

Morris, Karen

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Limitation on recovery of overpayment (RCW 51.32.220)

The Department may not apply an offset and reduce state benefits at the same time the Social Security Administration is taking an offset and paying reduced benefits. Only one agency may take the offset at any time. A "double offset" violates the provisions of 41 U.S.C. § 424a(d) and RCW 51.32.220(1) and (5). Additionally, the Department may not assess or recover an overpayment until an actual overpayment has been made. ...***In re Karen Morris, BIA Dec., 11 16806 (2012)*** [*Editor's Note: The Board's decision was appealed to Thurston County Superior Court No. 13-2-00038-2.*]

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

1 **IN RE: KAREN C. MORRIS**) **DOCKET NO. 11 16806**
2 **CLAIM NO. Y-187741**) **DECISION AND ORDER**
3 _____)

4 **APPEARANCES:**

5 Claimant, Karen C. Morris, by
6 Tacoma Injury Law Group, Inc., P.S., per
7 Robert S. Allen

8 Employer, Arctic Ice Cream Novelties, LLP,
9 None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 James S. Johnson, Assistant

13 The claimant, Karen C. Morris, filed an appeal with the Board of Industrial Insurance Appeals
14 on June 30, 2011, from an order of the Department of Labor and Industries dated May 4, 2011. In
15 this order, the Department affirmed its March 7, 2011 order in which it adjusted the compensation
16 rate effective October 16, 2010, based on receipt of social security benefits; established a new
17 compensation rate of \$1979.48 a month; assessed an overpayment of time loss compensation
18 benefits for the period October 16, 2010, through April 15, 2011, in the amount of \$5893.62; and
19 ordered that the overpayment be deducted from benefits at an initial rate of \$70 a month. The
20 Department order is **REVERSED AND REMANDED**.

DECISION

21 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
22 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and
23 Order issued on June 13, 2012, in which the industrial appeals judge affirmed the Department order
24 dated May 4, 2011. On August 20, 2012, the Department filed a response to the Petition for
25 Review.

26 This order addresses the only contested issue of the appeal: Whether the Department
27 correctly calculated the reduction of total permanent disability benefits necessary to offset Karen
28 Morris's receipt of social security disability benefits as provided by RCW 51.32.220(1) and
29 42 U.S.C. § 424a.

30 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
31 no prejudicial error was committed. The rulings are affirmed. We have granted review to reverse
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1 the Department order and remand the claim to the Department to recalculate Ms. Morris's benefits
2 taking into account the social security disability benefits she received.

3 The following is a summary of the evidence necessary to explain our decision. Karen Morris
4 was injured on May 13, 2003, while working for Arctic Ice Cream Novelties, LLP. On October 28,
5 2009, the Department issued an order in which determined that Ms. Morris was totally permanently
6 disabled effective December 16, 2009, as a result of her industrial injury. In August 2010,
7 Ms. Morris was placed on social security disability (SSD). She began receiving SSD benefits in
8 October 2010.

9 On March 7, 2011, the Department issued an order in which it determined that as of May 1,
10 2011, Ms. Morris's compensation would be adjusted effective October 16, 2010, based on her
11 receipt of social security disability benefits; and that her new compensation rate was \$1,979.48 a
12 month. The Department based the rate on monthly SSD payments totaling \$988, and the value of
13 80 percent of her highest years' earnings in the amount of \$2,788 per month. This information had
14 been provided by the Social Security Administration (SSA). The Department assessed an
15 overpayment of \$5,893.62, and Department pension benefit specialist Rita Norton issued an order
16 in which the Department required Ms. Morris to satisfy the overpayment by paying the Department
17 \$70 a month. Following Ms. Morris's protest, the Department affirmed the order on May 4, 2011.
18 Ms. Morris appealed the Department's decision, and our industrial appeals judge affirmed the
19 decision of the Department.

20 This appeal deals with the interplay of the payment of SSD benefits and state pension
21 benefits. Here, Ms. Morris was awarded SSD benefits following a determination that she was
22 totally permanently disabled and entitled to an industrial insurance pension. 42 U.S.C. § 424a
23 provides that the SSA will reduce SSD benefits where the claimant is paid state industrial insurance
24 benefits. This is referred to as the social security offset. The statute, however, allows a state to
25 "reverse the offset" and offset the social security disability payment against the state pension
26 benefits, thus reducing the benefits paid by the state, if the state enacts a "reverse offset" statute.
27 The Washington State Legislature enacted RCW 51.32.220 allowing the state to take the "reverse
28 offset."

29 The controversy before us is whether the Department correctly determined the amount of
30 benefits paid to Ms. Morris by the SSA when calculating the offset and determining her industrial
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1 insurance benefits, and whether she was overpaid \$5,893.62 by the Department for the period
2 October 16, 2010, through April 15, 2011, due to her receipt of SSD benefits.

3 Ms. Norton, the Department pension benefit specialist, obtained information from the SSA
4 that Ms. Morris's SSD full benefits were \$988 a month, but Ms. Morris was only receiving
5 approximately \$379 a month because the SSA had taken the offset against the industrial insurance
6 benefits as allowed by 42 U.S.C. § 424a thus reducing the monthly SSD benefits from \$988 to
7 \$379. In the order on appeal, Ms. Norton reduced the industrial insurance benefits based on
8 Ms. Morris's full entitlement of SSD benefits in the amount of \$988 although she knew that
9 Ms. Morris was not receiving the \$988. Ms. Norton was applying the "reverse offset" authorized by
10 RCW 51.32.220. Ms. Morris, as a result of the order on appeal, finds herself in a "double offset"
11 situation. Both the Social Security Administration and the Department are paying the reduced
12 benefits. Additionally, in the order on appeal the Department assessed an "overpayment" in the
13 amount of \$5,893.62 against Ms. Morris. Ms. Norton is correct that an overpayment would be owed
14 the Department if the Department paid full benefits while the SSA also paid full benefits, and the
15 Department had asserted its right under RCW 51.32.220 to the reverse offset. However, the facts
16 before us indicate that the SSA was offsetting against the Department benefits for the period
17 October 16, 2010, through April 15, 2011, and that the Department did not process the "reverse
18 offset" until March 2011 with an effective date of April 16, 2011. Although the Department can
19 reach back six months to recover overpayment because of the "reverse offset" it is improper for the
20 Department to assess the overpayment prior to Ms. Morris's actual receipt of the overpayment.

21 We addressed a similar situation in *In re Elwyn Netherda*, BIIA Dec., 01 23803 (2002). In
22 *Netherda* we determined that the Department policy of intentionally overpaying time loss
23 compensation benefits and delaying implementation of the reverse offset to prevent a "double
24 offset" did not violate RCW 51.32.220 regarding the six-month limitation for recoupment of
25 overpayments and was permitted by subsection (5) of RCW 51.32.220. Subsection (5) requires
26 that a worker's benefits not be reduced to less than they would be entitled to without the offset. As
27 we noted in *Netherda*, the "coordination of the offset and the reverse offset is haphazard, at best,
28 due to problems including time lags in the notification of one or another agency of entitlement to
29 benefits, or change in benefits amounts, as well as administrative or bureaucratic delays in acting
30 on information received." *Netherda* at 5. We noted that "a 'double offset' would cause extreme
31 hardship to a disabled worker who is forced to rely on disability payments to survive. Legally, such
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1 a double offset would violate the provisions of 42 U.S.C. § 424a(d) and RCW 51.32.220(1) and (5)."
2 *Netherda* at 5. See, also *In re Jeff Cook*, Dckt. No. 11 15217 (July 12, 2012).

3 In summary, the Department cannot reduce the state benefits at the same time the SSA is
4 paying reduced benefits. Only one agency can take the offset at any given time. Additionally, the
5 Department may not assess or recover an overpayment until an actual overpayment has been
6 made. We therefore reverse the Department order and remand this claim to the Department to
7 determine the amount of SSD payments made to Ms Morris for the period October 16, 2010,
8 through April 15, 3011; calculate the industrial insurance benefits owing to Ms. Morris based on the
9 actual payments made by the SSA; and determine if Ms Morris received any overpayment of
10 industrial insurance benefits for this period.

11 **FINDINGS OF FACT**

- 12 1. On October 13, 2011, an industrial appeals judge certified that the
13 parties agreed to include the Jurisdictional History in the Board record
solely for jurisdictional purposes.
- 14 2. On May 13, 2003, Karen C. Morris was injured during the course of her
15 employment with Arctic Ice Cream Novelties.
- 16 3. Ms. Morris received temporary total disability benefits from the
17 Department and, subsequently, was adjudged permanently totally
18 disabled due to her May 13, 2003 industrial injury effective
December 16, 2009.
- 19 4. Ms. Morris filed an application for social security disability benefits and
20 received such benefits during the period October 16, 2010, through
April 15, 2011.
- 21 5. In September 2010, the Washington State Department of Labor and
22 Industries received information from the Social Security Administration
23 alerting the Department that Ms. Morris was receiving social security
disability benefits.
- 24 6. Ms. Morris was not receiving \$988.00 in Social Security Disability
25 payments for the period October 16, 2010, through April 15, 2011, but
26 was receiving a lesser amount.

27 **CONCLUSIONS OF LAW**

- 28 1. Based on the record, the Board of Industrial Insurance Appeals has
jurisdiction over the parties to and the subject matter of this appeal.
- 29 2. The Department's calculation of the reduction of state benefits, so as to
30 offset Ms. Morris's receipt of social security disability benefits in
31 accordance with RCW 51.32.220 and 42 U.S.C. § 424a, is incorrect.
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1 3. The Department order is reversed. This claim is remanded to the
2 Department to determine the amount of social security disability benefits
3 paid to Ms. Morris for the period October 16, 2010, through April 15,
4 2011; to calculate industrial insurance benefits due Ms. Morris for the
5 period October 16, 2010, through April 15, 2011, based on the actual
6 social security payments made to Ms. Morris for this period; and to
7 determine the overpayment of industrial insurance benefits if any.

8 DATED: December 10, 2012.

9 BOARD OF INDUSTRIAL INSURANCE APPEALS

10 /s/ _____
11 DAVID E. THREEEDY Chairperson

12 /s/ _____
13 FRANK E. FENNERTY, JR. Member

14 /s/ _____
15 JACK S. ENG Member