporary total disability
2 benefits to Ms. Forsythe in lump sums for the period from September 13, 2007, through July 1,
3 2009. Nineteen days later, on September 23, 2009, the Department notified Ms. Forsythe that BOA
4 was going to begin taking an offset of the total disability benefits it paid to her because of her
5 receipt of social security benefits.

6 THE STATUTE

7 In relevant parts, RCW 51.32.220 provides:

8 (1) For persons receiving compensation for temporary or permanent
9 total disability pursuant to the provisions of this chapter, such
10 compensation shall be reduced by an amount equal to the benefits
11 payable under the federal old-age, survivors, and disability insurance
12 act.

12 . . .

13 (2) Any reduction under subsection (1) of this section shall be effective
14 the month following the month in which the department or
15 self-insurer is notified by the federal social security administration
16 that the person is receiving disability benefits under the federal
17 old-age, survivors, and disability insurance act: PROVIDED, That in
18 the event of an overpayment of benefits the department or
19 self-insurer may not recover more than the overpayments for the six
20 months immediately preceding the date the department or
21 self-insurer notifies the worker that an overpayment has occurred:
22 PROVIDED FURTHER, That upon determining that there has been
23 an overpayment, the department or self-insurer shall immediately
24 notify the person who received the overpayment that he or she shall
25 be required to make repayment pursuant to this section and
26 RCW 51.32.230.

27 This statute is commonly referred to as the reverse offset statute. Federal law allows the
28 Social Security Administration to offset the amount it pays for total disability benefits to a worker
29 who is under age 65 from compensation the worker receives from a state program such as
30 industrial insurance for total disability benefits. Because the State of Washington has a statute
31 authorizing it to do so, it may reverse the federal offset and take the offset itself against the amount
32 of social security benefits a worker receives so long as the requirements of RCW 51.32.220 are
met.

If there has been an overpayment of benefits and if the worker is being paid total disability
benefits, the Department or self-insured employer may deduct an amount equal to 25 percent of the
monthly amount the worker is due or one-sixth of the amount of the total overpayment, whichever is

1 less. RCW 51.32.220(3). No reduction may be taken unless the Department or self-insurer notifies
2 the worker of the reduction prior to the month in which the reduction is made. RCW 51.32.220(4).

3 DECISION

4 In the Proposed Decision and Order, our industrial appeals judge relied on *Potter v.*
5 *Department of Labor and Indus.*, 101 Wn. App. 399 (2000) to determine that BOA could recoup the
6 entire amount of overpayment of benefits. In the *Potter* case, on December 19, 1995, the
7 Department was notified that Ms. Potter was receiving social security disability benefits and on that
8 same date, the Department notified the claimant that it was going to reduce the amount of the total
9 disability benefits it was paying to her because of her receipt of those benefits. On January 3,
10 1996, it paid retroactive time loss compensation benefits to the claimant for the period from
11 February 23, 1993, through October 25, 1994, in a lump sum and it deducted the offset for the
12 entire time period. The Court of Appeals approved the deduction for the reason that the six-month
13 limitation in RCW 51.32.220(2) only applies to overpayments already received. Because the lump
14 sum was paid after the Department notified Ms. Potter that the offset would be deducted from her
15 industrial insurance benefits, the six-month limitation for recouping benefits did not apply. The court
16 noted that the statute authorizes the Department to recoup excess benefits that the worker has
17 already received, but limits the recovery to six months in order to prevent an undue hardship on
18 workers who likely had spent the excess. *Potter*, at 410.

19 A crucial difference exists in the facts currently before us and the facts in *Potter*. BOA paid
20 the retroactive benefits before the Department notified Ms. Forsythe that it was reducing her
21 benefits. The Department received notice that Ms. Forsythe was receiving social security benefits
22 in June 2009. In September 2009, it notified the claimant that it was reducing her industrial
23 insurance benefits. The reduction could not be implemented, however, until October 2009,
24 because that was the month after September 23, 2009, when the Department notified Ms. Forsythe
25 of the pending offset. BOA paid the retroactive benefits to Ms. Forsythe before September 23,
26 2009. Ms. Forsythe already received the lump sum compensation from BOA for total disability
27 when the Department notified her that benefits were offset due to receipt of social security benefits.
28 For that reason recovery of the overpayment is limited to the amount of compensation for six
29 months of total disability preceding notification. *In re Marianne Taylor*, Dckt. No. 09 17082 (July 20,
30 2010.)

31 The retroactive payments BOA made constituted overpayments of compensation for total
32 disability to Ms. Forsythe for the period from September 13, 2007, through July 1, 2009.

1 RCW 51.32.220(2) unambiguously limits BOA to recoupment of the portion of the lump sum
2 overpayment attributable to time loss compensation benefits owed for the six-month period that
3 came before September 2009, when Ms. Forsythe was notified of the overpayment.

4 Accordingly, BOA is entitled to the reverse offset for overpayments of time loss
5 compensation benefits it paid to Ms. Forsythe from March 2009, through August 2009. Because
6 the Department order before the Board limited BOA to take the reverse offset from July 1, 2009,
7 through September 30, 2009, it must be reversed and this matter be remanded to the Department
8 with directions to issue an order which contains the same language as its September 23, 2009
9 order with the exception that the order must declare that BOA is entitled to offset the amount of the
10 time loss compensation benefits overpayment it made to Ms. Forsythe because of her receipt of
11 social security disability benefits for the months from March 2009, through September 2009.

12 **FINDINGS OF FACT**

- 13 1. On May 8, 2007, the claimant, Jeannie R. Forsythe, filed an Application
14 for Benefits with the Department of Labor and Industries, in which she
15 alleged that she had been injured during the course of her employment
16 with Bank of America NA (BOA) on April 20, 2007. The Department
17 allowed the claim for benefits on July 27, 2007. On September 24,
18 2007, the Department issued its order, in which it denied that BOA was
19 responsible under the claim for a condition described as chronic post-
20 traumatic stress disorder and closed Ms. Forsythe's claim with time loss
21 compensation benefits as paid through September 12, 2007, and
without compensation for permanent partial disability. After
Ms. Forsythe filed a Protest and Request for Reconsideration on
October 12, 2007, the Department affirmed the provisions of its order on
November 7, 2007.

22 On November 27, 2007, a Notice of Appeal on behalf of Ms. Forsythe,
23 was filed with the Board of Industrial Insurance Appeals from the
24 November 7, 2007 Department order. On December 14, 2007, the
25 Board issued an Order Granting Appeal under Docket No. 07 26291,
26 and agreed to hear the appeal. On January 5, 2009, a Proposed
27 Decision and Order was issued in the appeal. In the decision the Board
28 reversed the November 7, 2007 Department order and remanded the
29 claim to the Department with directions to issue an order which required
30 BOA to accept responsibility for left shoulder pain (not contested),
31 adjustment disorder with anxiety (acute stress reaction), and
32 aggravation of pre-existing post-traumatic stress disorder, depression,
panic disorder, and agoraphobia; pay time loss compensation benefits
to Ms. Forsythe for the period from September 13, 2007, through
November 7, 2007; provide proper and necessary medical treatment;
and to take such other action as the law and the facts dictated. BOA
filed a Petition for Review of the Proposed Decision and Order on

1 February 19, 2009. The Board issued an Order Denying Petition for
2 Review on March 4, 2009.

3 BOA filed a Notice of Appeal from the March 4, 2009 Board order in
4 Mason County Superior Court, under Cause No. 09-2-00333-9, on
5 March 30, 2009.

6 On September 23, 2009, the Department issued an order in which it
7 declared that Ms. Forsythe's total disability compensation rate was being
8 adjusted effective July 1, 2009, because of her receipt of social security
9 disability benefits; the claimant's new rate of compensation was \$2,558
10 per month because social security paid her \$1,266 per month and her
11 highest years' earnings were \$3,824 per month; the new rate was not
12 going to be implemented until October 1, 2009; BOA had overpaid time
13 loss compensation benefits to Ms. Forsythe for the period from July 1,
14 2009, through September 30, 2009; and BOA was allowed to deduct the
15 overpayment from future benefits at the rate of \$214.20 per month.
16 BOA protested the order on October 29, 2009, but the Department
17 affirmed the provisions of the order on November 3, 2009. On
18 December 14, 2009, BOA filed a Notice of Appeal with the Board of
19 Industrial Insurance Appeals from the November 3, 2009 Department
20 order. On January 11, 2010, the Board issued an Order Granting
21 Appeal under Docket No. 09 22899, and agreed to hear the appeal.

- 22 2. In June 2009, the Social Security Administration notified the Department
23 that Ms. Forsythe was eligible for social security disability benefits and it
24 paid benefits to the claimant for the period from October 2007, through
25 May 2009.
- 26 3. On July 30, 2009, and September 4, 2009, BOA paid retroactive
27 temporary total disability benefits to Ms. Forsythe for the period from
28 September 13, 2007, through July 1, 2009.
- 29 4. On September 23, 2009, the Department issued an order in which it
30 notified Ms. Forsythe that (1) her monthly rate of time loss compensation
31 benefits was being changed to \$2,558, effective July 1, 2009, because
32 of her receipt of social security disability benefits in the sum of \$1,266;
(2) the rate change was going to be implemented on October 1, 2009;
(3) the new time loss compensation benefits rate calculation was based
on the fact that 80 percent of the claimant's highest year's earnings were
\$3,824 per month; (4) BOA had overpaid time loss compensation
benefits to Ms. Forsythe for the period from July 1, 2009, through
September 30, 2009, in the sum of \$1,285,24; and (5) that BOA could
recoup the overpayment by deducting \$214.20 per month from future
awards.
5. On October 29, 2009, BOA filed a Protest and Request for
Reconsideration to the Department order dated September 23, 2009.
6. The Department affirmed the provisions of its September 23, 2009 order
on November 3, 2009.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. The effective date of the social security offset is July 1, 2009, as provided by RCW 51.32.220(2).
3. As required by RCW 51.32.220(4), Ms. Forsythe received notice of the reduction of her benefits by a Department order dated September 23, 2009.
4. The implementation date of the social security offset is October 1, 2009, pursuant to RCW 51.32.220(4).
5. Because Ms. Forsythe was not notified of the reduction in her benefits until after September 23, 2009, BOA was not permitted to reduce the lump sums it paid on July 30, 2009, and September 4, 2009, for time loss compensation benefits covering the period from September 13, 2007, through February 28, 2009, under the terms of RCW 51.32.220(4).
6. BOA may only recover the overpayment of time loss compensation benefits it paid to Ms. Forsythe for the six months immediately preceding September 23, 2009, pursuant to RCW 51.32.220(2).
7. BOA was permitted to begin recovering the overpayment of time loss compensation benefits for the six months immediately preceding September 2009, on October 1, 2009.
8. The November 3, 2009, order of the Department of Labor and Industries is incorrect and is reversed. The claim is remanded to the Department with directions to issue an order which:
 - a. Adjusts Ms. Forsythe's monthly rate of time loss compensation benefits effective July 1, 2009, because of her receipt of social security benefits, with a new rate of \$2,558 per month based on social security payments of \$1,266 per month, and 80 percent of the claimant's highest year's earnings in the amount of \$3,824 per month;
 - b. Determines the new rate could not be implemented until October 1, 2009;
 - c. Determines that BOA overpaid time loss compensation benefits to Ms. Forsythe for the months of March through August 2009 based on the social security offset, and determines the amount of that overpayment;
 - d. Declares the overpayment will be deducted from future benefits at the rate of 25 percent of the monthly amount the worker is due or one-sixth of the amount of the total overpayment, whichever is less; and

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e. Takes such other and further action as the law and the facts dictate.

DATED: January 12, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
DAVID E. THREEEDY Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member