

Whitaker, Herschel

[SOCIAL SECURITY DISABILITY OFFSET \(RCW 51.32.220\)](#)

State offset computed in same manner as federal offset

Where, prior to the initiation of the reverse offset pursuant to RCW 51.32.220, the Social Security Administration has taken the offset pursuant to 42 U.S.C. § 424a, the worker should receive the same combined amount of federal and state benefits, regardless of which jurisdiction is taking the offset.*In re Herschel Whitaker*, BIIA Dec., 86 3069 (1988)

Scroll down for order.

1 disability benefits on January 24, 1984. Mr. Whitaker was initially denied benefits. Following a
2 hearing, Mr. Whitaker, on June 21, 198k, was awarded social security disability benefits retroactive to
3 December, 1983. Between July 1984 and January 1986 the Social Security Administration reduced
4 the social security disability benefits payable to Mr. Whitaker pursuant to 42 U.S.C. § 424a.
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7 On January 9, 1986, Weyerhaeuser requested information from the Social Security
8 Administration about Mr. Whitaker's claim for social security benefits. On January 15, 1986,
9 Weyerhaeuser received information from the Social Security Administration that the claimant had
10 become entitled to benefits as of December, 1983. Effective January 13, 1986, Weyerhaeuser offset
11 Mr. Whitaker's time loss benefits pursuant to the provisions of RCW 51.32.220. In calculating the
12 offset Weyerhaeuser based the amount of offset on the social security benefits in effect on January
13 13, 1986. On January 13, 1986, claimant was receiving \$648.60 in social security benefits.
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17 Mr. Whitaker contends that December, 1983, the date of his initial entitlement to concurrent
18 state and federal benefits, is the determinative date for both state and federal benefits. The
19 Weyerhaeuser Company contends that then offset in this matter should be calculated on the basis of
20 the benefit levels in effect on January 15, 1986, the date the Social Security Administration notified
21 Weyerhaeuser that Mr. Whitaker was receiving social security benefits.
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24 In a number of prior decisions we have detailed the history and intent of RCW 51.32.220, the
25 social security reverse offset statute. See, e.g., In re Lee Darbous, BIIA Dec. 58,900 (1982). We will
26 not, therefore, reiterate that discussion here. Suffice it to say that RCW 51.32.220(1) provides that the
27 state's reverse offset should be calculated in the same manner as provided by 42 U.S.C. § 424a.
28 That is, the worker should be placed in the same position whether the Social Security Administration
29 or the Department of Labor and Industries or the self-insured employer takes the offset.
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32 42 U.S.C. § 424a(a)(1) provides for computation of the offset based on the benefit levels in the
33 month that the worker is entitled to both state and federal periodic benefits, provided that the secretary
34 has, in a prior month, received notice that the worker is receiving concurrent benefits. That notification
35 date is critical under both 42 U.S.C. § 424a(a)(1) and RCW 51.32.220(2). The latter section provides
36 that Subsection 1 of RCW 51.32.220 (which mandates that the state computation should be identical
37 to the federal computation) "shall be effective the month following the month in which the department
38 or self-insurer is notified by the federal social security administration that the person is receiving
39 disability benefits under the federal old- age, survivors and disability insurance act. . . ."
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1 This Board has had occasion to interpret the statutory notification requirement in a number of
2 prior decisions. Our decision in In re Selma Hayes, BIIA Dec., 66,196 (1985) contains a good
3 summary of most of these decisions. The rule which has evolved through time is formulated in Hayes
4 as follows:
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7 Our prior decisions show that the Department has been held to have been
8 put on notice of concurrent entitlement for purposes of determining what
9 benefit levels to reference in its offset computation, from the date that
10 temporary total or permanent total workers' compensation benefits were
11 commenced except where such date preceded the date that federal SSDI
12 benefits were commenced. It was felt that the Department ought to be
13 held to have been put on notice when concurrent entitlement in fact
14 existed and inquiry at that time would have so revealed. However, when
15 in fact concurrent entitlement did not exist at the time of the
16 commencement of periodic state benefits or a decision regarding federal
17 entitlement was made retroactive subsequent to the date of
18 commencement of state benefits, the Department ought not to be held to
19 have been put on notice until such time as its own records revealed the
20 probable existence of that fact.
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22 Hayes at 7-8. That is, if state periodic benefits commence before social security benefits, then the
23 level of social security benefits in effect on the date the Department or self-insurer received actual
24 notice, from whatever source, of the worker's subsequent entitlement to concurrent social security
25 benefits is used in the offset calculation. In re Ricky A. Broderson, Dckt. No. 86 4201 (September 9,
26 1987).
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29 In the instant case, Mr. Whitaker was receiving state periodic disability benefits prior to
30 receiving social security benefits. Therefore, January 15, 1986, when the self-insured employer
31 received actual notice of the claimant's receipt of social security benefits would, at first blush, appear
32 to be the correct date to determine benefit levels.
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35 However, the instant appeal involves an issue which has not been squarely addressed by any
36 of the prior Board decisions, i.e., what benefit levels should be used in the offset computation when
37 the Social Security Administration has previously taken the offset. The prior Board decisions generally
38 dealt with methods of determining the date on which the Department or self-insured employer should
39 be held to have had notice that the worker was receiving social security benefits. The issue presented
40 to us in the present case is somewhat different.
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43 In this case, the Social Security Administration began reducing the claimant's benefits pursuant
44 to 42 U.S.C. § 424(a) in July of 1984 and the self-insured employer took over the offset in January,
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1 1986. This Board has consistently held that the state reverse offset should be applied in the same
2 manner as the federal offset. Under these circumstances we hold that where, prior to the initiation of
3 the reverse offset pursuant to RCW 51.32.220, the Social Security Administration has taken an offset
4 pursuant to 42 U.S.C. § 424a, the worker should receive the same combined amount of federal and
5 state benefits, regardless of who is taking the offset. With this guiding principle in mind, we turn to the
6 record before us.
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10 The Proposed Decision and Order concluded that, in calculating the reverse offset, the same
11 date applied with respect to both state and federal benefit levels, i.e., December 1983. Unfortunately,
12 the record does not disclose what benefit levels the Social Security Administration was using to
13 compute the offset at the time the self-insured employer took it over. Under the federal statute and
14 regulations, we assume that the federal benefit level being used in the calculation was that in effect in
15 July, 1984, when the Social Security Administration began taking the offset. We note that social
16 security cost-of-living increases occur each December, on an annual basis, so that the benefit level in
17 effect in December, 1983 and in July, 1984 would be the same.
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22 From our reading of 42 U.S.C. § 424a, subsequent federal cost-of- living increases would not
23 have been subject to offset by the Social Security Administration and would not have been taken into
24 account in subsequent periodic recalculations of the offset. On the other hand, it seems likely that the
25 Social Security Administration did take subsequent state cost-of-living increases into account in
26 readjusting the offset periodically. See 20 C.F.R. § 404.408(k), 70A Am. Jur. 2d Social Security and
27 Medicare § 247. Two Social Security Administration rulings support this view. SSR 80-14; SSR
28 82-68. In SSR 82-68 the Social Security Administration made the following policy statement:
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32 All increases in public disability benefits [state benefits] after offset is first
33 considered or imposed should be considered in the computation of DIB
34 [federal benefits] reduction and will result in the imposition of an additional
35 offset where appropriate. Although this issue was not specifically
36 addressed in section 224 of the Act, it is consistent with the intent of
37 Congress to limit combined public disability benefits and DIB.
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39 Each subsequent increase in the public disability benefit after offset is
40 imposed may result in a further reduction of federal disability benefits.
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42 SSR 82-68, at 895.
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44 The most simplistic formula for computing the reverse offset would be to simply subtract the
45 applicable social security benefit level (\$607.80) from the 80% of average current earnings figure
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1 (\$1,266.40), resulting in a monthly time loss compensation payment, after offset, of \$658.60. Thus, it
2 might appear that the level of state benefits is not the critical figure.
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4 However, to comply with the statutory scheme set forth at 42 U.S.C. 424a and RCW 51.32.220,
5 the better method would appear to be to add the social security benefit level of \$607.80 (as of July,
6 1984) and the current time loss compensation level of \$1,130.75 (as of January, 1986), resulting in the
7 amount of \$1,738.55. From that figure one would then subtract the 80% average current earnings
8 amount of \$1,266.40, which leaves \$472.15 as the offset figure. \$472.15 subtracted from the current
9 (January, 1986) time loss compensation figure is **\$658.60**.
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11 If the same formula were applied, but with the Social Security Administration rather than the
12 self-insured employer taking the offset, the following results would occur:
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14	\$607.80	social security benefits, July, 1984
15	+ \$1,130.75	time loss compensation as of January, 1986
16	\$1,738.55	
17	- \$1,266.40	80% average current earnings
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19	\$ 472.15	offset figure
20	\$ 648.60	social security benefits January, 1986
21	- \$ 472.15	
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23	\$ 176.45	new social security amount

24 In either case, whether the self-insured employer or the Social Security Administration was taking the
25 offset, Mr. Whitaker's combined total state and federal benefits would equal \$1,307.20.
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27 Because the record before us is not fully developed, we do not mandate either of the
28 above-described methods. However, we stress that the self-insured employer is required, on remand,
29 to calculate the offset so that claimant's combined benefits will be the same no matter who is taking
30 the offset. The formulas set forth above appear to comport with the statute and would probably
31 achieve the required result.
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33 At any rate, based on the record before us, it seems clear that, at least insofar as the
34 self-insured employer took the offset based on the social security benefit levels in effect in January of
35 1986, the Department order of August 14, 1986, adhering to the Department order of May 12, 1986,
36 was in error. Thus, that Department order must be reversed and the claim remanded to the
37 Department with direction to require the self-insured employer to take the offset based on the social
38 security benefit level in effect in July, 1984 (which is the same level that was in effect in December,
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1 1983) and further to assure that the claimant receives the same amount of combined benefits that he
2 would have received had the Social Security Administration continued to take the offset.
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4 **FINDINGS OF FACT**

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6 1. On December 3, 1982 the Department of Labor and Industries received a
7 report of accident alleging an industrial injury to the claimant on November
8 1, 1982 during the course of his employment with Weyerhaeuser
9 Company. On December 30, 1982 the Department issued an order
10 allowing the claim.

11 On May 12, 1986 the Department issued an order reducing the claimant's
12 monthly benefits to a new rate of \$803.70 (sic-\$617.80) pursuant to RCW
13 51.32.220 effective January 13, 1986 and establishing an overpayment in
14 the amount of \$803.70, to be deducted at the rate of \$133.95 from future
15 awards until the overpayment is extinguished.

16 On May 16, 1986 the Department received a protest and request for
17 reconsideration filed on behalf of the claimant. On August 4, 1986 the
18 Department issued an order holding the prior order of May 12, 1986 in
19 abeyance and on August 14, 1986 the Department issued an order
20 adhering to the provisions of the prior Department order dated May 12,
21 1986.
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23 On August 26, 1986 the Board of Industrial Insurance Appeals received a
24 notice of appeal filed on behalf of the claimant. On September 4, 1986 the
25 Board issued an order granting the appeal, assigning it Docket No. 86
26 3069, and directing that proceedings be held on the issues raised in the
27 appeal.

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29 2. On November 1, 1982 Herschel Whitaker was injured during the course of
30 his employment with the Weyerhaeuser Company.
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32 3. On January 26, 1984, Mr. Whitaker filed an application for social security
33 disability benefits. He was initially denied benefits on April 20, 1984, but,
34 following a hearing, was awarded social security disability benefits
35 retroactive to December of 1983 on June 21, 1985.
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37 4. Beginning July, 1984 and up until January, 1986 the Social Security
38 Administration reduced the claimant's social security benefits pursuant to
39 42 U.S.C. § 424a. As of July, 1984 the claimant's monthly social security
40 benefits were \$607.80.
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42 5. On January 9, 1986 the self-insured employer inquired of the Social
43 Security Administration as to claimant's receipt of social security benefits.
44 On January 15, 1986 the Social Security Administration advised the
45 self-insured employer that Mr. Whitaker was receiving social security
46 benefits. On May 12, 1986 the self-insured employer began taking the
47 reverse offset, effective January 13, 1986, reducing claimant's time loss
compensation payments to the monthly amount of \$617.80 from the
monthly amount of \$1,130.75.

1 6. Claimant's workers' compensation benefits as of January 13, 1986 were
2 \$1,130.75 and 80% of his average current earnings was \$1,266.40.
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4 **CONCLUSIONS OF LAW**

- 5 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
6 and the subject matter of this appeal.
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- 8 2. The reduction of benefits pursuant to RCW 51.32.220 should be
9 calculated so that Mr. Whitaker receives the same amount of combined
10 benefits as he would have received if the Social Security Administration
11 had continued to take the offset pursuant to 42 U.S.C. § 424a. The
12 federal level of benefits to be used in the computation is \$607.80, the
13 amount claimant was receiving when the Social Security Administration
14 began to take the offset in July, 1984.
- 15 3. The order of the Department of Labor and Industries dated August 14,
16 1986, which adhered to the provisions of a prior order dated May 12,
17 1986, reducing the claimant's monthly benefits to a new rate of \$803.70
18 (sic-\$617.80) effective January 13, 1986 and establishing an overpayment
19 in the amount of \$803.70 and directing that a deduction from future
20 awards be made in the amount of \$133.95 in order to extinguish the
21 overpayment, is incorrect and should be reversed and this claim
22 remanded to the Department to issue an order directing the self-insured
23 employer to recalculate the offset pursuant to RCW 51.32.220 in a manner
24 consistent with this decision, using the social security benefit level of
25 \$607.80 and the 80% of average current earnings amount of \$1,266.40.

26 It is so ORDERED.

27 Dated this 15th day of November, 1988.

28 BOARD OF INDUSTRIAL INSURANCE APPEALS
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32 /s/
33 SARA T. HARMON Chairperson
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36 /s/
37 FRANK E. FENNERTY, JR. Member
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40 /s/
41 PHILLIP T. BORK Member
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