Foster, Nancy (I)

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Computation based on benefit levels in effect on:

The index date used to determine the amount of the social security disability benefit in calculating the reverse offset is the date of receipt of concurrent state and federal benefits. *Overruling In re Charles Hamby*, BIIA Dec., 59,175 (1982) and *In re Lee Darbous*, BIIA Dec., 58,900 (1982) **….*In re Nancy Foster* (I), BIIA Dec., 14 19952 (2015)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: NANCY A. FOSTER	**)**	**DOCKET NO. 14 19952**
	)	
CLAIM NO. N-318911	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Nancy A. Foster, by
Casey & Casey, P.S., per
Carol L. Casey and Gerald L. Casey

Employer, Scott Wetzel Services, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
John Barnes

The claimant, Nancy A. Foster, filed an appeal with the Board of Industrial Insurance Appeals on July 22, 2014, from an order of the Department of Labor and Industries dated June 25, 2014. In this order, the Department adjusted the compensation on Ms. Foster's claim to $1,244 a month, effective April 1, 2008, because of Ms. Foster's receipt of monthly social security benefits of $1,304. The Department order is **REVERSED AND REMANDED.**

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on March 3, 2015, in which the industrial appeals judge affirmed the Department order dated June 25, 2014. On May 14, 2015, the Department filed a response to the Petition for Review.

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 appeal is before the Board as a result of Ms. Foster receiving concurrent federal social security disability (SSD) benefits and state time-loss compensation (TLC) benefits. The combined federal and state disability benefits cannot exceed 80 percent of the workers average current earnings (ACE). This cap in benefits can, and in Ms. Fosters case does, result in less benefits than the sum of the SSD and the state TLC benefits. Because 80 percent of the ACE figure is less than the sum of federal and state benefits, either the federal benefit or the state benefit must be reduced to meet the 80 percent of the ACE cap in benefits. This reduction in either the federal or state benefit is referred to as the offset. The offset is created by 42 U.S.C. 424a and the offset is taken by

the Social Security Administration (SSA) unless there is a state law allowing the state to take the offset. In Washington state, RCW 51.32.220 allows the Department to take the offset. This is referred to as the reverse offset.

The issue before the Board is the benefit index date in this reverse offset case. The benefit index date is used to set the amount of SSD benefits that the Department uses to calculate the amount of the reduction in TLC benefits when the Department takes the reverse offset. Once set, any future increases in the amount of the SSD benefits due to COLAs after the benefit index date are not used in determining the reverse offset.

The Department used the date of notification from the SSA of Ms. Foster's receipt of concurrent benefits as the benefit index date and set the date at March 2008. The Department relied on prior Board decisions that have long held that the benefit index date is the date the Department receives notification that the worker is receiving concurrent federal and state benefits. Ms. Foster argues that the benefit index date should be set at the first date she received concurrent federal and state benefits, September 2006. If the SSD amounts were the same on March 2008 and September 2006, there would no dispute. But they are not.

The difference in the amount of SSD benefits between the two dates is the cost of living adjustments (COLAs) that Ms. Foster received on the SSD benefits for 2007 and 2008. If the September 2006 date is used, the 2007 and 2008 federal COLAs are not included in the offset computation. This means the Department's reduction in state time-loss compensation benefits will be less than it would be if the index date of March 2008 is used and the COLAs used in the calculation. If the COLAs are used in the offset, the Department receives the benefit of the federal COLA. If the COLAs are excluded from the offset calculation, Ms. Foster receives the federal COLAs in addition to the maximum allowed combined benefits. Because we find that the prior Board decisions establishing the basis for requiring the notification to the Department of the worker's receipt of concurrent benefits to set the benefit index date are based on application of now repealed federal law, we reverse our prior decisions and hold that the benefit index date, which determines the amount of the federal benefits to be used in the offset calculation, is the first date of the workers receipt of concurrent federal and state benefits.

The relevant facts are as follows.

- Ms. Foster began receiving SSD benefits in September 2006.
- SSA notified the Department in March 2008 that Ms. Foster was entitled to SSD benefits beginning September 2006.
- June 9, 2014, the Department paid Ms. Foster retroactive TLC for the period March 24, 2006, through March 31, 2008.
- June 25, 2014, the Department issued the order on appeal that adjusted Ms. Foster's TLC rate effective April 1, 2008, based on her SSD rate in effect on April 1, 2008.
- July 16, 2014, the Department paid Ms. Foster retroactive TLC for the period April 1, 2008, through March 6, 2014.

It appears that the Department issued the June 9, 2014 order paying retroactive TLC to cover the period of concurrent benefits without the offset. The Department issued the June 25, 2014 order setting the offset, and then issued the July 16, 2014 order paying TLC with the offset.

Board decisions on selecting the benefit index date began in 1982. There are two significant Board decisions issued in 1982 that addressed this issue for the first time. *In re Charles Hamby*, BIIA Dec., 59,175 (1982) and *In re Lee Darbous*, BIIA Dec., 58,900 (1982) were both issued by the Board on March 29, 1982. In these decisions the Board referred to its "understanding" of the federal statute and federal administrative regulations that applied when the SSA was taking the disability offset. The decisions note that the federal statute required notice to the SSA before the reduction could be taken. The Board also noted that it "understood" that the benefit levels in effect during the month the SSA was put on such notice of entitlement were relied on for calculating the amount of the offset.

Both *Hamby* and *Darbous* discuss why a rule requiring reference to the benefits during the month the Department or self-insured employer is put on notice of entitlement, or with due diligence should have been put on notice, has several advantages under Washington's statutory scheme. The Board stated that such a rule is simple to administratively determine and it encourages the Department or self-insurer to make early inquiry whether collateral federal benefits are being applied for and received. The Board added that by encouraging early inquiry of entitlement to benefits and pegging the offset to that level, the worker is entitled to keep future federal cost of living increases.

The Board was correct in *Hamby and Darbous* that under the version of 42 USC section 424a in effect for the time period relevant to those decisions, notice to the SSA of the receipt of concurrent benefits was required in the month prior to determining the federal offset. But this notice provision was repealed in 1981.

Former 42 U.S.C. 424a provided:

§424a. Reduction of disability benefits through receipt of workmen's compensation

(a) Conditions for reduction; computation

If **for any month** prior to the month in which an individual attains the age of 62-

(1) **such individual is entitled to benefits under section 423 of this title**, **and**

(2) **such individual is entitled for such month, under a workmen's compensation law or plan of the United States or State, to periodic benefits for a total or partial disability (whether or not permanent) and the Secretary has, in a prior month, received notice of such entitlement for each month,**

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income **shall be reduced** (but not below zero) by the amount by which the sum of –

(3) such total of benefits under sections 423 and 402 of this title for such month, and . . .

(Emphasis added).

The current version of 42 U.S.C. 424a does not require notice to the SSA of receipt of concurrent state and federal benefits when determining the offset and sets the benefit index date at the date of receipt of concurrent state and federal benefits.

Current 42 U.S.C. 424a provides:

(a) Conditions for reduction; computation

If **for any month** prior to the month in which an individual attains retirement age (as defined in section 416(l)(1) of this title) -

(1) **such individual is entitled to benefits under section 423 of this title**, **and**

(2) **such individual is entitled for such month to** -

(A) **periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State,** or

(B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of the United States, a State, a

> political subdivision (as that term is used in section 418(b)(2) of this title), or an instrumentality of two or more States (as that term is used in section 418(g) of this title), other than (i) benefits payable under title 38, (ii) benefits payable under a program of assistance which is based on need, (iii) benefits based on service all or substantially all of which was included under an agreement entered into by a State and the Commissioner of Social Security under section 418 of this title, and (iv) benefits under a law or plan of the United States based on service all or substantially all of which is employment as defined in section 410 of this title,
>
> **the total of his benefits under section 423 of this title <u>for such month</u> and of any benefits under section 402 of this title <u>for such month</u>** based on his wages and self-employment income **<u>shall be reduced</u>** (but not below zero) by the amount by which the sum of-

(Emphasis added).

Simply stated, now when SSA computes the offset it looks to the first date of receipt of concurrent benefits and uses the amount of SSD benefits in effect on that date.

Hamby and *Darbous* are based on a federal notice provision that no longer exists. And there is nothing in the provisions of RCW 51.32.220 that directly addresses a notice provision to determine the benefit index date.

RCW 51.32.220 (1) provides in part that:

> For persons receiving compensation for temporary or permanent total disability pursuant to the provisions of this chapter, such compensation shall be reduced by an amount equal to the benefits payable under the federal old-age, survivors, and disability insurance act as now or hereafter amended not to exceed the amount of the reduction established pursuant to 42 U.S.C sect 424a.

It is apparent from reading *Hamby* and *Darbous* that the Board could not find such a requirement in RCW 51.32.220 and instead created the notice requirement by reference to the federal statute. Because the federal statute has changed and the notice requirement is gone in the federal computation, there is now a difference in the amount the worker receives depending on whether the Department or the SSA takes the offset.

There is a continuous thread in the discussions in *Hamby*, *Darbous,* and subsequent Board decisions regarding the need to keep the offset the same in a federal offset and in Washington's reverse offset so that the worker is treated the same. The Board cases did that until the federal notice provision was removed from 42 USC 424a. Now there is a difference in the offset depending on whether the SSA takes the offset or the Department takes the reverse offset. In the present appeal, if the first date of concurrent benefits is used as the benefit index date (September 2006), then the 2007 and 2008 COLAs are not used in the offset. This means the COLAs are given to the

worker above the 80 percent ACE figure. If the March 2008 notice to the Department date is used as the benefit index date, then the COLAs are part of the SSD benefits used in the state's reverse offset calculation, and the COLAs will reduce the amount the Department pays. Here the worker only gets the 80 percent ACE figure, and the Department receives the benefit of the COLAs.

By using the date notice is given to the Department as the benefit index date to determine the amount of the SSD benefits in the present appeal, the Department violates RCW 51.32.220(1) because the Department's reduction exceeds the amount of the reduction allowed under 42 U.S.C. 424a. RCW 51.32.220(1) requires that the amount of the SSD benefits used to calculate the offset must be the same under the federal offset or the state reverse offset. This provision mandates the same benefit index date for both the federal offset computation and the state reverse offset computation.

Hamby and *Darbous* established a rule for the index date in a reverse offset calculation that was designed to comply with the provisions of RCW 51.32.220(1) that require that the reduction not exceed the reduction allowed under 42 U.S.C. 424a. The rule ceased to meet the requirements of RCW 51.32.220 (1) after the 1981 amendments to 42 U.S.C. 424a removed the requirement that notice of the receipt of concurrent benefits was required before the offset could be taken by the SSA. Our decision today realigns the calculation of the reverse offset by the Department to reflect the SSA calculation of the offset under 42 U.S.C. 424a.

Hamby, *Darbous,* and the subsequent decisions of the Board that rely on the notice to the Department to determine the benefit index date for determining the amount of SSD benefits to be used in the reverse offset calculation made by L&I are overruled. Our decision makes the determination easy to apply, is consistent with the federal offset under 42 U.S.C. 424a, and complies with the requirements of RCW 51.32.220.

We note that although this case was tried and the Department defended its decision to use the date of notice of March 2009 as the index date, the Department filed a Post-Hearing Brief and a Response to the Claimant's Petition for Review arguing for the September 2006 date of receipt of concurrent benefits as the correct index date.

FINDINGS OF FACT

1. On August 25, 2014, and on October 2, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History, as amended, in the Board record solely for jurisdictional purposes.

2. Nancy Foster sustained an industrial injury on June 23, 1992, when she injured her back.

3. On March 14, 2008, the Social Security Administration notified the Department that Ms. Foster was entitled to SSD benefits as of September 2006.

4. September 2006 was the first month Ms. Foster was entitled to concurrent state time-loss compensation benefits and federal social security disability benefits.

CONCLUSIONS OF LAW

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

2. Ms. Foster's social security benefit level in effect in September 2006 is the amount of social security benefits to be used in calculating the amount of the offset as provided by RCW 51.32.220 and 42 U.S.C. 424a.

3. The Department order dated June 25, 2014, is incorrect and is reversed. This matter is remanded to the Department to calculate Ms. Foster's time-loss compensation benefits based on an offset that is based on her social security benefit level in effect September 2006.

Dated: July 23, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

/s/_____
JACK S. ENG Member