

Bates, Herman

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)

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

1 **IN RE: HERMAN BATES**) **DOCKET NO. 11 17675**
2 **CLAIM NO. W-384490**) **DECISION AND ORDER**

3 APPEARANCES:
4

5 Claimant, Herman Bates, by
6 Law Office of Tracey B. Madole, per
7 Tracy B. Madole

8 Self-Insured Employer, Clark Heavy Construction, Inc., by
9 Sather, Byerly & Holloway LLP, per
10 Krishna Balasubramani

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 John Barnes, Assistant

14 The self-insured employer, Clark Heavy Construction, Inc., filed an appeal with the Board of
15 Industrial Insurance Appeals on July 11, 2011, from an order of the Department of Labor and
16 Industries dated May 5, 2011. The May 5, 2011 Department order affirmed its order dated March 1,
17 2011, in which it corrected the provisions of an order dated November 23, 2010, and stated that
18 because Mr. Bates was receiving monthly social security benefits of \$718.00, the Department was
19 adjusting his monthly time-loss compensation benefit rate to \$2,990.18 effective February 1, 2010.
20 In its order, the Department also required the self-insured employer to recalculate any time-loss
21 compensation benefits it paid to Mr. Bates from February 1, 2010, through March 1, 2011, and to
22 pay any underpayment of such benefits to Mr. Bates in a lump sum. The Department order is
23 **AFFIRMED.**

DECISION

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

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

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

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

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

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

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

30 Mr. Bates strained his low back and right shoulder area as he was carrying a car door
31 during the course of his employment with Clark on December 8, 1998. His claim was allowed and
32 then was closed on March 9, 1999, with medical benefits only.

1 Mr. Bates subsequently filed an application to reopen his claim for aggravation of condition.
2 The Department denied the application. On March 17, 2000, Mr. Bates protested the denial and
3 the Department thereafter reopened the claim. In his protest letter, Mr. Bates stated that he had
4 applied for social security disability benefits. On January 4, 2001, Mr. Bates told Tessa
5 Whitton, M.D., that the Social Security Administration began paying him benefits in June 2000. In a
6 January 2003 report which she filed with the Department, Melissa Holton, VRC, declared that
7 Mr. Bates told her that he was receiving social security disability benefits.

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

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

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

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

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

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

28 In the *Potter* case on December 19, 1995, the Department was notified
29 that Ms. Potter was receiving social security disability benefits and on
30 that date the Department notified the claimant that it was going to
31 reduce the amount of the total disability benefits it was paying to her
32 because of her receipt of those benefits. On January 3, 1996, it paid
retroactive time-loss compensation benefits to the claimant for the

1 period from February 23, 1993, through October 25, 1994, in the lump
2 sum and it deducted the offset for the entire time period. The Court of
3 Appeals approved the deduction for the reason that the six-month
4 limitation RCW 51.32.220(2) only applies to overpayments already
5 received. Because the lump sum was paid after the Department notified
6 Ms. Potter that the offset would be deducted from her industrial
7 insurance benefits, the six-month limitation for recouping benefits did not
8 apply. The court noted the statute authorizes the Department to recoup
9 excess benefits that the worker has already received, but limits the
10 recovery to six months in order to prevent an undue hardship on
11 workers who likely had spent the excess.

12 *Forsythe*, at 4; *Potter*, at 410.

13 We went on to note that there was a difference in the *Forsythe* case as compared to the facts in
14 *Potter*.

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

30 *Forsythe*, at 4.

31 In the present appeal, the self-insured employer paid the lump sum past due time-loss
32 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.

1 **FINDINGS OF FACT**

- 2 1. On November 7, 2011, an industrial appeals judge certified that the
3 parties agreed to include the Jurisdictional History in the Board record
4 solely for jurisdictional purposes.
- 5 2. On December 8, 1998, Mr. Bates was injured during the course of his
6 employment with Clark Construction Group, when he lifted a car door.
- 7 3. The Department allowed Mr. Bates's claim and it paid industrial
8 insurance benefits.
- 9 4. On March 9, 1999, the Department closed Mr. Bates's claim without
10 compensation for permanent partial disability.
- 11 5. Mr. Bates filed an application to reopen his claim for aggravation of
12 condition with the Department on December 15, 1999. The Department
13 reopened the claim on November 21, 2000.
- 14 6. On January 26, 2010, the Social Security Administration notified the
15 Department that it was paying social security disability benefits to
16 Mr. Bates.
- 17 7. On February 3, 2010, the Department sent Mr. Bates a letter in which it
18 notified him that it would begin offsetting his monthly time-loss
19 compensation benefits effective February 1, 2010, because of his
20 receipt of social security disability benefits.
- 21 8. On April 29, 2010, the self-insured employer notified Mr. Bates that it
22 would begin reducing the time-loss compensation benefits based on his
23 receipt of social security disability benefits on May 1, 2010.

24 **CONCLUSIONS OF LAW**

- 25 1. The Board of Industrial Insurance Appeals has jurisdiction over the
26 parties and subject matter in this appeal.
- 27 2. Within the meaning in RCW 51.32.220, February 2010 was the month
28 after the Department was notified by the Social Security Administration
29 that it was paying benefits to Mr. Bates under the federal old age,
30 survivors, and disability insurance act, and is the effective date of the
31 offset.
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1 3. The May 5, 2011 order of the Department of Labor and Industries is
2 correct and is affirmed.

3 Dated: April 26, 2013.

4 BOARD OF INDUSTRIAL INSURANCE APPEALS

5
6 /s/
7 DAVID E. THREEDY Chairperson

8
9 /s/
10 FRANK E. FENNERTY, JR. Member

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12 /s/
13 JACK S. ENG Member
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