

Ames, Frank

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Effective date of offset

The effective date of the social security offset determines the beginning date for the recoupment of benefits for overpayment. Prior to the effective date of the offset, there is no offset and therefore no overpayment of state benefits. *Overruling In re Jeannie Forsythe*, BIIA Dec., 09 22899 (2011). ...*In re Frank Ames*, BIIA Dec., 14 11871 (2014) [Editor's Note: The Board's decision was appealed to superior court under Snohomish County Cause No. 15-2-01702-9.]

Scroll down for order.

1 from an order of the Department of Labor and Industries dated December 11, 2013. In this order,
2 the Department affirmed the June 20, 2013 order in which it adjusted the compensation rate
3 effective June 1, 2013, based on Mr. Ames' receipt of social security disability benefits; calculated
4 the new rate based on monthly social security benefits totaling \$2,833 and 80 percent of Mr. Ames'
5 highest year's earnings in the amount of \$4,291.20, as provided by the Social Security
6 Administration; determined his new monthly rate was \$2,051.66 of which \$1,025.83 was payable
7 under Claim No. W-784240 and \$1,025.83 was payable under Claim No. W-814442; advised
8 Mr. Ames that the new rate could not be implemented until July 1, 2013, as required by
9 RCW 51.32.220(4); assessed an overpayment for the period June 1, 2013, through June 30, 2013,
10 in the amount of \$2,832.60 (\$1,416.30 under Claim No. W-784240 and \$1,416.30 under Claim
11 No. W-814442), to be recovered from future benefits at a rate of \$472.10 (\$236.05 under Claim
12 No. W-784240 and \$236.05 under Claim No. W-814442) a month; and determined that due to the
13 cost of living increase effective July 1, 2013, the monthly benefit rate would be \$2,218.18, of which
14 \$1,109.09 would be payable under Claim No. W-784240 and \$1,109.09 would be payable under
15 Claim No. W-814442. The Department order is **AFFIRMED**.

ISSUE

16 This is a social security disability offset case. The sole issue is how far back Boeing can go
17 in applying the reverse offset and recouping an overpayment of state benefits under
18 RCW 51.32.220(2). The industrial appeals judge reversed the Department orders based in part on
19 language in *In re Jeannie Forsythe*¹ permitting the self-insured employer to go back to a date earlier
20 than the effective date of the offset. We have granted review to overrule that part of *Forsythe*; grant
21 summary judgment to the Department; and affirm the Department orders.

PROCEDURAL AND EVIDENTIARY MATTERS

22 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
23 review and decision. The Department filed a timely Petition for Review of an August 15, 2014
24 Proposed Decision and Order in which the industrial appeals judge reversed the December 11,
25 2013 Department orders and directed the Department to determine that Boeing overpaid time-loss
26 compensation benefits to Mr. Ames for the six-month period immediately preceding June 20, 2013,
27 based on the social security offset; determine the amount of the overpayment; and allow
28 recoupment from future benefits. Boeing filed a Response on October 30, 2014.

29 ¹ *In re Jeannie Forsythe*, BIIA Dec., 09 22899 (2011), at 8-9.

1 The Board has reviewed the evidentiary rulings in the record of proceedings. This case was
2 resolved on cross motions for summary judgment. In support of its motion, the Department
3 provided a copy of the Mason County Superior Court Findings of Fact and Conclusions of Law and
4 Judgment resolving the appeals of the worker, the employer, and the Department from our decision
5 in *Forsythe*.² Boeing moved to strike Exhibit A and paragraph 2 of Assistant Attorney General
6 Barnes' Declaration referencing the exhibit. The industrial appeals judge granted the motion,
7 finding that the superior court's resolution of the appeal from the Board's decision in *Forsythe* had
8 no precedential value and was irrelevant. In its Petition for Review, the Department contends that
9 while the superior court decision is not binding on the Board, it is persuasive and the industrial
10 appeals judge should not have stricken it.
11

12 We agree with the industrial appeals judge that the superior court judgment has no
13 precedential value. It also contributes little to the discussion. The superior court limited the
14 recoupment of any overpayment to the period after the effective date of the offset but it did so
15 without explanation. Nonetheless, our discussion would be incomplete if we failed to acknowledge
16 the outcome on appeal. Boeing's motion to strike Exhibit A and paragraph 2 of Mr. Barnes'
17 Declaration is denied.
18

19 We find that no other prejudicial error was committed and all other rulings are affirmed.
20

21 OVERVIEW

22 Boeing paid Mr. Ames full time-loss compensation benefits continuously from December 1,
23 2012, through June 30, 2013, and he has been receiving social security disability (SSD) benefits
24 since 2010. The effective date for the social security offset was June 1, 2013. The Department
25 notified Mr. Ames of the offset by a June 20, 2013 order and implemented the offset on July 1,
26 2013. Because the offset was not effective until June 1, 2013, the Department limited the
27 recoupment of an overpayment to the period of June 1, 2013, through June 30, 2013.
28

29 Boeing argues that it can recoup a purported overpayment going all the way back to
30 December 2012, six months prior to when Mr. Ames was notified of an overpayment. But there
31 cannot have been any overpayment of time-loss compensation benefits prior to June 1, 2013,
32 because there was no offset until then. Prior to June 1, 2013, Mr. Ames was entitled to full
33 time-loss compensation benefits. The six-month proviso in RCW 51.32.220(2) is a limitation on
34 recoupment. It does not provide blanket permission to go back six months in every case,
35
36

37
38
39
40
41
42
43
44
45
46
47 ² Exhibit A, attached to the Declaration of John Barnes, Assistant Attorney General.

1 regardless of when the offset became effective. The limitation on recoupment cannot override the
2 effective date of the offset.
3

4 In *Forsythe*, the Board allowed the self-insured employer to go back a full six months for the
5 offset instead of stopping at the effective date. That portion of *Forsythe* is overruled. The main
6 holding of *Forsythe* addressing how lump sums of past due benefits should be treated under
7 RCW 51.32.220 stands.
8
9

10 DECISION

11 The self-insured employer and the Department filed cross motions for summary judgment.
12 In resolving these appeals, we rely on the documents designated by the industrial appeals judge
13 under CR 56(h). As indicated above, we have also considered Mr. Barnes' July 10, 2014
14 Declaration in its entirety as well as the attached Exhibit A.
15
16

17 The facts are not disputed. But we need to clarify the date when his attorney received the
18 June 20, 2013 order on Mr. Ames' behalf, giving the worker notice of the reverse social security
19 offset and a resulting overpayment of time-loss compensation benefits. The date the order was
20 received is critical because it determines the implementation date under RCW 51.32.220(4) and
21 triggers the six-month limitation on recoupment of any overpayment under RCW 51.32.220(2).
22
23

24 To address this factual issue, Boeing provided Mr. Ames' responses to the Employer's
25 Requests for Admission. Mr. Ames admitted he received the June 20, 2013 order at PO Box 898,
26 Everett, WA 98206-0898, which is his attorney's address. At the motion hearing, Mr. Ames'
27 attorney agreed that the order was received within a few days of June 20, 2013. The record
28 establishes that Sedgewick CMS, which handles claims for Boeing, received the order on June 24,
29 2013, at its address in Lexington, Kentucky. The order was received at Boeing's attorney's office in
30 Seattle, Washington, on June 24, 2013. We conclude that Mr. Ames' attorney would likewise have
31 received the June 20, 2013 order in the due course of mail at his office in Everett, Washington on
32 June 24, 2013.
33
34

35 RCW 51.32.220(2) provides that any reduction of time-loss compensation benefits based on
36 the receipt of social security benefits:
37
38

39 "[s]hall be effective the month following the month in which the department or
40 self-insurer is notified by the federal social security administration that the person is
41 receiving disability benefits under the federal old-age, survivors, and disability
42 insurance act: PROVIDED, That in the event of an overpayment of benefits the
43 department or self-insurer may not recover more than the overpayments for the six
44
45
46
47

1 months immediately preceding the date the department or self-insurer notifies the
2 worker that an overpayment has occurred.

3
4 RCW 51.32.220(4) provides: "No reduction may be made unless the worker receives notice of the
5 reduction prior to the month in which the reduction is made."

6
7 Under the statutory scheme there are a number of critical dates. First, there is the date the
8 Social Security Administration notified the Department that Mr. Ames was receiving federal
9 disability benefits: May 25, 2013. That date triggered the effective date for the state offset, which is
10 the month following the month in which the Department received notice from the Social Security
11 Administration: June 1, 2013. However, the offset cannot be implemented "unless the worker
12 receives notice of the reduction prior to the month in which the reduction is made."³ Mr. Ames was
13 notified of the offset by the June 20, 2013 order, which he received in the due course of mails on
14 June 24, 2013, and which properly advised him that the offset would be implemented on July 1,
15 2013.
16
17
18
19

20 Because of the difference between the implementation date and the effective date of the
21 offset, there is typically a period when full benefits are paid, resulting in an overpayment. Mr. Ames
22 was paid full time-loss compensation benefits from December 1, 2012, through June 30, 2013. The
23 Department determined that there was an overpayment from the effective date of the offset, June 1,
24 2013, through June 30, 2013.
25
26
27

28 In its Motion for Summary Judgment, Boeing relied on *Forsythe* and asserted "the employer
29 is entitled to recover an overpayment of benefits resulting from the claimant's simultaneous receipt
30 of Social Security and temporary total disability benefits for the period of December 1, 2012 through
31 May 31, 2013."⁴ In the Proposed Decision and Order, the industrial appeals judge found there was
32 an overpayment for the six months proceeding June 20, 2013. The Department argues that there
33 can be no overpayment until the effective date of the offset, which is June 1, 2013. Before that,
34 there is nothing to recoup.
35
36
37

38 Boeing contends that the offset applies to all the time-loss compensation benefits paid during
39 the six months prior to when Mr. Ames was notified of an overpayment, without regard to the
40 effective date of the offset. Alternatively, Boeing argues that the limitation on recoupment in the
41 second sentence of RCW 51.32.220(2) creates an exception to the effective date for the offset
42 established by the first sentence of RCW 51.32.220(2). The Department reads subsection 2 as a
43
44
45

46 ³ RCW 51.32.220(4).

47 ⁴ Employer's Motion for Summary Judgment, at 1.

1 whole and argues that the six-month period is the outside limit for recoupment of an overpayment,
2 but it does not apply when there are fewer than six months between the effective date of the offset
3 and the date the worker is notified of the overpayment.
4

5 **Forsythe:** The Department urges us to overrule the portion of *Forsythe* that is inconsistent
6 with its argument. In *Forsythe*, the Board addressed the question of how to handle a lump sum of
7 back time-loss compensation benefits under RCW 51.32.220(2). The key facts were: In
8 June 2009, the Social Security Administration notified the Department that Ms. Forsythe was
9 entitled to social security disability benefits and paid back benefits for the period of October 2007,
10 through May 2009. On July 30, 2009, and September 4, 2009, the self-insured employer paid
11 retroactive time-loss compensation benefits covering the period of September 13, 2007, through
12 July 1, 2009. On September 23, 2009, the Department issued an order in which it reduced
13 Ms. Forsythe's state benefits due to the receipt of federal benefits. The Department determined
14 that the offset was effective on July 1, 2009; it would be implemented on October 1, 2009; and
15 there was an overpayment of time-loss compensation benefits from July 1, 2009, through
16 September 30, 2009.
17

18 The employer appealed, contending it was entitled to recoup an overpayment beginning on
19 September 13, 2007, because the lump sum payments of time-loss compensation benefits went
20 back to that date. The Board held that because Ms. Forsythe had already received the lump sums
21 when the Department notified her that benefits would be reduced, "recovery of the overpayment is
22 limited to the amount of compensation for six months of total disability preceding notification. *In re*
23 *Marianne Taylor*, Dckt. No. 09 17082 (July 20, 2010.)"⁵ The Board applied the six-month limitation
24 on recoupment of an overpayment as follows:
25

26 The retroactive payments BOA [Bank of America] made constituted overpayments of
27 compensation for total disability to Ms. Forsythe for the period from September 13,
28 2007, through July 1, 2009. RCW 51.32.220(2) unambiguously limits BOA to
29 recoupment of the portion of the lump sum overpayment attributable to time loss
30 compensation benefits owed for the six-month period that came before September
31 2009, when Ms. Forsythe was notified of the overpayment.
32

33 Accordingly, BOA is entitled to the reverse offset for overpayments of time loss
34 compensation benefits it paid to Ms. Forsythe from March 2009, through August 2009.
35 Because the Department order before the Board limited BOA to take the reverse
36 offset from July 1, 2009, through September 30, 2009, it must be reversed and this
37 matter be remanded to the Department with directions to issue an order which
38
39
40
41
42
43
44
45
46

47 ⁵ *Forsythe*, at 8.

1 contains the same language as its September 23, 2009 order with the exception that
2 the order must declare that BOA is entitled to offset the amount of the time loss
3 compensation benefits overpayment it made to Ms. Forsythe because of her receipt of
4 social security disability benefits for the months from March 2009, through
5 September 2009.⁶
6

7 It is this portion of the decision that Boeing relies on in the current appeals.

8 In *Forsythe*, the Department handled the overpayment issue the same way it did here. The
9 Department limited the employer's recoupment of overpaid time-loss compensation benefits to the
10 period of July 1, 2009, the effective date of the offset, through September 30, 2009, the last date
11 prior to the implementation of the offset on October 1, 2009. In the current case, the Department
12 limited Boeing's recoupment of overpaid time-loss compensation benefits to the period of June 1,
13 2013, the effective date of the offset, through June 30, 2013, the last date prior to the
14 implementation of the offset on July 1, 2013.
15
16
17

18 All parties appealed our decision in *Forsythe*. The superior court reversed our order and
19 entered a conclusion of law stating that the employer had overpaid benefits for the period of July 1,
20 2009, through September 30, 2009, but not for the period before July 1, 2009. The court affirmed
21 the Department order.
22
23

24 **Taylor:** In *Forsythe*, the Board relied on *Taylor*, and Boeing contends that *Taylor* supports
25 its position:
26

27 When benefits have been paid on an ongoing basis for six months prior to the
28 requisite notice, the application of the statute is fairly straightforward. Beginning the
29 month after the month in which notice was given, the Department or self-insured
30 employer may begin to recover any overpayment that occurred because the prior six
31 months of benefits were not reduced to reflect the social security offset. Any
32 overpayment that occurred before that cannot be recovered.⁷
33

34 Boeing's reliance on *Taylor* is misplaced. In *Taylor*, the Social Security Administration notified the
35 self-insured employer on July 30, 2007 that the worker was receiving social security disability
36 benefits. Thus, under RCW 52.32.220(2), the effective date for any offset was August 1, 2007, a
37 fact on which the parties agreed. As it happened, Ms. Taylor was not receiving time-loss
38 compensation benefits at that time, so there was nothing to offset.
39
40

41 A year and a half later, on February 17, 2009, the Department directed the self-insured
42 employer to pay several years of back time-loss compensation benefits. On February 25, 2009, the
43
44

45
46 ⁶ *Forsythe*, at 8-9.

47 ⁷ *Taylor*, at 11-12; Employer's Motion for Summary Judgment, at 9.

1 employer paid time-loss compensation benefits for the period of September 3, 2006, through
2 February 24, 2009. At the same time, the employer notified Ms. Taylor that her benefits would be
3 offset due to her receipt of social security benefits, a notice she received on February 27, 2009.
4 That meant that under RCW 51.32.220(4) the offset could not be implemented until March 1, 2009.
5

6
7 As with *Forsythe*, the main question in *Taylor* was how the lump sum payment should be
8 treated. If it had been paid after the implementation date for the offset, then the entire lump sum
9 would have been subject to the offset under *Potter v. Department of Labor & Indus.*⁸ but because it
10 was paid prior to the implementation date, the six-month limitation on recoupment of an
11 overpayment applied. As a result, the self-insured employer could only recoup six months of
12 overpayment, going back to August 27, 2008.
13

14
15 For our purposes, the significant facts in *Taylor* are that the effective date of the offset was
16 August 1, 2007; the worker received notice of the offset and the overpayment of benefits on
17 February 27, 2009; and the employer was allowed to go back six months to August 27, 2008, to
18 recover an overpayment. That is one year after the effective date of the offset. So the question
19 raised in the current appeals was neither raised nor addressed in *Taylor*, and *Taylor* does not
20 support Boeing's position in the current appeals. Instead, it demonstrates a factual situation where
21 there is no conflict between the effective date of the offset and the six-month limitation on recouping
22 an overpayment, negating Boeing's contention that the Department's reading of the statute renders
23 the overpayment provisions "inoperative."⁹
24

25
26 **Summary:** We must give effect to all of the provisions of RCW 51.32.220. Under
27 RCW 51.32.220(2), any reduction of time-loss compensation benefits based on the receipt of social
28 security benefits "shall be effective the month following the month in which the department or
29 self-insurer is notified by the federal social security administration that the person is receiving
30 disability benefits." The Department received the requisite notice from the Social Security
31 Administration on May 25, 2013. That means the effective date for the offset was June 1, 2013.
32 Before that, there was no offset and therefore no overpayment of state benefits.
33

34
35 Boeing's argument ignores the effective date of the offset and assumes that as soon as
36 Mr. Ames began receiving both state and federal benefits, state benefits were being overpaid. But
37 RCW 51.32.220 establishes a reverse offset and a framework for how the state can take advantage
38
39

40
41
42
43
44
45
46 ⁸ *Potter v. Department of Labor & Indus.*, 101 Wn. App. 399 (2000).

47 ⁹ Response, at 4.

1 of the offset rather than the federal government. The authority to reduce state benefits is triggered
2 by the statutorily required notice from the Social Security Administration. Before that, there is no
3 automatic right to reduce state benefits and the Social Security Administration may well be taking
4 advantage of the offset by reducing social security disability benefits under 42 U.S.C. § 424a. The
5 mere fact that a worker is receiving simultaneous state and federal benefits does not mean that the
6 state benefits can be reduced. The state's right to take the reverse offset has to be triggered by the
7 notice from the Social Security Administration, which in turn establishes the effective date.
8
9
10

11 There is another problem with Boeing's approach that works to its own detriment. As the
12 Department points out, ignoring the effective date of the offset and focusing solely on the date the
13 worker receives notice of the offset and the overpayment would allow Mr. Ames to retain full
14 time-loss compensation benefits during a period when Boeing is entitled to pay reduced benefits.
15 In the Proposed Decision and Order, the industrial appeals judge permitted Boeing to go back six
16 months from June 20, 2013, but failed to address what should happen from June 20, 2013, until
17 July 1, 2013. As the Department says, that means Boeing would not be allowed to take the offset
18 during that period, even though it is entitled to do so. In contrast, the Department's approach
19 addresses the entire period between the effective date and the implementation date. Under the
20 Department's interpretation, anything paid from the effective date forward is subject to offset, with
21 one limitation—the self-insured employer cannot recoup more than six months back from the date
22 when the worker was notified that there was an overpayment.
23
24
25
26
27
28
29

30 The Department's Motion for Summary Judgment is granted and the Department orders are
31 affirmed. There is no overpayment of state benefits unless the worker was paid full time-loss
32 compensation benefits when he was only entitled to reduced benefits. Because the offset was not
33 effective until June 1, 2013, there could not have been any overpayment of state benefits to recoup
34 prior to that. The part of *Forsythe* that suggests otherwise is overruled. The main holding of
35 *Forsythe* addressing how lump sums of past due benefits should be treated under RCW 51.32.220
36 stands.
37
38
39

40 **FINDINGS OF FACT**

- 41 1. On April 9, 2014, an industrial appeals judge certified that the parties
42 agreed to include the amended Jurisdictional Histories for Docket
43 Nos. 14 11871 and 14 11872 in the Board record solely for jurisdictional
44 purposes.
45
- 46 2. Frank Ames has two workers' compensation claims with The Boeing
47 Company, Claim Nos. W-784240 and W-814442.

- 1 3. Mr. Ames has been receiving social security disability benefits
2 continuously since 2010.
- 3 4. Mr. Ames continuously received time-loss compensation benefits under
4 one or a combination of the two Boeing claims from December 1, 2012,
5 through June 30, 2013, without any reduction based on his
6 simultaneous receipt of social security disability benefits.
- 7 5. On May 25, 2013, the Department was notified by the Social Security
8 Administration that Mr. Ames was receiving social security disability
9 benefits.
- 10 6. On June 20, 2013, the Department issued an order that adjusted the
11 compensation rate effective June 1, 2013, based on Mr. Ames' receipt of
12 social security disability benefits and assessed an overpayment for the
13 period June 1, 2013, through June 30, 2013, to be recovered from future
14 benefits.
- 15 7. The June 20, 2013 Department order was received by Mr. Ames'
16 attorney in the due course of the mail on June 24, 2013.
- 17 8. The pleadings and evidence submitted by the parties demonstrate that
18 there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction over the
24 parties and subject matter of these appeals.
- 25 2. The Department is entitled to a decision as a matter of law as
26 contemplated by CR 56.
- 27 3. Under RCW 51.32.220(2), the effective date for the reverse social
28 security offset and the reduction of state benefits was June 1, 2013.
- 29 4. On June 24, 2013, Mr. Ames received the required notice under
30 RCW 51.32.220(4) and RCW 51.32.220(2) that his state benefits would
31 be reduced as a result of his receipt of social security disability benefits
32 and that time-loss compensation benefits had been overpaid.
- 33 5. Under RCW 51.32.220(4), the implementation date for the reverse social
34 security offset was July 1, 2013.
- 35 6. RCW 51.32.220(2) limits the recovery of any overpayment of time-loss
36 compensation to the six months preceding June 24, 2013, the date
37 Mr. Ames was notified of an overpayment. But there was no
38 overpayment of state benefits until June 1, 2013, the effective date for the
39 reverse offset.
- 40 7. Time-loss compensation benefits were overpaid between the effective
41 date of the offset, June 1, 2013, and the implementation date for the
42 offset, July 1, 2013. Boeing is entitled to recover that overpayment from
43 future benefits under RCW 51.32.220(3).

- 1 8. In Docket No. 14 11871, the December 11, 2013 Department order is
- 2 correct and is affirmed.
- 3
- 4 9. In Docket No. 14 11872, the December 11, 2013 Department order is
- 5 correct and is affirmed.

6 DATED: December 4, 2014.

7 BOARD OF INDUSTRIAL INSURANCE APPEALS

8
9
10
11 /s/ _____
12 DAVID E. THREEDY Chairperson

13
14
15
16 /s/ _____
17 FRANK E. FENNERTY, JR. Member

18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47