Hayes, Selma

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Computation based on benefit levels in effect on:

The date of constructive notification of concurrent benefits. **….*In re Verlin Jacobs*, BIIA Dec., 66,644 (1985); *In re Selma Hayes*, BIIA Dec., 66,196 (1985); *In re Charles Hamby*, BIIA Dec., 59,175 (1982)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In Re: SELMA HAYES	**DOCKET NO. 66,196**
CLAIM NO. G-601441	**DECISION AND ORDER**

APPEARANCES:

Claimant, Selma Hayes, by
William J. Van Natter

Employer, Kenney Presbyterian Home,
None

Department of Labor and Industries, by
The Attorney General, per
James S. Kallmer Assistant

This is an appeal filed by the claimant on November 4, 1983 from an order of the Department of Labor and Industries dated October 31, 1983 which adhered to the provisions of a prior order dated December 12, 1980 declaring the claimant's monthly pension rate to be $152.56 effective October 16, 1980 after application of the social security offset reduction provision of RCW 51.32.220. Further, the order determined that benefit overpayments had been made in the amount of $373.40 for the period of October 16, 1980 to December 15, 1980, which overpayment was to be repaid by reducing future payments by $38.14 per month. 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 a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on January 31, 1985 in which the order of the Department dated October 31, 1983 was affirmed.

8/14/85

The Proposed Decision and Order characterized the facts in this case as having been received by stipulation of the parties. The record of "facts" upon which our determination of the issues must turn was actually accomplished by both the claimant and the Department setting forth by statements of their respective counsel the salient facts necessary to present arguments supporting their theories of the case. All objections except as to relevance were waived. Rulings as to relevance are hereby affirmed, although we do not necessarily endorse the procedure by which the record facts were admitted as evidence.

The legal issue framed by the parties in their respective statements of fact and briefs can be fairly stated as follows:

> "What rate of social security disability benefits must be used as the base for determining the amount of the Department's offset in applying the reduction of benefits provisions contained in RCW 51.32.220?"

The claimant contends that the social security benefit levels in effect on December 24, 1975 must be used in computing the amount of offset. The Department contends the benefit levels in effect in October, 1980 must be used.

Ms. Selma Hayes was injured during the course of her employment in 1974. She began receiving social security disability insurance (SSDI) benefits in June, 1975. Ms. Hayes' workers' compensation claim was administratively closed in December, 1976 with a permanent partial disability award. She availed herself of the appeals process and was eventually adjudicated permanently totally disabled effective May 13, 1977. Her first award for that status was initiated by the

Department on October 24, 1979. In February, 1981, Ms. Hayes was awarded, again following pursuit of litigation, temporary total disability benefits for the period December 24, 1975 through may 12, 1977. Consequently, with the benefit of hindsight, the first date Ms. Hayes was concurrently entitled to both federal SSDI benefits and state workers' compensation payments was December 24, 1975. At that time, her SSDI monthly stipend was $121.70. The facts of this case do not show the Department acted in bad faith in delaying the eventual resolution of the disputed disability status by causing or encouraging bureaucratic foot-dragging in processing Ms. Hayes' claim. Still, it must be acknowledged as a legal truism that the Department was guilty of an erroneous adjudication in December, 1976 when it attempted to close the claim with a disability determination much less than that to which the claimant was ultimately found to be entitled.

On September 26, 1980, long after the claimant had been determined to be permanently totally disabled effective May, 1977, the Department claims it first received notification from the Social Security Administration that Ms. Hayes was and had been receiving SSDI benefits and that her then periodic benefit rate was $186.70. This "fact" of first notification from the Social Security Administration was "accepted" by claimant's counsel. However, in her Petition for Review, the claimant now seeks further opportunity to establish that the Department actually had information in its files as early as August, 1976 and documented again in February, 1977 and May, 1977 that the claimant was receiving social security disability benefits. The claimant was accorded full opportunity to present all relevant

evidence during the course of proceedings at hearing this appeal; there is no allegation that such evidence was unavailable at time of hearing, nor that the same was newly discovered since hearing. Consequently, we are not persuaded that such additional opportunity is justified in this case. Moreover, in view of our discussion to follow, we believe such additional evidence is unnecessary to the resolution of the issue presented.

To fully articulate our decision herein we are compelled to reexamine pertinent prior Board decisions to clarify our reasoning in this case. The issue of what base rate to use in computing the amount of offset under RCW 51.32.220 has been presented in several appeals brought to this Board in the past.

In re Charles Hamby, (Docket No. 59,175, March 29, 1982) presented a situation where, by order dated June 27, 1980, the claimant was placed on the pension rolls effective December 29, 1978. That date also happened to be the first date Mr. Hamby was concurrently entitled to state workers' compensation benefits and federal SSDI payments. Although the Department received official notice directly from the Social Security Administration concerning the claimant's entitlement to federal benefits in December, 1980, this Board's order required the Department to compute its offset by reference to SSDI benefit levels in effect on the first date of concurrent entitlement. Had the Department made inquiry of the Social Security Administration in December, 1978 the fact of concurrent entitlement would have been discovered. Although Hamby had received total temporary disability benefits even earlier, such were terminated on a date preceding his

receipt of federal benefits. Therefore, any earlier inquiry would have resulted in a negative report of concurrent entitlement.

In re Donald Clinton (Docket No. 61,711, April 15, 1983) presented the facts where a claimant injured in 1970 had later returned to the labor force. In 1975 his claim was reopened and he was placed on temporary total disability benefits effective September, 1975. On July 24, 1979 the Department entered an order placing the claimant on the pension rolls effective December 13, 1978. His actual first month of concurrent entitlement was May, 1976, several months after state temporary total disability benefits had been commenced. The Department received official notice from the Social Security Administration of such concurrent entitlement in August, 1980, but its own file record showed constructive knowledge of Mr. Clinton's receipt of SSDI benefits as early as April, 1978. This Board's order required the Department to compute its offset based on benefit levels in effect in April, 1978, when it was first put on notice by its own file documents of the existence of concurrent entitlement. Had the Department made inquiry whether the claimant was also receiving SSDI benefits, when it first had commenced temporary total disability in September, 1975, it would have received a negative report. Consequently, the Department was held to be put on notice of concurrent entitlement no earlier than its record showed such status to probably exist.

In re Verlin Jacobs (Docket No. 66,644, May 31, 1985) presented the history of the Department entering an order on June 7, 1983, placing the claimant on the pension rolls effective March 1, 1977.

That effective date was also the first date of concurrent entitlement of state and federal benefits. The six-year delay in pension implementation was due to the Department's earlier erroneous adjudication that the claimant was only permanently partially disabled. It was a result of litigation that such error was determined. It was not until November, 1983 that the Department received official notice of concurrent entitlement from the Social Security Administration. This Board's order required the Department to compute its offset based on benefit levels in effect in March, 1977. Had a correct adjudication been made of the claimant's disability status in March, 1977 and inquiry made of the claimant's receipt of SSDI benefits, the fact of concurrent entitlement would have been discovered and the Department's offset could have been commenced based, of course, on benefit levels then in effect.

These and other prior decisions concerning RCW 51.32.220 have caused this Board to evolve what is felt to be a straightforward approach to the resolution of legal disputes in its application. That approach, reduced to its barest terms, is simply: The worker ought to be placed in the same position when the Department of Labor and Industries takes the offset as was the case when the Social Security Administration was authorized to take the offset. We understand the federal statute and administrative regulations provide that when the Social Security Administration was taking the offset from workers in this state, that reduction of benefits by offset was only commenced in the month after the month the Social Security Administration was <u>put on notice</u> that the worker was entitled to state

workers' compensation benefits. We further understand that the benefit levels in effect during the month the Social Security Administration was put on notice of such entitlement were relied upon for computing the extent of offset.

A careful analysis of the Board's prior decisions shows a consistent application of these principles. The present appeal and those which have preceded it concerning the appropriate benefit reference levels have revealed to us a great confusion over the legislative intent of the language of Subsection 2, RCW 51.32.220. That section reads:

> "Any reduction under Subsection (1) of this section shall be effective the month following the month in which the Department or self-insurer is notified by the Federal Social Security Administration that the person is receiving disability benefits under the Federal Old Age, Survivors and Disability Insurance Act ..."

In choosing that language, we do not believe this State's legislature intended the statute to be applied so strictly that it would require the Department be notified directly "by" the federal agency before attempting to implement any offset. The notification from the federal agency may be a key for determining the first effective month for the Department to commence the offset, but we believe and have held in prior decisions that the date of such notification should not be the operative fact for determining the base benefit level for offset computation.

Our prior decisions show that the Department has been held to have been put on notice of concurrent entitlement for the purpose of determining what benefit levels to reference in its offset

computation, from the date that temporary total or permanent total workers' compensation benefits were commenced except where such date preceded the date that federal SSDI benefits were commenced. It was felt that the Department ought to be held to have been put on notice when concurrent entitlement in fact existed and inquiry at that time would have so revealed. However, when in fact concurrent entitlement did not exist at the time of commencement of periodic state benefits or a decision regarding federal entitlement was made retroactive subsequent to the date of commencement of state benefits, the Department ought not to be held to have been put on notice until such time as its own records revealed the probable existence of that fact.[1]

As we announced in re Jacobs, a rule requiring reference to benefit levels during the month the Department of Labor and Industries is put on notice of entitlement or with due diligence should have been put on notice, has several advantages under this state's statutory scheme. First, in most cases, it is simple to administratively

1. The Board's decision in re Lee V. Darbous (Docket No. 58,900, March 29, 1982) might appear to be in conflict with this principle. That case was, however, governed by facts quite disparate from those of the Board's decisions discussed above. In Darbous a concurrent entitlement decision was not made by the Social Security Administration until April, 1980, but benefits were paid retroactive to November, 1978. Thereafter, the claimant's level of cooperation with his self-insured employer can charitably be described as recalcitrant insofar as releasing information necessary to determine what level of offset, if any, was appropriate. Because the employer had to estimate this information, no adjustment for any portion of this "period of noncooperation" was appropriate. RCW 51.32.220 (1). To best effectuate that legislative intent, offset calculatons based on benefit levels subsequent to the earliest date of notification of concurrent entitlement was clearly appropriate.

determine. Second, it encourages the Department to make early inquiry whether collateral federal benefits were being applied for and received.

Logic alone urges recognition of the date of concurrent entitlement as the reference date of benefit levels for determining the amount of offset. Under the federal scheme, a totally disabled worker is entitled to benefits regardless of the cause of total disability. Only occasionally would the situation arise where a worker found permanently totally disabled under state workers' compensation law would not also be assured of the same status under a social security disability adjudication. It is to the direct financial benefit of insurers in those states like Washington where the offset is reversed, to make inquiry as soon as possible whether a worker receiving workers' compensation periodic benefits is also receiving SSDI payments. Patently, the date on which a worker is effectively declared permanently totally disabled under state law ought to trigger the astute claims manager to make such inquiry--the earlier information of concurrent benefits is received, the earlier the workers' compensation insurer may reduce its benefit payments, thereby saving substantial financial resources. During the waiting period, the worker still receives all benefits to which he is rightfully entitled, even if he is receiving both federal and state benefits.

In reaching our present result, we are mindful of two significant intents present in the federal and state legislation. First, there is the Congressional intent that the benefit structure should not be

designed to discourage workers from returning to gainful work as early as they reasonably can. Second, there is the clear intent in this state's law, which must be considered in conjunction with the Congressional intent, not to penalize this state's injured workers because of bureaucratic delay or erroneous original adjudications.

In this case, proper calculation of the offset permitted under RCW 51.32.220 should be made by reference to the benefit levels in effect as of December 24, 1975, the date that temporary total disability compensation was made effective. The fact that this date had to be established as a result of subsequent litigation should not change this result. Permitting the Department to compute the offset based on benefit levels in effect on a later date would unfairly penalize workers who obtained proper state benefits only after availing themselves to the appeals process. What is accomplished by reference to benefit levels on this date is the fair and accurate adjudication of claims early in the claims history, and the encouragement of astute claims management to take the earliest possible advantage of statutory provisions permitting reduction of benefits by offset. The Department correctly applied RCW 51.32.220 in beginning the offset as of October 16, 1980, the month after the date upon which it was advised and received notice of concurrent entitlement. However, the rate of social security benefits to be used in the calculation was incorrectly determined and this matter will be reversed to correct that error.

FINDINGS OF FACT

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto and a careful review of the entire

record before us, we hereby incorporate Proposed Findings of Fact Nos. 1, 2, 3 and 4. In addition we find as follows:

5. Claimant's monthly social security entitlement on December 24, 1975 equaling $121.70 is the rate to be applied in the calculation of the social security offset administered by the State Department of Labor and Industries.

6. On September 26, 1980, the Department of Labor and Industries received written communication from the Federal Social Security Administration that claimant had been receiving disability benefits under the Federal Old Age Survivors and Disability Act as early as December 24, 1975. The effective date to apply the reduction of $121.70 was the month following that date of communication.

CONCLUSIONS OF LAW

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

2. The reduction of benefits pursuant to RCW 51.32.220 should be computed by reference to claimant's worker's compensation and social security disability benefit levels in effect as of December 24, 1975. October 16, 1980, the month following the date the Department was notified, is the effective date to apply the reduction.

3. The Department order dated October 31, 1983 adhering to its December 12, 1980 order which reduced claimant's monthly pension rate per RCW 51.52.220 effective October 16, 1980, and detrmined that an overpayment existed of $373.40 for the period of October 16, 1980 through December 15, 1980 to be reduced from future awards in the amount of $38.14 per month, is incorrect, should be reversed, and the claim should be remanded to the Department to recompute the claimant's benefit levels consistent with the Findings and Conclusions herein.

It is so ORDERED.

Dated this 14th day of August, 1985.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

/s/_____
PHILLIP T. BORK Member