

Sambrano, Estevan

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Limitation on recovery of overpayment (RCW 51.32.220)

The six month limitation on the recovery of overpayments under RCW 51.32.220 is not applicable when the delay in benefits is caused by litigation. ...*In re James Conrad*, BIIA Dec., 68,967 (1985); *In re Estevan Sambrano*, BIIA Dec., 63,484 (1984) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 84-2-00851-1. *See also*, *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. 399 (2000).]

Scroll down for order.

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

1 **IN RE: ESTEVAN SAMBRANO**) **DOCKET NO. 63,484**
2)
3 **CLAIM NO. G-507390**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

6
7 Claimant, Esteven Sambrano, by
8 Nashem, Prediletto, Schussler and Halpin, per
9 William L. Halpin

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11 Employer, Callison-Broadview Farms, Inc.,
12 Acct. finaled, None

13
14 Department of Labor and Industries, by
15 The Attorney General, per
16 James E. Sedney, Assistant
17

18 This is an appeal filed by the claimant on November 29, 1982, from an order of the
19 Department of Labor and Industries dated November 18, 1982, which adhered to the provisions of
20 a prior order dated June 23, 1982 (mailed August 5, 1982) applying an offset for the claimant's
21 Social Security benefits, effective March 23, 1981. **AFFIRMED.**

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23 **PROCEDURAL STATUS**

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25 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
26 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
27 Proposed Decision and Order issued on December 13, 1983, in which the order of the Department
28 dated November 18, 1982 was reversed, and remanded to the Department of Labor and Industries
29 with direction to limit the retroactive application of the offset to six months prior to the date of
30 notification of August 5, 1982.

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32 **SUMMARY OF FACTS**

33 The facts in this appeal are not in dispute. The parties agreed to submit the matter for a
34 Proposed Decision and Order based upon a set of stipulated facts and legal arguments presented
35 in briefs previously filed. The matter is before this Board by virtue of the Department's Petition for
36 Review which essentially reasserts arguments set forth in its brief. A summary of salient facts
37 follows.

38 On October 17, 1973, Mr. Sambrano sustained an industrial injury. The claim was allowed
39 and eventually closed on June 11, 1976 with a permanent partial disability award. In March 1981,
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1 the claimant filed an application to reopen his claim for aggravation of condition. That application
2 was denied, resulting in an appeal to this Board alleging that Mr. Sambrano was permanently totally
3 disabled. On June 14, 1982, this Board entered an order granting the claimant the status of a
4 permanently totally disabled worker. On June 23, 1982 in compliance with the Board's order, the
5 Department reopened the claim and placed the claimant on the pension rolls effective March 23,
6 1981. Also on June 23, 1982, the Department entered an order (subsequently mailed on August 5,
7 1982), applying the provisions of RCW 51.32.220 to reduce by offset those permanent total
8 disability benefits which had accrued between March 23, 1981 and June 23, 1982. Following Mr.
9 Sambrano's protest to that order, the Department on November 18, 1982, entered an order
10 adhering to the terms of its order of June 23, 1982. Mr. Sambrano then filed his notice of appeal to
11 this Board.
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13 In addition to receiving benefits under the Industrial Insurance Act for his injury, Mr.
14 Sambrano applied for social security disability benefits during November 1975. Benefits were
15 granted within a few months and he began receiving payments from the Social Security
16 Administration which have continued to be paid for all pertinent periods herein.
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18 ISSUE

19 In general, the issue presented by this appeal concerns whether the Department properly
20 reduced Mr. Sambrano's permanent total disability benefits for the period March 23, 1981 through
21 June 23, 1982 by applying the provisions of RCW 51.32.220, commonly termed the social security
22 offset reversal statute.
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24 DECISION

25 The claimant contends that the Department violated the expressed provisions of RCW
26 51.32.220 by reducing benefits for more than "six months immediately preceding the date the
27 Department or self-insurer notifies the worker that an overpayment has occurred..." The claimant
28 further contends the Department attempted to implement the reduction of accrued permanent total
29 disability benefits without giving him notice of reduction as required by that same statute. The
30 Department takes the position, in response to the claimant's contentions, that it is fully entitled to
31 reduce the award of accrued benefits by the amount that would have been offset had the
32 Department granted Mr. Sambrano permanent total disability status at the outset following receipt
33 of Mr. Sambrano's application to reopen his claim. The Department posits that since March 23,
34 1981 the issue of whether Mr. Sambrano was entitled to any further benefits was in dispute until
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1 resolved by the Board's order of June 14, 1982. Being in dispute, no payments were made for
2 permanent total disability benefits to Mr. Sambrano. Therefore, no overpayment of benefits
3 occurred. There being no overpayment of benefits, the Department asserts that the limitations
4 contained in the provisos to RCW 51.32.220(2) do not apply. Their position is based upon the
5 phrasing of the statute that the provisos contained in that section refer only to recovery of
6 overpayments of benefits. The Department asserts in this case that since retroactive payment was
7 made to bring Mr. Sambrano current in benefits receipt for his permanent total disability status, it
8 cannot be forced to make overpayments and then be prohibited by the six-month limitation from
9 recovery of them. The Department asserts that there is no statutory obstacle to the reduction of
10 benefits for permanent total disability status which accrued, but were not paid by virtue of the
11 appeal adjudication process.
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14 We believe the distinction which the department draws is an accurate one and is in
15 compliance with legislative intent. It is established within the statutory framework of RCW
16 51.32.220 and 51.32.230 that it is the policy of this state not to create undue hardship upon the
17 recipients of benefits for mistakes of the administrative agency charged with the delivery of benefits.
18 The statutory scheme provides that where payments to injured workers have been made in excess
19 of their legal entitlement, the agency's ability to recoup from the recipient is made subject to
20 considerable restriction. We believe this policy was framed because money once received is
21 generally used and is no longer available to be paid back. On the other hand, the right to receive
22 benefits retroactively by virtue of an ex post facto adjudication of disability does not present the
23 same set of circumstances which the legislature addressed in placing limitations on the recovery of
24 overpayments. Benefits which have not yet been paid can't be spent. Having not been spent, the
25 hardship which exists for those workers who have received benefits, relied on their right to use
26 them, and in fact have used them, do not exist for persons whose right to receive is later
27 determined through exercise of the legal process.
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30 Had Mr. Sambrano been accorded permanent total disability status in March 1981 by the
31 Department of Labor and Industries in the course of administrative adjudication of his claim, we
32 have no doubt that his monthly award would have been reduced in the manner contemplated under
33 the statute. Mr. Sambrano was receiving full social security disability benefits and had been for six
34 years. That fact would have been known or discovered by the Department in setting up the
35 claimant's pension reserve.
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1 The effect of the Board's adjudication in Mr. Sambrano's prior appeal was to make him whole
2 so that he would be entitled to receive all of the benefits he would have received had he been
3 adjudicated in his appropriate status back in 1981. To allow Mr. Sambrano to keep the full benefit
4 of the social security disability compensation which he did receive, and to also receive the full
5 monthly pension amount on a retroactive basis without regard to those social security benefits
6 would result in a windfall to him that flies in the face of legislative intent. To hold otherwise might
7 encourage those workers with contested claims to discourage an administrative adjudication of
8 permanent total disability status so that a more protracted avenue of Board appeal can be pursued
9 to establish that status and result in the receipt of more dollars than the law would otherwise
10 provide. We believe that would be contrary to the law and policy of this state as expressed in our
11 Act.

12 In adjudicating the application of the social security offset reversal statute, this Board has
13 consistently held to the philosophy that a worker must be placed in the same position financially with
14 the state taking the offset as he or she would have been had the federal government been reducing
15 social security disability benefits by taking the offset itself, as provided in 42 U.S.C. 424(a). We
16 have further indicated that the burden caused by bureaucratic delay on the part of the agency
17 required to administer the offset reversal statute should not be borne by the injured worker. We do
18 not see our decision in this case in any way contrary to those philosophical underpinnings in our
19 law. To uphold the Department's action in this case places the claimant in the precise position he
20 would have been in had he been adjudicated permanently totally disabled at the earliest possible
21 time. Moreover, there was no undue bureaucratic delay by the Department of Labor and Industries
22 for failure to act in adjudication of the claim. The Department did act in a reasonably timely fashion
23 consistent with its authority upon receipt of Mr. Sambrano's application to reopen his claim. The
24 claimant pursued his legal right through a statutorily created legal process to establish that an
25 erroneous decision had been made. Under such circumstances, we cannot fault the Department
26 and accuse it of bureaucratic delay.

27 After consideration of the Proposed Decision and Order and the Petition for Review filed
28 thereto, and a careful review of the entire record before us, including briefs submitted by the
29 parties, we are persuaded that the proposed decision erred in limiting the Department's retroactive
30 application of the offset to six months prior to the date of notification of taking the offset. The
31 proposed findings, conclusions and order are hereby set aside, and the Board enters the following:
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FINDINGS OF FACT

1. On October 17, 1973, Estevan Sambrano, the claimant, suffered an industrial injury during the course of his employment with Broadview Farms. Within the time limit permitted by statute, he filed a claim with the Department of Labor and Industries which was allowed with compensation and treatment provided. Following interlocutory action, the claim was eventually closed by Department order on June 11, 1976, with a permanent partial disability award equal to 10% as compared to total bodily impairment and with time-loss compensation as paid to May 19, 1976. An appeal to the Board of Industrial Insurance Appeals and later to the Superior Court resulted in a judgment affirming the Department's closing order.
2. On March 23, 1981, Mr. Sambrano filed an application to reopen his claim for aggravation of condition with the Department. On June 3, 1981, the Department issued an order denying that application. Following a timely protest by the claimant, the Department issued an order adhering to the denial of the application on July 21, 1981. The claimant filed a notice of appeal from that order with the Board of Industrial Insurance Appeals on August 7, 1981. On June 14, 1982, the Board issued its order effectively reversing the Department's action, and declaring the claimant to be a permanently totally disabled worker within the meaning of the Workers' Compensation Act. On June 23, 1982, the Department issued an order in compliance with the Board's order reopening the claim effective March 23, 1981, and placing the claimant on the pension rolls effective that date.
3. Also on June 23, 1982, but not mailed until August 5, 1982, the Department issued an order reducing the retroactive pension benefits to which the claimant was entitled by application of the offset of social security benefits he had received between March 23, 1981 and June 23, 1982, this action being taken under authority of RCW 51.32.220. Following a timely protest of that order by the claimant, the Department issued its final order on November 18, 1982, adhering to its social security offset notification of June 23, 1982. On November 29, 1982, claimant filed his notice of appeal in this matter to the Board. On December 27, 1982, the Board issued an order granting the appeal subject to proof of timeliness and assigning it Docket No. 63,484.
4. By its order of June 23, 1982, mailed August 5, 1982, the Department of Labor and Industries notified the claimant of its intention to implement reduction of monthly permanent total disability benefits by applying the offset provisions authorized in RCW 51.32.220.
5. Between March 23, 1981 and June 23, 1982, the claimant had not been paid any permanent total disability benefits contemporaneously with his receipt of social security disability benefits under that federal program. Having not been paid such benefits on a contemporaneous basis, no overpayment of benefits had been made by the Department.

1 6. The passage of time between the claimant's final adjudication as a
2 permanently totally disabled worker and the effective date of that
3 declared status was due to an erroneous adjudication by the
4 Department, but was not due to an improper administration of the Act
5 resulting in bureaucratic delay by the Department.
6

7 **CONCLUSIONS OF LAW**

- 8 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
9 and subject matter to this appeal.
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11 2. The provisions of RCW 51.32.220(2) and RCW 51.32.230 limiting
12 recovery of overpayment of benefits for a period not to exceed six
13 months immediately preceding the date of notification that overpayment
14 has occurred, are not applicable to the circumstances of the claimant in
15 view of the facts herein.
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17 3. The order of the Department of Labor and Industries dated November
18 18, 1982, adhering to the provisions of a prior order implementing
19 reduction by offset of monthly permanent total disability benefits, is
20 correct, and should be affirmed.

21 It is so ORDERED.

22 Dated this 31st of May, 1984.

23 BOARD OF INDUSTRIAL INSURANCE APPEALS

24 /s/

25 MICHAEL L. HALL

Chairman

26 /s/

27 PHILLIP T. BORK

Member

28 **DISSENTING OPINION**

29 Mr. Sambrano has suffered undue hardship by the Department of Labor and Industries
30 denying his pension check for 16 months. In addition, Mr. Sambrano will not receive interest on his
31 money withheld from him by the Department. He will have to use part of his pension check to pay
32 for the attorney he hired to defend his rights under the law, and now the Board majority are adding
33 to that hardship by further reducing his "back" pension longer than the six-month period which, I
34 believe, the law allows the Department to recoup.
35

36 To say that Mr. Sambrano has not suffered a hardship under the hands of the Department of
37 Labor and Industries is to stretch the definition of "Webster's" interpretation of hardship.
38

39 I would adopt in toto the Proposed Decision and Order issued on December 13, 1983, by our
40 industrial appeals judge and hereby incorporate said decision within my dissent.
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42 Dated this 31st day of May, 1984.

43 /s/

44 FRANK E. FENNERTY, JR.

Member