McKenna, Laverne

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

"Average monthly wage"

The "average monthly wage", as used for purposes of computing the social security offset, is determined according to the definition contained in the federal statute. ….***In re Laverne McKenna,*** **BIIA Dec., 49,873 (1978)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LaVERNE D. McKENNA	**)**	**DOCKET NO. 49,873**
	)	
CLAIM NO. S-140794	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, LaVerne D. McKenna, by
John Calbom

Self-insured employer, Chicago Bridge and Iron Company, by
Witherspoon, Kelly, Davenport and Toole, per
Ned Barnes

Department of Labor and Industries, by
The Attorney General, per
Thomas O'Malley, Assistant

This is an appeal filed by the claimant on April 8, 1977, from an order of the Department of Labor and Industries dated March 22, 1977, which closed this claim against the self-insured employer, Chicago Bridge and Iron Company, with a permanent partial disability award equal to 20% as compared to total bodily impairment, and with time-loss compensation as previously paid to March 22, 1977. **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 timely Petitions for Review filed by the claimant, the employer and the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on March 24, 1978, in which the order of the Department dated March 22, 1977 was reversed, and remanded with direction to classify the claimant as permanently and totally disabled and place him on the pension rolls as of March 22, 1977, and also to make a redetermination regarding claimant's temporary total disability compensation prior to March 22, 1977, and the amount by which such compensation should have been reduced by reason of the social security offset law.

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

The general nature and background of this appeal are as set forth in the hearing examiner's Proposed Decision and Order and shall not be reiterated herein.

As to the first issue of whether claimant was permanently totally disabled at the time of closure of this claim, we believe the hearing examiner has very adequately and fairly summarized the evidence on both sides relevant to the claimant's injury of May 9, 1974, and its disabling residuals as they affect the claimant--given his age of 56 and his limited education (6th grade), experience and training. In this regard, we have no further definitive comment to add to the hearing examiner's evaluation. It is sufficient to say that we find that the hearing examiner's determination of permanent and total disability accords with the weight of the evidence, both lay and expert, and we hereby uphold that determination.

The second issue is whether the claimant's time-loss compensation from September 8, 1975 to March 22, 1977 was correctly calculated in light of the social security offset law. The claimant makes a two- fold challenge to the offset utilized by the self-insured employer against his monthly time-loss compensation. The problem arises by virtue of the fact that the claimant is under 62 years of age and was drawing, simultaneously, both time-loss compensation and social security disability benefits. In essence, under these circumstances the law prescribes that the combined total of the state and federal benefits (i.e., the total of time-loss compensation and social security disability benefits) may not exceed 80 percent of the worker's "average current earnings." This is mandated by federal law, to wit: 42 U.S.C. 424a. Insofar as the combined total of such benefits exceeds said 80 percent figure, the excess is to be taken as a reduction from the workers' social security disability benefits--i.e., his social security disability entitlement will be "offset" by the amount of such excess thereby affecting a "cost saving" in this amount to the federal social security system.

Subsection (d) of 42 U.S.C. 424a, however, permits the individual states to take advantage of this offset (instead of the federal government), upon the passage of enabling state legislation. Specifically that subsection of the federal code provides:

> "The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is paid provides for the reduction thereof <u>when anyone is entitled to benefits</u> under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under Section 423 of this title."

The requisite enabling legislation (RCW 51.32.220) was enacted by our Washington state lawmakers in 1975, and became effective as of September 8, of that year. Thus, from that date

forward, the "offset" in "combined receipt" cases, as mandated by 42 U.S.C. 424a, is to be taken by the state against the workers' compensation benefits (time-loss compensation or permanent total disability payments) instead of by the federal government against the social security disability benefits. Accordingly, the worker is now to receive the full benefit entitlement in social security benefits, but the workers' compensation benefits are reduced by whatever amount the combined total of workers' compensation benefits and social security disability benefits exceed 80 percent of his average current earnings. In short, the intent of the federal law and the implementation thereof by the state legislation is simply to reverse the taking of the offset so that the cost-saving benefit thereof now inures to the state workers' compensation program rather than to the federal social security program. As for the disabled worker, the intent is that he and his family receive the same amount in combined benefits as would be the case without the "offset reversal."

In the instant case, the claimant has no quarrel with the offset procedure as such. Rather, it is his position that the offset is not applicable in his case inasmuch as the combined total of his time-loss compensation entitlement and his social security disability entitlement does not reach 80 percent of his income. Under the figures supplied by the claimant, he was earning, at the time of his May 9, 1974 industrial injury herein, $1795.20 per month. It is not controverted that the claimant's time-loss entitlement was therefore at the maximum--i.e., 75 percent of the state's average monthly wage at the time of his injury, to wit: 75 percent of $747, or $560 per month. His social security disability entitlement (and the amount he actually received) totaled $577.90 per month, consisting of $320.20 for the claimant and $85.90 each for his wife and two children. Thus, the combined entitlement in both time-loss compensation and social security disability benefits totaled $1137.90 per month ($560.00 plus $577.90), a total which, as the claimant points out, is substantially less than 80 percent of $1795.20, the amount of his monthly wages at the time of injury. Thus, he argues, the "80 percent limitation" was not breached in his case, and he was entitled to receive time-loss compensation at the full rate of $560 per month, without any reduction or offset therefrom.

This brings us to the heart of the claimant's theory. If his wage figure of $1795.20 is indeed the correct basis upon which the 80 percent "combined receipt" limitation is to be calculated, then his contention that no offset is applicable against his time-loss compensation is also correct. The claimant cites as authority in this regard RCW 51.08.178, which in effect establishes or bases a worker's rate of time-loss compensation, percentagewise, on the "wages" he was earning "at the

time of injury," subject, of course, to the maximum of 75 percent of the average monthly wage of the state as prescribed by RCW 51.32.090(7).

The wage base upon which our state predicates a worker's rate of time-loss compensation and the wage base upon which the federal government adjudicates the amount of social security disability benefits, must be recognized as two independent, and not sister, concepts. There is no provision in the law of the State of Washington which limits the worker's "combined receipt" benefits to 80 percent of his "wages" or "earnings." The 80 percent limitation rule is wholly and exclusively a creature of federal law. This being the case, it is the federal law which structures the wage base upon which its 80 percent limitation is to be calculated. The form chosen by the federal lawmakers is an alternative one, and is set forth in 42 U.S.C. 424a as follows:

> "For purposes of clause (5) an individual's average current earnings means the largest of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, (B) one-sixtieth of the total of his wages and his self-employment income (computed without regard to the limitations specified in sections 409(a) and 411(b) (1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest, or (C) one-twelfth of the total of his wages and self-employment income computed without regard to the limitations specified in sections 409(a) and 411(b) (1) of this title) for the calendar year in which he had the highest such wages and income during the period consisting of the calendar year in which he became disabled (as defined in Section 423(d) of this title) and the five years preceding that year."

Generally speaking, what this federal formula does is to extract an average monthly earnings figure from the worker's highest annual earnings within a five-year period. In other words, whereas the Washington statute (RCW 51.08.178), for purposes of establishing the rate of time-loss compensation, uses the worker's monthly wages "at the time of injury" as a wage basis, the federal government, for purposes of calculating its 80 percent "combined receipt" limitation, uses as a wage basis the worker's best average monthly earnings over a period of time. Under the federal government formula, the claimant's wage basis in this case was established at $1372 per month--a figure that is not in dispute (so long as it is assumed, arguendo, that the federal formula is applicable to the instant case).

As previously noted, in 1975 our state enacted RCW 51.32.220, enabling our workers compensation program to take the "offset" cost savings in "combined receipt" cases previously being taken by the federal government. At the present time, all recipients of either time-loss

compensation or permanent total disability pension payments under this state's workers' compensation program who are simultaneously receiving social security disability benefits are under the edicts of this statute. Specifically, it provides:

> "For persons under the age of 62 receiving compensation for temporary or permanent total disability pursuant to the provisions of chapter 51.32 RCW, 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. 424a. However, such a reduction shall not apply when the combined compensation provided pursuant to chapter 51.32 RCW and the Federal Old-age Survivors and Disability Insurance Act is less than the total benefits to which the Federal reduction would apply, pursuant to 42 U.S.C. 424a." (Emphasis supplied.)

As can be seen, our statute, in adopting the language "not to exceed the amount of the reduction established pursuant to 42 U.S.C. 424a," has, in effect, incorporated by reference the wage basis utilized by the federal government.

In sum, it is clear that the "average current earnings" provisions of 42 U.S.C. 424a, not the definition of "wages" in our state worker's compensation law, governs the calculation of the claimant's wage basis for purposes of then determining the amount of proper offset, if any, against his time-loss compensation benefits.

Secondly, and lastly, the claimant challenges the offset against time-loss compensation on the ground that the computation was based upon his total family allotment under social security of $577.90, whereas it should have been based only upon that portion thereof attributable to his individual entitlement--i.e., upon $320.20. Using this latter figure as the "federal portion" of the claimant's "combined benefits" would, of course, bring him well within the 80 percent limitation rule (even assuming the proper wage basis of$1372 per month), thereby entitling him to receive time-loss compensation at the full rate of $560 per month. As authority in support of the general concept of this proposition, the claimant cites this Board's decisions in In re Sam Agostinelli, Dec'd., Claim No. V-750217, Docket No. CV-18 (November 10, 1976), and In re John B. Welch, Dec'd., Claim No. V-760783, Docket No. CV-126 (November 21, 1977).

Insofar as material to this contention, the Board's holding in the above two decisions was to the effect that social security benefits payable on account of one family member (beneficiary) could not be considered as a collateral resource to be offset against benefits payable under our Crime

Victims Compensation Act to another family member (beneficiary). Our holding to this effect was based directly upon what we deemed to be the intent of our legislature, as we gleaned it to be from interpretation of the express provisions of our Crime Victims Compensation Act itself, as well as from the manifest public and social purpose underlying the enactment of this remedial legislation. By contrast, to apply the general concept of our holding in those two cases to the case at hand, and thereby exclude the social security disability benefits attributable to the claimant's wife and two children from the offset computation, would, ironically, contravene the Congressional purpose of the "offset" legislation, which is "to preclude a claimant from receiving excessive combined benefits for the same disability." See Iglinsky v. Finch, 314 F. Supp. 425 (1970). Furthermore, it would contravene the plain mandate of the law itself, inasmuch as 42 U.S.C. 424a specifically provides that, in addition to the individual's disability insurance benefit, the wife's and children's benefits based on his disability status and earnings record (pursuant to Section402 of 42 U.S.C.) are also to be included in the offset calculation. In other words, it is the total family benefit under the social security law which must be included in the calculation. This is clear not only from the above-cited statutory provisions, but also from the federal regulations promulgated to implement them. See 20 CFR 404.408 of the Code of Federal Regulations.

It would appear (although we do not decide, in light of the facts and the contentions raised in this case) that claimant's argument (about considering only his benefit entitlement in the offset calculation) would have considerable persuasion if applied to the "state portion" rather than the "federal portion" of the "combined benefits" --provided, that the facts were such that he had been living separate and apart from his family. It has been judicially recognized by our Court that the portion of the monthly workers' compensation payment attributable to the child or children is to be regarded as a separate benefit from the portion of the monthly payment attributable as the parent's compensation, based on the statute (RCW 51.32.010) requiring payment of the child's portion to the legal custodian of the child where that person is other than the principal parent-recipient. See Gassaway v. Department of Labor and Industries, 18 Wn. App. 747 (1977), and cases cited therein. It is to be noted that, under this type of circumstance, in the federal government's administration and calculation of the offset as against social security disability benefits, the question of whether the portion of the workers' compensation benefit allocable to the worker's wife or children is or is not included in the offset calculation depends on to whom such payments are made:

> "Some states pay additional amounts (in workmen's compensation benefits) for the worker's dependents. If these payments are made directly to the dependents, rather than the...[worker], they will be excluded in computing offset. If they are paid to the...[worker], they are included for offset purposes." (Emphasis supplied.)

Section 6035(a) of Social Security Claims Manual (exhibit 3 herein). See also, 20 CFR 404.408(h) of the Code of Federal Regulations. In this case, there is no question but what the claimant was living with his wife and two children and thus the entire amount of time-loss compensation was payable to him, and no portion was payable to his dependents or anyone else on their behalf. See RCW 51.32.060, 51.32.090, and 51.32.010. Thus, under the federal law as applied to the facts here, the full amount of the monthly time-loss compensation would be included in the calculation of the offset.

Therefore, it is clear that the Social Security Administration would adjudicate the offset calculation in this case, based on claimant's "total family entitlement" under both the social security disability law and our workers' compensation law. To give effect to his argument that only "his" portion of the social security family benefits should be counted in the offset computation--or to decide that only "his" portion of the total time-loss compensation should be so counted--would result in the claimant receiving more in "combined" disability benefits than he would have received if the "offset reversal" effected in 1975 by our legislature through the enactment of RCW 51.32.220 had not taken place. Quite certainly, such an anomalous result would not accord with either the intent of our lawmakers, in enacting RCW 51.32.220, or the intent of Congress, in the enactment of 42 U.S.C. 424a(d), permitting the individual states to take the "offset" which would otherwise be taken by the federal government.

All told, in specific answer to claimant's contention, we hold that the claimant's "total family entitlement" under social security of $577.90 is the correct amount to be considered in the calculation of the "offset" to be taken against his time-loss compensation under our Workers' Compensation Act.

As a final note, the parties have stipulated that, due to erroneous payroll or wage figures originally supplied by the federal government, the offset which was actually taken by the self-insured employer against the claimant's monthly time-loss compensation was excessive. Specifically, the claimant's rate of time-loss compensation at $560 per month had been reduced by $161.70 per month, whereas the correct figures show that it should have been reduced by only

$40.30 per month. In other words, the claimant was actually paid time-loss compensation at the rate of $398.30 per month, whereas he should have been paid at the rate of $519.70 per month.

FINDINGS OF FACT

Proposed Findings 1 through 4 of the Proposed Decision and Order dealing with the jurisdictional facts and the extent of claimant's permanent disability, are adopted by the Board and are incorporated herein by this reference. In addition, the Board makes Findings 5 and 6, as follows:

5. At all times material herein, the claimant resided with his wife and two children and had custody of his two children.

6. The offset or reduction taken against the claimant's monthly time-loss compensation by the self-insured employer, for the period from September 8, 1975 to March 22, 1977, should have been $40.30 per month instead of the $161.70 per month actually taken, per the following:

Total social security disability benefits =		$577.90
Time-loss compensation	=	$ 560.00
		$1137.90
Maximum permissible combined benefits (80% of "average current earnings" of $1372)		= $1097.60
Excess over maximum, to deduct from time-loss		= $40.30

CONCLUSIONS OF LAW

Based upon the foregoing findings, the Board makes the following conclusions:

1. The Board has jurisdiction of the parties and the subject matter of this appeal.

2. On or about March 22, 1977, when the Department closed this claim the claimant, Laverne D. McKenna, was permanently and totally disabled within the meaning of the Workers' Compensation Act as a result of his industrial injury of May 9, 1974.

3. The "average current earnings" provisions of 42 U.S.C. 424a of the federal code govern the calculation of the claimant's wage basis, for purposes of determining the proper offset or reduction to be taken against his time-loss compensation benefits because of his simultaneous receipt of federal social security disability benefits.

4. The claimant's "total family entitlement" in social security disability benefits is the correct amount to be considered in the calculation of the proper offset or reduction to be taken against his time-loss compensation benefits.

5. The order of the Department of Labor and Industries dated March 22, 1977, closing this claim with an unspecified permanent partial disability award of 20% as compared to total bodily impairment, and with time-loss compensation as paid from July 16, 1974 through March 22, 1977, is incorrect and should be reversed, and this claim remanded to the Department with instructions to place the claimant on the pension rolls as a permanently and totally disabled worker, and with instructions to the self-insured employer to recompute the claimant's time-loss compensation for the period from September 8, 1975 to March 22, 1977, using the correct offset or reduction therefrom of $40.30 per month, and pay to the claimant the amount he was underpaid in time-loss compensation for said period.

It is so ORDERED.

Dated this 30th day of October, 1978.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
PHILLIP T. BORK Chairman

/s/
SAM KINVILLE Member

/s/
WILLIAM C. JACOBS Member