SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Benefit index date

Informal notice may be used to determine the benefit index date.  ***In re Herman Bates, BIIA Dec., 11 17675 (2013)***

Effective date of offset

The implementation date, not the effective date, of the offset is the date that determines when a reduction in benefits can be taken. Where a lump sum time-loss compensation payment was made after the implementation date, the self-insured employer was entitled to take the offset.

Formal notice from the Social Security Administration to the Department is required to determine the effective date of the offset.  ***In re Herman Bates, BIIA Dec., 11 17675 (2013)***

Scroll down for order.
The self-insured employer, Clark Heavy Construction, Inc., filed an appeal with the Board of Industrial Insurance Appeals on July 11, 2011, from an order of the Department of Labor and Industries dated May 5, 2011. The May 5, 2011 Department order affirmed its order dated March 1, 2011, in which it corrected the provisions of an order dated November 23, 2010, and stated that because Mr. Bates was receiving monthly social security benefits of $718.00, the Department was adjusting his monthly time-loss compensation benefit rate to $2,990.18 effective February 1, 2010. In its order, the Department also required the self-insured employer to recalculate any time-loss compensation benefits it paid to Mr. Bates from February 1, 2010, through March 1, 2011, and to pay any underpayment of such benefits to Mr. Bates in a lump sum. The Department order is AFFIRMED.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on October 1, 2012, in which the industrial appeals judge reversed and remanded the Department order dated May 5, 2011. In this order, we address the only contested issue of this appeal, the effective date of offset for the social security disability benefits.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.
This is a social security offset case. The Department determined the effective date of the offset to be February 1, 2010. The self-insured employer, Clark Heavy Construction, Inc. (Clark), challenges the effective date of offset as set by the Department. Clark argues that the effective date of offset should be either December 1999, the date Mr. Bates began receiving social security disability benefits, or a date in 2000 or 2001, when the Department had constructive knowledge of Mr. Bates receipt of the federal benefits. Clark's primary focus is on whether it is required to pay a retroactive lump sum of time-loss compensation benefits without taking the offset for the federal benefits. We find that the Department correctly applied the law in determining the effective date of offset and affirm the Department order.

Social security offset calculations require establishing three different and distinct dates. These dates are: (1) the date to establish the benefit level; (2) the effective date of the offset; and (3) the date the offset can be implemented. The first date is the date used to establish the level of social security benefits on which a worker's offset is based. We refer to that date as the benefit index date. Determining when the Department or the self-insured employer was notified that a worker was receiving social security benefits is a key factor in establishing the benefit index date. A second date is the effective date of offset as set forth in RCW 51.32.220(2). This section states:

Any reduction under subsection (1) of this section shall be effective the month following the month in which the department or self-insurer is notify by the federal social security administration that the person is receiving disability benefits under the federal old-age, survivors, and disability insurance act.

The third date is the date on which the reduction in payment may be taken by the Department or the self-insured employer. This is the implementation date. This is set forth in RCW 51.32.220(4), which states:

No reduction may be made unless the worker receives notice of the reduction prior to the month in which the reduction is made.

We believe Clark has confused these dates in this appeal. So that the employer's argument may be understood, we set forth relevant portions of the statement of stipulated facts the parties filed with the Board on July 23, 2012.

Mr. Bates strained his low back and right shoulder area as he was carrying a car door during the course of his employment with Clark on December 8, 1998. His claim was allowed and then was closed on March 9, 1999, with medical benefits only.
Mr. Bates subsequently filed an application to reopen his claim for aggravation of condition. The Department denied the application. On March 17, 2000, Mr. Bates protested the denial and the Department thereafter reopened the claim. In his protest letter, Mr. Bates stated that he had applied for social security disability benefits. On January 4, 2001, Mr. Bates told Tessa Whitton, M.D., that the Social Security Administration began paying him benefits in June 2000. In a January 2003 report which she filed with the Department, Melissa Holton, VRC, declared that Mr. Bates told her that he was receiving social security disability benefits.

Based on those facts, the employer asserts that the effective date of the offset should be April 1, 2000. It argues that the Department had constructive knowledge that Mr. Bates was receiving social security benefits as of March 2000, and that it should thereupon have investigated whether he was being paid such benefits. We believe that Clark has confused the effective date of offset and the benefit index date. The benefit index date is the date used to determine the amount of social security disability benefits to be used in the offset calculation. This Board has, in a number of cases, allowed notification to the Department by means other than direct notice from the Social Security Administration in determining the benefit index date. Such formal notice is not required. See, In re Verlin Jacobs, BIIA Dec., 66,644 (1985). The establishment of the benefit index date affects the calculation of the offset by not using future cost of living increases from the Social Security Administration.

Clark’s argument uses the Board case law regarding the setting of the benefit index date and applies it to establish the effective date of the offset. Clark argues that the effective date of offset should be the date the Department was advised by the worker or was put on notice of the worker’s receipt of social security benefits from some source other than the Social Security Administration. However, we have not expanded use of the informal notice used to set the benefit index date to the notice requirements necessary to set the effective date of offset. We have recognized that formal notice from the Social Security Administration to the Department is required in determining the effective date of the offset. RCW 51.32.220(2). In re Selma Hayes, BIIA Dec., 66,196 (1985).

The effective date of offset is the month following the month that the Department receives notice from the Social Security Administration that the worker was receiving social security disability benefits. RCW 51.32.220(2). The facts in this appeal establish that the Department received the formal notice from the Social Security Administration in January 2010. The Department set the
effective date of offset as February 2010 in the order on appeal. This is the correct date for the effective date of the offset. Although before us in this appeal, the parties did not litigate the benefit index date.

We also note that Clark notified Mr. Bates in April 2010 of the offset and that it would be applied to a lump sum payment of past due time-loss compensation benefits. This notification to the worker establishes the implementation date of the offset as set forth in RCW 51.32.220(4). The date the reduction can begin is May 2010, the month following the April notice by the self-insured employer to the worker that the reduction would be implemented. We note that the time-loss compensation benefits lump sum payment was paid in June of 2010 which was after the implementation date. It appears to us that Clark’s primary argument is directed at the implementation date of the offset as applied to a lump sum of time-loss compensation benefits which was paid in June of 2010. Clark argues that it should not be required to pay past due time-loss compensation benefits from December 1999 through October 2006 without taking the social security disability offset. Clark’s argument to move the effective date of offset back to 1999 or 2000 in order to avoid paying the time-loss compensation benefits without the offset is misplaced. It is the implementation date that determines when a reduction can be taken, not the effective date of offset.

While the order on appeal does not directly address the issue of the date the offset reduction can be implemented and does not address the application of the offset to the lump sum of time-loss compensation benefits, we deem it appropriate to explain to the parties our decisions regarding implementation of the offset on lump sum payments.

In In re Jeannie Forsythe, BIIA Dec., 09 22899 (2011), we discussed the situation where a lump sum payment of time-loss compensation benefits was paid to the worker and how the social security disability offset would apply to the lump sum payment. In Forsythe, we relied on Potter v. Department of Labor & Indus., 101 Wn. App. 399 (2000), to determine whether the employer could recoup the entire amount of the overpayment of benefits paid as lump sum time-loss compensation benefits. In Forsythe, we stated that:

   In the Potter case on December 19, 1995, the Department was notified that Ms. Potter was receiving social security disability benefits and on that date the Department notified the claimant that it was going to reduce the amount of the total disability benefits it was paying to her because of her receipt of those benefits. On January 3, 1996, it paid retroactive time-loss compensation benefits to the claimant for the
period from February 23, 1993, through October 25, 1994, in the lump sum and it deducted the offset for the entire time period. The Court of Appeals approved the deduction for the reason that the six-month limitation RCW 51.32.220(2) only applies to overpayments already received. Because the lump sum was paid after the Department notified Ms. Potter that the offset would be deducted from her industrial insurance benefits, the six-month limitation for recouping benefits did not apply. The court noted the statute authorizes the Department to recoup excess benefits that the worker has already received, but limits the recovery to six months in order to prevent an undue hardship on workers who likely had spent the excess.

_Forsythe_, at 4; _Potter_, at 410.

We went on to note that there was a difference in the _Forsythe_ case as compared to the facts in _Potter_.

A crucial difference exists in the facts currently before us and the facts in _Potter_. BOA paid the retroactive benefits before the Department notified Ms. Forsythe that it was reducing her benefits. The Department received notice that Ms. Forsythe was receiving social security benefits in June 2009. In September 2009, it notified the claimant that it was reducing her industrial insurance benefits. The reduction could not be implemented, however, until October 2009, because that was the month after September 23, 2009, when the Department notified Ms. Forsythe of the pending offset. BOA paid the retroactive benefits to Ms. Forsythe before September 23, 2009. Ms. Forsythe already received the lump sum compensation from BOA for a total disability when the Department notified her that benefits were offset due to receipt of social security benefits. For that reason recovery of the overpayment is limited to the amount of compensation for six months of total disability preceding notification. _In re Marianne Taylor_, Dckt. No. 09 17082 (July 20, 2010).

_Forsythe_, at 4.

In the present appeal, the self-insured employer paid the lump sum past due time-loss compensation benefits after the implementation date. This is what happened in _Potter_ and the Department was entitled to the offset. Had the payment of the past due time-loss compensation benefits been made prior to the implementation date of the offset, _Forsythe_ would control. Here, because the self-insured employer paid the retroactive time-loss compensation benefits after the implementation date, _Potter_ applies and the self-insured employer is entitled to the offset.

The Department order setting the effective date of offset of February 1, 2010, is correct and is affirmed.
FINDINGS OF FACT

1. On November 7, 2011, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. On December 8, 1998, Mr. Bates was injured during the course of his employment with Clark Construction Group, when he lifted a car door.

3. The Department allowed Mr. Bates's claim and it paid industrial insurance benefits.

4. On March 9, 1999, the Department closed Mr. Bates's claim without compensation for permanent partial disability.

5. Mr. Bates filed an application to reopen his claim for aggravation of condition with the Department on December 15, 1999. The Department reopened the claim on November 21, 2000.

6. On January 26, 2010, the Social Security Administration notified the Department that it was paying social security disability benefits to Mr. Bates.

7. On February 3, 2010, the Department sent Mr. Bates a letter in which it notified him that it would begin offsetting his monthly time-loss compensation benefits effective February 1, 2010, because of his receipt of social security disability benefits.

8. On April 29, 2010, the self-insured employer notified Mr. Bates that it would begin reducing the time-loss compensation benefits based on his receipt of social security disability benefits on May 1, 2010.

CONCLUSIONS OF LAW

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

2. Within the meaning in RCW 51.32.220, February 2010 was the month after the Department was notified by the Social Security Administration that it was paying benefits to Mr. Bates under the federal old age, survivors, and disability insurance act, and is the effective date of the offset.
3. The May 5, 2011 order of the Department of Labor and Industries is correct and is affirmed.

Dated: April 26, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEDY Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
JACK S. ENG Member