Hamby, Charles

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Computation based on benefit levels in effect on:

The date of constructive notification of concurrent benefits. **….*In re Verlin Jacobs*, BIIA Dec., 66,644 (1985); *In re Selma Hayes*, BIIA Dec., 66,196 (1985); *In re Charles Hamby*, BIIA Dec., 59,175 (1982)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHARLES J. HAMBY	)	**DOCKET NO. 59,175**
	)	
CLAIM NO. H-244922	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Charles J. Hamby, by
William J. Van Natter

Employer, Fair Shake Company, Inc.,
None

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

This is an appeal filed by the claimant on April 6, 1981, from an order of the Department of Labor and Industries dated February 17, 1981, wherein it was determined that the claimant's monthly pension rate was $126.47 effective January 16, 1981, and further determining that an overpayment had been made, and providing for a $31.62 per month deduction. **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant 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 February 17, 1981 was reversed, and remanded to the Department with direction to commence reduction of the claimant's compensation as is authorized by law effective the month following which the Department is notified by the Federal Social Security Administration that the claimant is receiving disability benefits under the Federal Old Age Survivors and Disability Insurance Act.

Two issues are presented for ultimate disposition by this appeal. First is whether the Department of Labor and Industries had effectively been notified "by" the Social Security Administration of Mr. Hamby's right to federal disability entitlement under the provisions of RCW 51.32.220(2). Assuming an affirmative answer to the first issue, the second question concerns whether the Department properly computed the offset under RCW 51.32.220 by choosing to base its computations on the workers' compensation and social security disability insurance benefits in

effect as of February 1981, rather than those that were in effect in December 1978, which was the earliest date the claimant was entitled to receive both social security disability and periodic workers' compensation benefits paid in lieu of wages.

To best become acquainted with the factual background giving rise to this appeal, we take note of several salient facts. Mr. Hamby sustained the industrial injury involved in this appeal on November 22, 1977. He diligently filed his application for benefits, the claim was allowed, time-loss compensation was commenced and paid through May 15, 1978. His monthly time-loss rate when terminated was $708.00 per month. The claim was closed December 19, 1978 without award for permanent Disability. As a result of an appeal to this Board, Mr. Hamby was adjudged to be a permanently totally disabled worker effective December 19, 1978, which order was implemented by the Department on June 27, 1980.

During May 1978, Mr. Hamby first became entitled to also receive social security disability income at an initial benefit level of $583.74 per month. That level was incrementally raised by the Social Security Administration so that by February 1981, his federal disability benefits came to $760.40. Effective February 1981, his pre-offset pension benefit as a permanently totally disabled worker was equal to $886.87.

By his appeal, Mr. Hamby asserts that the federal and state benefit levels which were or would have been in effect in December 1978 should provide the base for the computations of the offset under RCW 51.32.220. If such were done, Mr. Hamby asserts he would be entitled to receive $177.66 per month more for the next 14 years (until he reaches age 62) than by the method used by the Department.

In essence, Mr. Hamby maintains that it was not his fault that the Department of Labor and Industries incorrectly adjudicated his claim in December 1978. He posits that had he not been required to exercise his legal rights to appeal to this Board, he would have been receiving his monthly pension beginning December 1978, rather than having to wait two years to receive a retroactive payment in a lump sum. Had such circumstances prevailed, the Department would have been entitled to commence the offset, i.e., by reduction of pension payments 26 months earlier than it was able to do. However, the offset would have been based on the benefit levels in effect in December 1978, and Mr. Hamby would have been entitled to receive all incremental increases and cost of living adjustments which accrued subsequent thereto.

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. 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.

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 point 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).
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> 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 Comm. on 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.R. 6675 Before the Senate Comm. on Finance, 89th Cong. 1st Sess. 252, 259, 366, 540, 738-40, 892-97, 949-54,990 (1965).
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> Section 424a of title 42 was then enacted to deal with the problem. As is relevant here, 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'd433 F. 2d 405.*

In this appeal, Mr. Hamby is persuasive in showing that because of the relatively young age of his becoming permanently totally disabled, and because of the Department's initial erroneous determination denying him that status and subsequent delay in taking the offset, the Department will realize, if its action is upheld, a windfall amounting over the next several years to nearly $30,000.

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. Hamby.

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. The facts before us, however, do not suggest even the slightest failure to cooperate by Mr. Hamby.

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 Department of Mr. Hamby's qualification for federal benefits. We do, however, believe the proposed Decision and Order placed undue emphasis on the phraseology used in the statute that communication be made by the Social Security Administration. We simply do not perceive the legislature intended that the information supporting offset computations had to come solely and exclusively from the Social Security Administration as a condition precedent to the implementation of the offset. We think it is clearly reasonable for a worker to submit the required data to the Department, and if acceptable as accurate, it is clearly reasonable for the Department to rely upon such data in making the appropriate computations. The facts presented to us for consideration in resolving this appeal suggests the claimant rather than the Social Security Administration notified the Department concerning his receipt of federal benefits.[1] 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 the same data is directly communicated to the Department by the Social Security Administration.

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[1] The stipulation of facts submitted or our consideration states:

> "The claimant sent notification of his social security benefits to the Department in December 1980." As an addendum to its Petition for Review, the Department, through its counsel, requested this Board to attach certain documentation of the December 1980 communication to its petition. We decline so to do. If the Department were dissatisfied with the stipulation as phrased, it should not have agreed to it. To attempt to show in its petition that the claimant merely authorized a release of information from the Social Security Administration, and that that agency in fact, communicated the desired information to the Department, is to make a sham of the adversary process and negotiations conducted thereunder, and amounts to a request to impeach the Department's own statement. In our view, the parties freely entered into the stipulation which is the complete statement of facts which we are to consider. By choosing such a vehicle, we must consider those things as fact that are stipulated as such. If by their stipulation, the parties have us consider as fact those things which actually are not, they have only themselves to blame. Similarly, if the parties in making their stipulation overlook an issue of law or raise an issue in contest by the phraseology of their agreed words, we must accept that to be their intention.

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 the Department'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 in a lump sum for previous payments he or she has received. Additionally, reductions cannot begin until "the month following the month" in which the worker receives notice that reduction in benefits is being made.

Had Mr. Hamby been adjudicated in December 1978 as permanently totally disabled by the Department, there is no question that the off-set computations could have been made based on the benefit levels then in effect. In addition, had the reduction by offset commenced in December 1978, Mr. Hamby would have been entitled to receive the 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 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 month which were determined for such individual and such persons for the first month for which reduction under this section was made (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."

It is difficult to imagine terminology to be any more confusing or cause any more obfuscation than that quoted above, but we do believe it supports our statement that increases akin to cost-of-living adjustments made <u>after</u> offset is commenced belong to the benefits recipient.

In resolving the dilemma presented by this appeal with fairness and equity, we must 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. However, in this case, Mr. Hamby being permanently totally disabled as of December 1978 will not ever be able to return to gainful work. Consequently, the concern that his motivation to return to work would be adversely affected by the level of benefits received is ill-founded. The Congressional and legislative intent for return to work cannot be served because in Mr. Hamby's case, that intent does not apply. Thus, the remaining significant intent present in this state's statutory scheme is to assure that Mr. Hamby is not penalized by bureaucratic delay.

Under most circumstances, this state's statute which (1) prohibits the Department 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 immediately preceding six-month period from the date reductions begin, provides a sound and sufficient assurance that an injured worker will not be penalized by bureaucratic delay.

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, it is simple to administratively determine. Second, it encourages the Department or self-insurer to make early inquiry whether collateral federal benefits are 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 of 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 or supplemental pension adjustments relative to the average monthly wage 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.

The ultimate question, then, in Mr. Hamby's appeal, is: What was the date the Department was placed or should have been placed on notice of Mr. Hamby's entitlement to federal benefits?

Mr. Hamby was injured November 22, 1977. Time loss was paid through May 15, 1978 and was then terminated, but the claim was continued open. The Department's records reveal Mr. Hamby's date of entitlement to social security disability to be May 1978. Since, however, he was not thereafter receiving temporary total disability benefits, there was no workers' compensation payment being paid in lieu of wages and thus no offset was appropriate. Effective December 19, 1978, Mr. Hamby became permanently totally disable.

As we see it, December 19, 1978 was the earliest date, had the claim been correctly adjudicated by the Department, that both state and federal benefits accrued. Therefore, it was also the date the Department should be held to have been placed on notice of entitlement. We hold than that the offset permitted the Department of Labor and Industries by RCW 51.32.220 should be computed by reference to the benefit levels in effect as of that date, even though that date was established as a result of subsequent litigation. To permit the Department to compute the offset based on benefit levels in effect at a later date would encourage the erroneous and/or untimely adjudication of workers' legitimate claims of being permanently totally disabled.

The claimant was forced to exercise his right of appealing to this separate quasi-judicial agency, in order to attain his correct disability status. We believe it would clearly be unjust to treat

him differently under the offset reversal statute than a worker who would be adjudicated as permanently totally disabled at the purely administrative level and who was not forced into exercising his right of appeal.

FINDINGS OF FACT

1. On November 22, 1977, the claimant was injured during the course of his employment with Fair Shake Company, Inc. On November 28, 1977, the claimant submitted an application for benefits to the Department of Labor and Industries. The claim was allowed, and subsequently closed on December 19, 1978 by an order which granted no further permanent partial disability over that previously awarded under another claim number. On January 9, 1979, the claimant filed a notice of appeal to the Board of Industrial Insurance Appeals. As a result of that litigation, the Board issued an order May 5, 1980, ordering the Department to grant the claimant the status of a permanently totally disabled worker, effective December 29, 1978. On June 27, 1980, the Department implemented the Board order and granted the claimant a pension effective December 19, 1978.

2. On February 7, 1981, the Department issued an order determining that the claimant was entitled to $126.47 per month effective January 16, 1981, as his pension benefit pursuant to the Workers' Compensation Act as reduced pursuant to the provisions of the Social Security Act and further determining that there had been an overpayment for which $31.62 each month would be deducted from the amount due the claimant. On April 6, 1981, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On April 30, 1981, the Board issued an order granting the appeal and directed that proceedings be held on the issues raised by the appeal.

3. December 19, 1978 was the date upon which the Department would have been placed on notice of the claimant's entitlement to both federal social security disability income benefits and permanent total disability benefits under this state's Industrial Insurance Act.

4. As of December 19, 1978, the claimant's permanent total disability pension benefit was equal to $759.62 per month. As of that date, his entitlement to social security disability income under the Federal Old Age and Survivors Insurance Act was $583.74 per month.

5. The Department of Labor and Industries was notified regarding the claimant's level of social security disability benefits, in December 1980.

CONCLUSIONS OF LAW

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

2. The offset to be taken pursuant to RCW 51.32.220 with respect to this claimant's benefits should be computed by reference to the benefit levels in effect (for his status as a permanently totally disabled worker and as one entitled to receive social security disability income benefits from the federal Social Security Administration) as of December 19, 1978.

3. The order of the Department of Labor and Industries of February 17, 1981 is incorrect, should be reversed, and this claim remanded to the Department to re-compute the claimant's benefit levels consistent with the findings and conclusions herein.

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