Darbous, Lee

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Computation based on benefit levels in effect on:

The date of actual notification of concurrent benefits. **….*In re Donald Clinton*, BIIA Dec., 61,711 (1983); *In re Lee Darbous*, BIIA Dec., 58,900 (1982)**

The date of actual notification of concurrent benefits when the worker is noncooperative in disclosing information. **….*In re Lee Darbous*, BIIA Dec., 58,900 (1982)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LEE V. DARBOUS	)	**DOCKET NO. 58,900**
	)	
CLAIM NO. S-269241	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Lee V. Darbous, by
Beckwith and Collins, per
David R. Collins

Employer, City of Seattle, by
The City Attorney, per
Richard E. Mann, Assistant

Department of Labor and Industries, by
The Attorney General, per
Linda McQuaid, Assistant

This is an appeal filed by the claimant on February 17, 1981, from an order of the Department of Labor and Industries dated December 17, 1980, wherein the offset for Social Security Administration benefits received by the claimant was determined and further a determination was made that an overpayment had previously been made and deduction for that overpayment was provided. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review on timely Petitions for Review filed by the claimant, the employer and the Department of Labor and Industries to a Proposed Decision and Order issued on September 18, 1981, in which the order of the Department dated December 17, 1980 was reversed, and the matter remanded to the Department and the self-insured employer with direction "to pay to the claimant his benefits as authorized by law until the same may be reduced as authorized by law".

The case before us presents a new wrinkle under RCW 51.32.220 which we believe has not been squarely confronted by any appellate jurisdiction in this nation. The issue in this appeal is, as perceived by the claimant, a simple one: which federal disability and state workers' compensation benefits must be used in calculating the amount of benefits to be offset, those existing in November 1978 or those in effect in October 1980. Stated another way, we perceived the agreed issue to be whether Mr. Darbous is entitled to receive, unaffected by offset, the incremental increases in base social security disability benefits and state workers' compensation time-loss benefits which occurred

between November 1978 and October 1980. The Department of Labor and Industries and the self-insurer, City of Seattle, maintain the offset should be calculated by reference to the level of benefits in effect at the date the offset was calculated, October 1980. The claimant maintains the offset should be calculated based upon the benefit levels which were in effect on the date of first entitlement, November 1978.

In 1975 the Washington Legislature first enacted RCW 51.32.220, and took advantage of a somewhat veiled grant of authority in federal law relating to social security disability payments, contained in 42 USC § 424a. In passing this legislation, this state was one of several which deliberately and successfully placed a major financial obligation upon the federal government, which theretofore was being absorbed by workers' compensation insurance funds supported by employer premiums or by companies which had qualified to self-insure their workers' compensation liability. Since that time, thousands of claims have been adjudicated spawning numerous appeals to this Board concerning various aspects of administrative application of this piece of legislation, which we have commonly come to refer to as the social security offset reversal statute.

Before proceeding further, we deem it advisable to step back and once again survey the relationship between the claimant's two benefit sources and the manner by which the present problem was encountered. Freeman v. Harris, 625 F. 2d 1303 (1980), contains a rather succinct and intelligently written history of social security disability income and the offset provisions in federal law which provide an appropriate pint of commencement for our discussion:

> "Social Security was first proposed by President Roosevelt as part of the New Deal legislative reform. As initially instituted, the Social Security Act of 1935 contained no provisions for disability insurance. It did, however, provide old age and unemployment insurance which, as a general rule, the states were not providing.
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> In 1956 the Social Security Act was expanded to include monthly benefits for disabled wage earners. As enacted in 1956, there was a full offset of workers' compensation payments against Social Security disability benefits. 70 Stat. 816 (1956). 'It is self-evident that the offset reflected a judgment by Congress that the workmen's compensation and disability insurance programs in certain instances served a common purpose, and that the workmen's compensation programs should take precedence in the area of overlap.' Richardson v. Belcher, 404 U.S. at 82, 92 S.Ct. at 257. The offset provision was repealed in 1958, 72 Stat. 1025 (1958), but was reinstituted in 1965 in a slightly different form, 79 Stat. 406 (1965).

> The reinstitution of the offset was triggered by data submitted to legislative committees which showed that in the majority of the states, the typical worker who was receiving workers' compensation and federal disability benefits actually received more in benefits than his pre-disability take-home pay. Hearings on H.R. 6675 Before the Senate Common Finance, 89th Cong, 1st Sess.151 (1965). This was thought to cause two evils: first, it reduced the worker's incentive to return to the work place and hence impeded rehabilitative efforts; and second, it created fears that the duplication of benefits would lead to an erosion of state workers' compensation programs. Hearings on H.E. 6675 Before the Senate Comm. on Finance, 89th Cong., 1st Sess. 252, 259, 366, 540, 738-40, 892-97, 949-54, 990 (1965).
>
> Section 424a of title 42 was then enacted to deal with the problem. As is relevant her, it requires an offset of Social Security disability payments against workers' compensation so that the total benefits received by the worker under the two programs do not exceed 80% of his pre-disability income... This eradicated the problem of a worker being financially better off disabled than if he or she returned to work.
>
> ...However, because Social Security disability payments are less than 80% of a workers' pre-disability income the system which resulted after the 1965 amendment did encourage workers to pursue state worker's compensation as well as federal Social Security."

This history recited in the Freeman case is significant when the federal government is taking the offset, but it does not tell the whole story for those states like Washington which enacted offset-reversal statutes.

42 USC §424a, permits the Social Security Administration to reduce disability benefits to persons who are also receiving state workers' compensation periodic benefits. 42 USC § 424a(d) provides that the reduction by the Social Security Administration shall not be taken "...if the workmen's compensation law or plan under which periodic benefits is payable provides for the reduction thereof..." This provision permits the states paying worker's compensation benefits to effectively reverse the offset. By so doing, a state could reduce the dollars paid from funds supported by employer premiums and cause the federal government to pay disabled workers the full social security disability amounts which would be paid were they not receiving any periodic workers' compensation benefits.

Prior to 1975, persons who received temporary total or permanent total disability payments under this state's Industrial Insurance Act and who also qualified to receive social security disability benefits, were paid their full workers' compensation entitlement from the Department of Labor and

Industries. Applying the offset reduction of 42 USC §424a, the Social Security Administration paid a lesser amount to these individuals than would have been paid had those individuals not been covered by the workers' compensation.

In 1975, the state Legislature correctly perceived that fiscal benefits would inure to the state's advantage by enacting RCW 51.32.220. By "reversing" the offset, it was envisioned that this state's employers would realize considerable savings. Instead of having the state compensation fund pay the lion's share of benefits, the offset reversal permitted the federal government with its larger tax base to carry the greater financial burden.

States capitalizing upon the offset reversal, however, must still maintain the legislative intent of 42 USC § 424a. The purpose of Congress in requiring the reduction in benefits was to preclude individuals from receiving excessive combined benefits for the same disability. Iglinsky v. Finch, 314 F. Supp. 425 (D. La. 1970), *aff'd.*433 F. 2d 405.

In this appeal, Mr. Darbous argues that a worker whose periodic benefits are offset based on calculations premised on initial date of entitlement of benefits would receive more each month than a worker whose offset is based on benefit levels in effect on the date the reduction by offset is commenced. Failure to permit this differential, Mr. Darbous contends, amounts to an unconstitutional denial of equal protection of the laws contrary to the 14th Amendment of the federal constitution.

Because of our construction of provisions of RCW 51.32.220, we fail to agree that an issue of constitutional proportions is presented by the facts relevant to Mr. Darbous' claim adjudication.

The operative feature of RCW 51.32.220 is to permit the Department or self-insurer to reduce periodic state benefits paid in lieu of wages (temporary total disability or permanent total disability benefits) and permit the injured worker to receive his full entitlement of social security disability income. The net effect to the worker was intended to result in no change of combined monthly dollar benefits than if the federal government was taking the offset under 42 USC §424a. It is critical that this agency preserve that net effect to Mr. Darbous.

The legislature has, however, placed additional requirements on the taking of reductions by offset authorized by the state statute. For example, the injured worker must cooperate to authorize the release of information from the Social Security Administration to properly compute his or her benefits. If this cooperation is not secured, the Department may estimate the amounts payable under the federal act and that estimate will be considered to be correct until the worker cooperates,

with no readjustment for any period of non-cooperation. Such almost happened in this case, as the employer had to twice send a letter requesting an information release (in May and August 1980) and did not receive a reply from Mr. Darbous until Septemaber 24, 1980. Rather than a signed release, the reply included a copy of a benefits explanation letter to Mr. Darbous dated April 17, 1980 from the Social Security Administration.

Another requirement is that reduction in benefit payments cannot be commenced until "the month following the month in which the Depart- ment or self-insurer is notified by the federal Social Security Administration" that the worker is receiving federal disability benefits. RCW 51.32.220(2). It was this provision which was the foundation for the decision in the Proposed Decision and Order in this case.

Factually, we must agree that the stipulation by the parties contains no specific statement that the Social Security Administration directly informed the self-insurer or the Department of Mr. Darbous' qualification for federal benefits. This was due, as we see it, in no small part to Mr. Darbous' fault as he failed to execute required release of information forms which were properly requested of him. Instead, when faced in September 1980 with his employer's estimate of federal benefit levels (which would have resulted in much lower worker's compensation benefits being paid) Mr. Darbous immediately sent a copy of the letter he had received from the Social Security Administration five months earlier. Apparently, he never did return the requested release of information forms.

Under such circumstances, we do not think the legislature would require blind and slavish adherence to the precise language of the statute that the Department or self-insurer be notified directly "by" the federal agency. It was perceived when the statute was drafted that the Social Security Administration controlled the flow of information necessary to make offset calculations and could provide that information more quickly than the claimant. However, both the worker and employer were satisfied that the data communicated to Mr. Darbous in April, 1980 by the Social Security Administration was reliable and accurate. Under such circumstances, we see no need to engage the bureaucratic process any further, by requiring the parties to pretend they don't have information until that same data is directly communicated to the Department or self-insurer by the federal Social Security Administration.

Once the information concerning receipt of federal disability benefits is received, the Department or self-insurer may only seek recovery for overpayments for the immediately preceding

six months. Thus, if it takes the Social Security Administration longer than six months to assemble the required data and respond to this state's request for information, then the Department or self-insurer will not be entitled to recover any of the "extra" benefits paid to the worker. Moreover, such recovery can only be made from future benefit payments. That is, a worker cannot be required to reimburse the Department (or the self-insured employer) in a lump sum from previous payments he or she has received. Additionally, reductions cannot begin until "the month following the month" in which the worker receives notice that the reduction in benefits is being made.

We must note that in this appeal we have not been asked to determine the appropriateness of recovering overpayments which may have been made to Mr. Darbous prior to October 1980, and on that point we make no comment. We do note, however, that had Mr. Darbous been diligent in his reply to his employer's letter of May 1980, requesting the release of information, the effective month for implementing a reduction in benefits could have been June 1980 instead of October 1980.

Beginning November 1978, Mr. Darbous became entitled to receive both time loss and social security disability income benefits. His time-loss benefit was $759.62 per month at that time. His federal disability benefit was $486.10 at that time. Had information regarding entitlement to federal benefits been provided by the Social Security Administration as of November 1978, Mr. Darbous would have received $3,082.46 less in benefits from November 1978 through September 1980, and his offset would have been computed based upon the November 1978 combined benefit levels.[1] In addition to that sum, the claimant received federal disability "cost of living" increases and time-loss adjustment increases based on the rise in this state's average monthly wage. Consequently, as of October 1980, the "pure" benefit levels had increased to $615.20 per month for social security disability income and $886.87 for time-loss benefits each month.

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[1] Computed as follows:

80% average current earnings (maximum monthly benefit which Mr. Darbous can receive)	$1,111.70
Less social security income benefit	(486.10)
Self-insured employer's time-loss payment obligation	625.60
Actual time loss paid commencing November 1978	759.62
Less actual time-loss obligation	(625.60)
Monthly benefit excess paid	$ 134.02

23 months (November 1978 thru September 1980) x $134.02 per month = $3,082.46 in total "extra" benefits

Had the reduction by offset commenced in November 1978, Mr. Darbous would have been entitled to receive these incremental increases, as we see it, on top of the 80% average current earnings "lid" imposed by federal law. The federal act provides at 42 USC § 424a(a)(7) and (8) that:

> In no case shall the reduction in the total of such benefits under Sections 423 and 402 of this Title for a month (in a continuous period of months) reduce such total below and the sum of:
>
> (7) The total of the benefits under Sections 423 and 402 of this Title, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such months which were determined for such individual and such persons for the first month for which reduction under this section was made per month = $3,082.46 in total "extra" benefits(or which would have been so determined if all of them had been so entitled in such first month), and
>
> (8) Any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months <u>after</u> the first month for which reduction under this section is made." (Emphasis added)

It is difficult to imagine terminology to be any more confusing or cause any more obfuscation than that quoted above. Nevertheless, we believe for our purposes the language is intended to mean that Mr. Darbous gets to keep incremental benefit increases beyond the 80% average current earnings "lid" which are made effective <u>after</u> October 1980. We do not believe the federal statute directly speaks to the issue presented by this appeal which is, essentially, whether Mr. Darbous gets to keep from October 1980 forward the increases in base benefit levels which accrued between November 1978 and October 1980, that is, in the months <u>before</u> the first month in which reduction by offset is made.

Appeals which have previously reached this Board concerning other legal issues surrounding the application of RCW 51.32.220 have caused the development of what we feel is a straight forward approach to the resolution of legal disputes. Absent additional considerations imposed by this state's statutes such as those mentioned above, that approach reduced to its barest terms is simply: The worker ought to be placed in the same position when the Department or self-insurer takes the offset as was the case when the Social Security Administration was taking the offset. We understand the federal statute and federal administrative regulations provide that when the Social Security Administration was taking the offset from workers in this state, that reduction of benefits by

offset was only commenced in the month after the month the Social Security Administration was put on notice that the worker was entitled to state workers' compensation benefits. We understand that the benefit levels in effect during the month the Social Security administration was put on such notice of entitlement were relied upon for computing the extent of offset.

A rule requiring reference to benefit levels during the month the Department or self-insurer is put on notice of entitlement or with due diligence would have been put on notice has several advantages under this state's statutory scheme. First, in most cases it is simple to administratively determine. Second, it encourages the Department or self-insurer to make early inquiry whether collateral federal benefits were being applied for and received. During the waiting period, the worker still receives all benefits to which he is rightfully entitled, even if he is receiving both federal and state benefits. By encouraging early inquiry on entitlement to benefits and pegging the offset to that level, the worker is entitled to keep future federal cost-of-living increases and state time-loss compensation adjustments even though such increases may exceed 80% of the worker's "average current earnings". Also, if a worker fails to cooperate by releasing information, he or she would be subject to the Department's "estimate" of federal benefits and not be able to receive an adjustment for the period of non-cooperation.

In resolving this dilemma with fairness and equity, we must also keep in mind two significant intents present in the federal and state legislation. First, there is the Congressional intent that the benefit structure should not be designed to discourage workers from returning to gainful work as early as they reasonably can. Second, there is the clear intent in this state's law (which must be considered in conjunction with the Congressional intent) not to penalize this state's injured workers because of bureaucratic delay.

We believe that this state's statute which (1) prohibits the Department or self-insurer from recovering overpayments in lump sums from past benefits paid, (2) requires overpayments to be recovered from future benefits solely, and (3) limits recovery to the overpayments made in the six-month period immediately preceding the date reductions begin, provides a sound and sufficient assurance that an injured worker will not be penalized by bureaucratic delay. Similarly, it appears that if benefit levels were fixed (for purposes of offset computations) as of the date of first eligibility for both federal and state benefits (here, November 1978), the net result would permit not only the keeping of excess payments during the information-gathering period, but could serve to discourage

cooperation of an injured worker in releasing information, and may well discourage that worker's motivation for physical or vocational rehabilitation to enable an early return to the work force.

The ultimate question, then, in Mr. Darbous' appeal is: What was the date the self-insured employer was placed or should have been placed on notice of Mr. Darbous' entitlement to federal benefits such that the legislative intent permeating this state's offset scheme and the Congressional intent embodied in federal law is also observed?

According to the facts presented for our consideration, prior to May 1980, the employer, City of Seattle, made no attempt to determine whether Mr. Darbous was applying for or receiving social security disability benefits. Much less did it give the claimant notice of its intention to offset some of its self-insured workers' compensation liability. Because of this delay, Mr. Darbous most certainly reaps the benefit of receiving and keeping the major portion of both benefits unscathed by the offset reductions.[2] Still, the claimant could have authorized release of information from the Social Security Administration if so requested to do by his employer. Yet, that information presumably was in fact not available until April 17, 1980, the date that Mr. Darbous was notified by the Social Security Administration of his entitlement.

We note from Exhibit No. 5 that notification of social security acceptance of a claim often takes the form of a large "catch-up" check "in lieu of any other notice". Apparently even under federal regulations the offset could not commence until the month following such acceptance. We do not see that the situation should be any different here.

As we have noted earlier, Mr. Darbous was less than diligent in replying to his employer's letters of May 1980 and August 1980. Yet, despite this failure of cooperation and although it was probably justified in acting earlier, the employer made no attempt to take advantage of that provision of state law allowing an "estimate" of federal benefits until September 15, 1980. Consequently, for that period after May 1980 the employer paid the full amount of workers' compensation benefits until such time as an "estimate" was being made. Because the employer is required to continue making such payments, it would seem that Mr. Darbous could fail to cooperate

[2] We purposely make no attempt to discern under the law if the social Security Administration could offset its benefits by the time-loss payments being made by the self-insurer until such time as the self-insurer acts to implement the offset for its own benefit. That issue is not before us and is surely a subject of federal law and not this state's jurisdiction and authority.

as he did with total impunity unless the offset were based on benefit levels in effect when the "estimate" is made or when the actual and accurate offset was implemented. We do not believe Mr. Darbous should be able to act with such impunity.

In sum, we hold that it was proper to compute the offset reduction permitted by RCW 51.32.220 by reference to the actual benefit levels in effect for time-loss payments and social security disability income as of the month the reduction was first taken (October 1980) without reference to the benefit levels in effect on the earliest possible date reduction could conceivably have been taken. Insofar as the Department's order of December 17, 1980 complies with this holding, that order is affirmed.

FINDINGS OF FACT

Findings No. 1 and 2 of the Proposed Decision and Order are hereby adopted, and in addition thereto, the Board enters the following findings:

3. Effective November 1978, the claimant was entitled to receive from the Social Security Administration for social security disability income benefits had he also not been receiving workers' compensation benefits, $486.10 per month. As of October 1980, his social security disability benefit base had risen to $615.20.

4. As of November 1978, the claimant's entitlement to temporary total disability benefits from his self-insured employer had he not also been entitled to receive social security disability benefits was equal to $759.62. As of October 1980, the claimant's adjusted time-loss benefit independent of social security disability income resources had risen to $886.87.

5. For purposes of RCW 51.32.220, reduction by offset, the self-insurer in September 1980 had been provided information from the Social Security Administration through the claimant, sufficient to permit its commencement of reduction by offset of time-loss benefits effective for the month of October, 1980.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and subject matter of this appeal.

2. For purposes of instituting the reduction of benefits by offset pursuant to RCW 51.32.220, it is appropriate for the department or self-insurer to use in its calculations of the current benefit entitlement of the claimant for workers' compensation and social security disability insurance, the benefit levels in effect as of the first month for which reduction is made.

3. The order of the Department of Labor and Industries dated December 17, 1980 is in accord with the above- stated Conclusion No. 2, and is correct, and should be affirmed.

It is so ORDERED.

Dated this 29th day of March, 1982.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
MICHAEL L. HALL Chairman

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member