Strand, Vernon

SOCIAL SECURITY RETIREMENT OFFSET (RCW 51.32.225)

Calculation

Where the worker received social security retirement benefits, the Department was not obliged to separately compute the worker's spouse's portion of benefits. (*Overruling In re Earl F. Lique*, BIIA Dec., 88 3334 (1990)). ***….In re Vernon Strand*, BIIA Dec., 92 1604 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 93-2-02652-0.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: VERNON A. STRAND	**)**	**DOCKET NO. 92 1604**
	)	
CLAIM NO. H-901299	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Vernon A. Strand, by
Casey & Casey, P.S., per
Carol L. Casey and Gerald L. Casey, Attorneys

Employer, Poulsbo Lumber Co., Inc., by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Michael Davis-Hall, Assistant

This is an appeal filed by the claimant, Vernon A. Strand, on March 19, 1992 from an order of the Department of Labor and Industries dated March 9, 1992 which affirmed an order dated February 20, 1992 which adjusted claimant's compensation effective March 1, 1992 because of the receipt of Social Security retirement benefits. **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 a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on April 21, 1993 in which the order of the Department dated March 9, 1992 was reversed and the matter remanded to the Department with directions to take into account Mr. Strand's correct marital status when calculating his rate of time loss compensation and his Social Security retirement offset, but in all other respects to calculate the offset in accordance with the order of March 9, 1992.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

Claimant petitions the Board to review the Proposed Decision and Order, specifically with regard to the proposed determinations relevant to the procedures used by the Department to calculate Mr. Strand's Social Security retirement offset. In addition to the issues raised in the Petition for Review, the Proposed Decision and Order disposed of several related issues. Issues raised prior to hearings in the matter included: the constitutionality of the retirement offset; the legality of the Department taking the offset without first promulgating rules; the correctness of the calculation of Mr. Stand's time loss benefits which did not include compensation based on his correct marital status; the

correctness of the offset calculations which were performed without separately calculating the spouse's portion of the Social Security and time loss benefits; the correctness of the level of Social Security entitlement used by the Department in calculating the offset and, finally; the legality of taking an offset when the claimant reaches 65 years of age when an offset had already been taken before he reached the age of 65.

Of all the issues disposed of in the Proposed Decision and Order, the claimant's Petition for Review only raises objections to determinations with regard to the level of Social Security entitlement used by the Department in calculating the offset, to the failure to separately compute claimant's spouse's portion of the benefits and to the legality of the Department taking the offset without promulgating rules. All other issues disposed of in the proposed decision were decided in favor of the Department with the exception that the Proposed Decision and Order remanded the matter to the Department with directions to calculate Mr. Strand's time loss benefits for purposes of the offset as if he was married. We agree with the ultimate determinations as proposed by our industrial appeals judge with regard to all the issues, however, the rationale concerning the correct level of Social Security entitlement and the calculation of the offset without a separate calculation of the spouse's portion of the benefits demands closer examination than contained in the Proposed Decision and Order.

Mr. Strand was injured in 1981. His claim was first closed in 1985. In 1988 he applied with the Department to have his claim reopened. In 1988 he also applied for Social Security benefits. He claims to have requested Social Security disability payments, however, he was initially placed on early retirement benefits in April of 1989 because he was only 62 years old at that time. His early retirement benefit was $547.00. After only two months, effective June of 1989, he began receiving disability benefits which were paid at the same rate as if he had retired at age 65 with full entitlement, $672.00. His wife was entitled to an additional $53.00 a month due to this disability. An adjustment had been made by the Social Security Administration to compensate him at the higher "disability" rate for April and May of 1989.

Mr. Strand asserts that for the purpose of calculating offset, the Department should have used the early retirement level of benefits, $547.00, rather than the $725.00 he began receiving in June of 1989. The claimant does not express any authority for calculating the amount of the offset in any method other than that which had been used by the Department. No reason is given as to why the Department should use the early retirement level of benefits when it is clear that at the time he turned

65 years old he was receiving full Social Security retirement benefits, not the lower amount he would have received if he had continued to receive early retirement benefits.

Victoria Kennedy supervises the Department's pension benefits and Social Security offset programs. Ms. Kennedy testified that the Department exercises the offset by calculating the level of claimant's Social Security entitlement when he or she first becomes entitled to receive the Social Security benefits. She noted that the Department does not adjust the amount of the offset when the Social Security Administration, in order to reflect cost of living increases, adjusts the level of Social Security benefits. When Mr. Strand turned 65 years old he had a Social Security benefit of $768.00 for himself and $61.00 for his wife. Ms. Kennedy explained that the Department took his rate of Social Security entitlement and adjusted down to compensate for the cost of living increases provided by Social Security since June of 1989 (when Mr. Strand first began receiving disability benefits from the Social Security Administration). This was in accordance with a Department policy in cases where a worker had been receiving Social Security disability benefits prior to turning 65 years old and thereafter begins receiving Social Security retirement benefits.

The amount offset by the Department is therefore less than if the level of the Social Security benefits were implemented at the time Mr. Strand actually received the time loss benefits and, accordingly, such procedures for offset calculations result in an increased level of time loss payments. The record supports a conclusion that the correct procedure was used by the Department and the Department order will not be reversed on the grounds that the level of benefits that should have been used for offset purposes was the level of benefits Mr. Strand received when he initially received Social Security early retirement benefits instead of Social Security disability benefits in 1989. The Department is already calculating the offset with an adjustment for cost of living increases to the worker's benefit.

The more difficult issue to resolve is whether the Department should have used separate calculations for the offset of Social Security benefits paid for Mr. Strand's wife. The claimant argues that the Board's ruling in In re Earl F. Lique, BIIA Dec., 88 3334 (1990) requires the Department to compute the offset by separate computations. In Lique it was determined that children's benefits were separate from the worker's, due, in part, because the children's portion of the benefits could be paid separately to the person having legal custody of the children. This argument was found unpersuasive in the Proposed Decision and Order and our industrial appeals judge did not propose that the Department use the "Lique" computations for spouse's, rather than children's benefits.

Conceptually, a spouse's portion of benefits seems equally separate as a child's portion -- the worker is only entitled to the extra amount of benefits due to the status of being married or having dependent children. Unlike children's benefits which may be paid to someone other than the worker, we are unaware of any mechanism where the spouse of an injured worker can be paid total disability benefits separately. The rationale in Lique does not apply to the situation herein, where we are not dealing with a child's benefit, but instead are dealing with the spouse's benefit. The manner in which benefits can be paid, however, does not seem to be a distinction which merits different treatment for calculation of the offset. Therefore, at first glance it might seem more consistent with the Board's prior ruling to extend the calculations set forth in Lique to benefits received due to the marriage relationship.

After serious reconsideration of the rationale used in the Lique decision, it appears the most prudent option is to abandon the Lique decision and return to offset calculations based on a recognition that Social Security and workers' compensation provide a "family entitlement" which does not require separate offset calculations for each member of the family. The decision in Lique to require separate calculations for children's benefits was supported by two cases which were thought to establish that children's entitlement to workers' compensation benefits are separate from the worker's entitlement: Anderson v. Department of Labor & Indus., 40 Wn.2d 210 (1952) and Gassaway v. Department of Labor & Indus., 18 Wn. App. 747 (1977).

In Anderson, the claimant had received cash advances which exhausted his pension reserve. Apparently there remained only monthly pension payments to his dependent son. The Department mistakenly sent the claimant additional money and then requested repayment. The Department then took the overpayment out of the child's monthly pension check. The court ruled that the Department had no right to correct mistakes as to the parent's pension at the expense of the child's pension because "the child's pension is distinct from and not part of the parent's pension as such." Anderson, at 215. In Gassaway, Mr. Gassaway died in an accident covered by the Industrial Insurance Act. He was survived by three natural children living with his former wife, a widow and a stepchild. The ex-wife requested that the death benefits be apportioned equally between the widow and the three children, rather than the children receiving only their share, 2% of the monthly payment per child. The court, citing Anderson, acknowledged a child's allocation of total disability benefits as distinct, and ruled that there would not be an equal division of monthly benefits and noted that payments made on behalf of a worker's natural children should be made to the person having legal custody.

The Lique case cites these authorities then inexplicably states that these decisions compel reading the retirement offset statute, RCW 51.32.225, as requiring separate offset computations for claimant and his dependents. Apparently, the decision in Lique to calculate separately was premised on the rationale that Social Security benefits going to a child are a child's separate entitlement. Lique at 7. Clearly, the Anderson and Gassaway cases support the rejection of any determination which may increase or decrease a child's portion of total disability benefits. Because a child's portion of the disability benefits is a statutorily determined percentage which cannot be increased or decreased through independent actions of the Department, the claimant, or any other interested person, it does not necessarily follow that the child's portion is separate in all accounts from the worker's portion. Nor does it follow that separate offset computations must be calculated for each recipient of a worker's total disability compensation.

The Department, in a memorandum filed in this case, also argues that the premise relied on in Lique may be wrong. A Social Security ruling supports the Department's contention. Dilley v. Secretary, Social Security Ruling 74-9c (D.N.J., 1973). In that ruling, the federal court had to determine whether the Social Security disability offset of workers' compensation benefits could be applied to a child's portion of the Social Security disability benefits. The court noted that 42 U.S.C. § 402 does not create an independent right of the child to benefits under that section. Also, it was noted that the increase in total benefits was for the purpose of providing additional benefits to a family, based on the additional cost of supporting children. The court noted that the statute contains a formula by which the sum total of all benefits to which a disabled worker and his family are entitled may be reduced if the worker is also entitled to workers' compensation benefits. This case determined that the federal offset should apply to the child's portion of the entitlement.

We are not suggesting that it must necessarily follow that a separate offset computation should not be performed merely because the child's portion is capable of offset. However, the case is excellent guidance as to how the federal system interprets the nature of children's and spouse's benefits.

The federal interpretation of the nature of Social Security benefits for children is that the benefits are dependent on a parent becoming eligible and that the sum total of benefits can be calculated for offset purposes. It therefore seems ill-advised for this Board to state that there is a federal entitlement for children which is separate from the parental entitlement under the Social Security system and offsets should be calculated separately with regard to particular family members.

It is apparent that the federal system contemplates a family entitlement, not a series of individual entitlements for a father, mother and/or child. Therefore, a calculation of state offset, based on the assumed existence of a separate federal entitlement for parent and child, seems misplaced. It follows that a similar separate calculation for worker and spouse would also be premised on an erroneous assumption.

Because we are dealing with Washington's offset of retirement benefits, it could be argued that the Social Security ruling with regard to the federal offset of disability benefits has no relevance to our inquiry. The law which creates the entitlement to Social Security benefits, however, is the same whether the benefits be for disability or old age or for children or spouses. 42 U.S.C. § 402 sections (b), (c) or (d). The nature of the child's or spouse's entitlement is the same whether it is based on disability or retirement because it is dependent on the parent's or spouse's disability or retirement. Consequently, there is no support in the federal statute for treating retirement offset differently than the disability offset.

Additionally, the Board had rejected an argument that a claimant's offset for Social Security disability benefits should be based only on that portion of the federal entitlement attributable to his individual entitlement. In re Laverne D. McKenna, BIIA Dec., 49,873 (1978). The Board determined that there existed a total family benefit under the Social Security law which would be completely included in the offset.

This Board therefore withdraws from the prior decision to require separate calculations for the worker and children when determining the amount of the offset because it is clear that the Social Security benefits need not be treated as a separate entitlement for the children as was the premise in the Lique decision. Instead, the federal view seems to be that there exists a family entitlement which is a derivative of the initial beneficiary's entitlement. The entitlement need not be considered as truly separate for all conceivable purposes, including calculation of an offset. Accordingly, merely because the proportion of benefits cannot be changed by action of the Department or recipient does not mean that the child or spouse entitlement is truly separate, contrarily, the condition precedent for the child or spouse entitlement is the worker's entitlement. There is no independent entitlement without the worker's entitlement. As with the federal disability and retirement benefits, the dependent's entitlement is not separate for all purposes merely because it can be paid to separate individuals. The right to the benefit is not separate from the workers, instead, it is derivative of the worker's benefits.

Additionally, the State system indicates a certain limitation on the concept of an individual entitlement for children as it does not create an entitlement for each child if a worker has more than five dependent children. Under RCW 51.32.050 and RCW 51.32.060, a 2% increase in the worker's disability benefits is provided for each child up to five children. There is not an additional 2% for the sixth or additional children. Certainly, if an additional percentage is not allowed for the sixth child, there is no separate or individual benefit for that child. Similarly, the first five children cannot be considered as entitled to an individual benefit when their minimal allocation of a total of 10% (2% x 5) is reduced on a per capita basis when there are more than five dependent children.

Finally, it should be noted that there is no benefit to the worker by performing the separate calculations for the claimant's spouse. In Lique, the separate calculations worked to the worker's benefit, however, the same result would not occur here. In Lique, the child's portion of the workers compensation benefits was $10.58 and the worker's was $518.56; the child's portion of the Social Security benefits was $215.00 and the worker's was $348.30. From these figures it can be seen that the child's portion of the workers' compensation benefits after cost of living adjustments is only 1.9%, the child's portion of the Social Security benefits is 38.1%. The result in Lique was an offset computation in the worker's favor. The same benefit will not likely occur for a separate calculation of the spouse's benefits in this case. The spouse's portion of the Social Security benefits is $53.00 of the total benefit of $724.00 or 7.3% of the total benefit. Comparing this figure of 7.3% to the 38.1% ratio in the Lique case, it is apparent the advantages to the worker in performing the separate calculations experienced in the Lique case will not hold up in Mr. Strand's case. The separation of the calculation will not result in a significant reduction of the offset. In Lique, because of the increased percentage of the child's Social Security benefit, separate calculations resulted in a total offset of the child's portion, but caused a lesser offset of the worker's portion, resulting in increased monthly workers' compensation benefits being paid to the worker.

In summation, we do not feel that the rationale used in Lique for performing separate calculations for children's benefits is persuasive. Rather than attempt to extend that rationale to include spouse's benefits, we hereby overrule In re Earl F. Lique, BIIA Dec., 88 3334 (1990) insofar as it requires the Department to perform separate calculations. Accordingly, separate calculations are not required for the worker and spouse. This matter is therefore remanded to the Department to calculate Mr. Strand's Social Security offset, taking into account his marital status for the purpose of

calculating time loss compensation, but in all other respects to calculate the offset in accordance with the order of March 9, 1992.

FINDINGS OF FACT

1. On August 10, 1981, the claimant, Vernon A. Strand, filed an application for industrial insurance benefits with the Department of Labor and Industries. The application was accepted and benefits paid, including time loss compensation. On April 1, 1985, his claim was closed with time loss as paid and with an award for permanent partial disability equal to 25% compensation rate for unspecified disabilities as compared to total bodily impairment.

   On April 21, 1988, Mr. Strand filed an application to reopen his claim for aggravation of condition, and on October 8, 1990, the Department rejected that application by an order. On November 27, 1991, following litigation before the Board of Industrial Insurance Appeals, and pursuant to its order, the Department reopened the claim effective April 19, 1988. Further time loss compensation was paid, and on February 20, 1992 the Department issued an order indicating:

   > The compensation on your claim is being adjusted effective 3-1-92 because you receive Social Security retirement benefits. Your new compensation rate is $459.92 per month.
   >
   > This rate is based on monthly Social Security payments for you and your wife, totalling $724.00, and your highest year's earnings of $15,808.98 for 1979.

   Mr. Strand filed a timely protest and request for reconsideration from that order and it was affirmed by a Department order issued on March 9, 1992. Mr. Strand appealed on March 19, 1992 and the Board allowed the appeal, assigning it Docket No. 92 1604.

2. Vernon A. Strand, while in the course of his employment with Poulsbo Lumber Co., Inc., sustained an industrial injury on August 5, 1981 when he strained his back while attempting to catch a large board that was falling.

3. As a proximate result of his industrial injury of August 5, 1981, Mr. Strand sustained a strain to his spine that resulted in permanent partial disability equal to 25% compensation rate for unspecified disabilities as compared to total bodily impairment at the time his claim was first closed on April 1, 1985.

4. Between April 1, 1985 and October 8, 1990, the claimant's condition causally related to his industrial injury of August 5, 1981 became aggravated and his condition worsened.

5. Vernon A. Strand was born on March 22, 1927 and turned 65 on March 22, 1992. He has been married at all times pertinent to this appeal and he has two children who were grown and married at all times pertinent to this appeal. He began receiving Social Security retirement benefits in the amount of $547.00 per month in April 1989 but following a letter from the Social Security Administration dated October 11, 1989, he was placed on Social Security disability benefits beginning in June 1989 of $672.00 per month.

6. The Department calculated Mr. Strand's Social Security offset using $724.00 per month in Social Security benefits comprised of $671.00 for him and $53.00 for his spouse, which represented his Social Security retirement benefits at age 65, less COLA's and an adjustment for early retirement, and time loss compensation in the amount of $1183.92, which resulted in a new time loss compensation rate of $459.92 per month which it promulgated by its order issued on February 20, 1992 and affirmed by its order dated March 9, 1992. For time loss purposes, those calculations did not take into consideration the fact that Mr. Strand was married.

CONCLUSIONS OF LAW

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

2. The Department should have calculated Mr. Strand's Social Security offset pursuant to Title 51 RCW using a time loss compensation rate taking into account his married status, but otherwise correctly calculated his offset. The Department is not required to calculate the offset by performing a separate calculation of the benefits received because of his marital status.

3. Social Security offset statutes in Title 51 RCW are constitutional and do not violate equal protection or due process concepts or other constitutional protections and the Department did not need to promulgate rules prior to taking the offsets nor did Mr. Strand have a vested right precluding Social Security offset because his industrial injury occurred prior to implementation of those RCW provisions.

4. The order of the Department of Labor and Industries dated March 9, 1992 that affirmed a prior order that indicated:

> The compensation on your claim is being adjusted effective 3-1-92 because you receive Social Security retirement benefits. Your new compensation rate is $459.92 per month.
>
> This rate is based on monthly Social Security payments for you and your wife, totaling $724.00, and your highest year's earnings of $15,808.98 for 1979,

is incorrect and is reversed. This claim is remanded to the Department with directions to issue an order calculating Mr. Strand's Social Security offset, taking into account his married status for time loss, but otherwise calculating his offset in accordance with its March 9, 1992 order.

It is so ORDERED.

Dated this 18th day of November, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
ROBERT L. McCALLISTER Member