Conrad, James

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Limitation on recovery of overpayment (RCW 51.32.220)

The six month limitation on the recovery of overpayments under RCW 51.32.220 is not applicable when the delay in benefits is caused by litigation.In re James Conrad, BIIA Dec., 68,967 (1985); In re Estevan Sambrano, BIIA Dec., 63,484 (1984) [dissent] [Editor's Note: The Board's decision was appealed to superior court under Yakima County Cause No. 84-2-00851-1.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: JAMES D. CONRAD)) DOCKET NO. 68,967	
)		
CL AIM NO. G-400243	1	DECISION AND ORDER	

APPEARANCES:

Claimant, James D. Conrad, by Gerald L. Casey

Employer, G. S. Investment Company, Inc.,

None

Department of Labor and Industries, by The Attorney General, per Gayle Barry and Francois L. Fischer, Assistants

This is an appeal filed by the claimant on October 15, 1984 from an order of the Department of Labor and Industries dated August 19, 1984 which adhered to an order dated March 15, 1984 which reduced Mr. Conrad's time-loss compensation rate due to an offset for his receipt of social security disability benefits. **AFFIRMED**.

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 Department of Labor and Industries to a Proposed Decision and Order issued on June 24, 1985 in which the order of the Department dated August 19, 1984 was reversed and the claim remanded to the Department with direction to limit the retroactive application of the social security offset to the six-month period immediately preceding March 15, 1984 and thereafter to take such action as is indicated or required by the law and the facts.

The issues raised by this appeal and the evidence presented by stipulation are adequately set forth in the Proposed Decision and Order. The sole remaining issue in dispute concerns whether the Department properly reduced Mr. Conrad's rate of temporary total disability benefits effective August 1, 1982 by virtue of the application of RCW 51.32.220, commonly termed the social security offset reversal statute.

This same issue was most recently presented to the Board in the case of Estevan Sambrano (Docket No. 63,484, 5-31-84). The Department's Petition for Review urges the facts presented by the instant case closely resemble those in Sambrano. It asserts that the Proposed Decision and

Order misinterpreted the Board's holding in that case and that a correct application of the Board's decision would support the Department's action in its order of August 19, 1984.

The Department urges the Board to recognize that its action in reducing temporary total disability benefits effective August 1, 1982 was consistent with the intent of the offset statute. On July 20, 1982 the Department first learned that Mr. Conrad was receiving social security disability benefits. Had Mr. Conrad's claim been open at that time, the Department without question, could have commenced reduction by offset of payment of time-loss benefits in August, 1982. RCW 51.32.220(2). When Mr. Conrad's claim was reopened in February, 1984, effective April 13, 1982, it then paid temporary total disability benefits which had accrued during the interim, to which he was entitled. However, because medical information up to February, 1984 indicated that Mr. Conrad's accepted injury condition had not worsened, it would have been incorrect as a matter of law for the Department to have reopened the claim any earlier.

Here, as in Sambrano, there existed a bona fide dispute over the issue of medical facts and their significance. Also here, as in Sambrano, that dispute was appealed to the Board of Industrial Insurance Appeals. It was not until February 14, 1984 following resolution of the claimant's appeal that the Department received an uncontested report from a Dr. Burrell, concluding there was objective medical evidence of a worsening of Mr. Conrad's condition related to his injury. Then, and only then, was the Department able to acquit its administrative responsibility adjudicating the question of aggravation and ordering the claim to be reopened. Since benefits could not legally have been paid until the dispute over aggravation was resolved, no "overpayment" of benefits occurred. There being no overpayment, the Department asserts that the limitations contained in the provisos of RCW 51.32.220(2) should not apply. Since the payments made in 1984 were made retroactive to bring Mr. Conrad current in benefits received for his temporary total disability status, the Department effectively argues that it cannot be required to "make" overpayments and then be prohibited by the six-month limitation of the statute from recovery of them.¹

¹ This was the precise result attained in re Kenneth R. Beitler (Docket No. 58,976, 3-31-82) but the circumstances of the administrative handling of that claim were far different than the facts attendant here or in Sambrano. There was no evidence of the delay in adjudication being due to a bona fide dispute of facts in Beitler. Rather, the delay was occasioned by the Department's own failure to secure information necessary to calculate the level of benefits and offset due primarily to the machinations of a hamstrung bureaucracy. The Board determined in Beitler that such was beyond the intent envisioned by the Legislature in limiting the Department to recoupment only from "overpayments". The Board's decision prevented the Department from profiting from unreasonable bureaucratic delay.

We believe the distinction which the Department draws is an accurate one and is in compliance with legislative intent. It is established within the statutory framework of RCW 51.32.220 and 51.32.230 that it is the policy of this state not to create undue hardship upon the recipients of benefits from mistakes of the administrative agency charged with the delivery of benefits. The statutory scheme provides that where payments to injured workers have been made in excess of their legal entitlement, the agency's ability to recoup from the recipient is made subject to considerable restriction. We believe this policy was framed because money, once received, is generally used and is no longer available to be paid back. On the other hand, the right to receive benefits retroactively by virtue of a bona fide dispute over entitlement to benefits, which is resolved in a reasonably timely fashion, does not present the same set of circumstances which the legislature addressed in placing limitations on the recovery of overpayments. Benefits which have not yet been paid cannot be spent. Having not been spent, the hardship which exists for those workers who have received benefits, relied on their right to use them, and in fact have used them, does not exist for persons whose right to receive is later determined through reasonable claims management and exercise of the legal appeals process.

Had the Department received requisite medical information substantiating aggravation of Mr. Conrad's condition in April, 1982 when he applied for a reopening of his claim, we have no doubt the Department would have timely adjudicated the matter. We expect the claim would have been reopened and Mr. Conrad would have begun receiving his periodic time-loss stipend thereafter. The Department would then have been able to commence reduction of that stipend effective August, 1982, in the manner contemplated under the statute. Our result here permits the essence of those circumstances to prevail. To hold otherwise might encourage workers with contested claims to discourage timely administrative adjudication of their entitlement to periodic benefits. For if the Department were held accountable for all delay, even when occasioned by administrative appeal, in payment of benefits, those monies could then be effectively sheltered from the offset provisions. We believe that would be contrary to the law and policy of this state as expressed in our Act.

In adjudicating the application of the social security offset statute, this Board has consistently held to the philosophy that a worker must be placed in the same position financially with the state taking the offset, as he or she would have been had the federal government been reducing social security disability benefits by taking the offset itself, as provided in 42. U.S.C. 424(a). We have

further indicated that the burden caused by undue bureaucratic delay on the part of the agency required to administer the offset reversal statute should not be borne by the injured worker. We do not see our decision in this case in any way contrary to those interpretations of our law. To uphold the Department's action in this case places the claimant in the precise position he would have been had his reopening application been adjudicated in his favor in April, 1982. We do not see the circumstances which prevail herein to constitute undue or unreasonable bureaucratic delay by the Department of Labor and Industries in failing to make that adjudication in Mr. Conrad's claim prior to February, 1984.

After consideration of the Proposed Decision and Order, the Petition for Review filed thereto, and a careful review of the entire record before us, including memoranda previously submitted by the parties, we are persuaded that the Proposed Decision erred in limiting the Department's retroactive application of the offset to six months prior to the date of notification of taking the offset. The proposed Findings, Conclusions and Order are hereby set aside and the Board enters the following:

FINDINGS OF FACT

- 1. On February 14, 1973 the Department of Labor and Industries received an application for benefits from the claimant, James D. Conrad, alleging the occurrence of an industrial injury on January 12, 1973, during the course of his employment with Carpet Exchange. On July 11, 1973 an order was issued allowing the claim, claim No. G-400243. September 4, 1973 the Department issued an order closing the claim with no award for permanent partial disability. Following a timely protest of that determination and action by the Department to set aside its prior order, the claim was eventually closed August 13, 1974 with no additional permanent partial disability beyond that awarded in Claim No. An appeal which followed that determination eventually F-914711. resulted in the claim being reopened for additional treatment. August 23, 18 1976 the Department issued an order implementing a Superior Court order holding the claim open for medical care, and also segregating any psychiatric condition as being causally unrelated to the industrial injury of January 12, 1973. The claim was eventually closed on May 4, 1979, awarding a permanent partial disability equal to 18% as compared to total bodily impairment, and denying responsibility for the claimant's psychiatric condition. Following an appeal to the Board of Industrial Insurance Appeals, that order was effectively upheld.
- 2. On April 16, 1982 the claimant filed an application to reopen his claim for aggravation of condition. On September 20, 1982 the Department issued an order denying that application. Following a timely protest of that determination, the Department issued an order on October 15,

1982, adhering to the provisions of its order of September 20. Thereafter, followed appeals to the Board of Industrial Insurance Appeals which eventually resulted in a determination remanding the claim to the Department for further consideration. On February 21, 1984 the Department issued an order reopening the claim effective April 13, 1982, for authorized treatment and action as indicated. On March 15, 1984, the Department issued an order reducing the claimant's time-loss compensation rate to the amount of \$98.12, effective August 1, 1982 and \$120.77 effective July 1, 1983 by applying the offset provisions of RCW 51.32.220. Following timely protest of the Department's action, the Department issued an order on August 19, 1984 adhering to its order of March 15, 1984. On October 15, 1984 the claimant filed a notice of appeal with the Board. On October 22, 1984, the Board issued an order granting the appeal, assigning it Docket No. 68,967 and directed that proceedings be held on the issues raised by the appeal.

- 3. On July 20, 1982 the Department of Labor and Industries first received notice that the claimant, James D. Conrad, was receiving social security disability benefits from the federal Social Security Administration. By its order of March 15, 1984, the Department notified the claimant of its intention to implement reduction of the benefits by applying offset provisions contained in RCW 51.32.220.
- 4. Between April 16, 1982 and February 21, 1984 the claimant had not been paid benefits as a temporarily totally disabled worker contemporaneously with his receipt of social security disability benefits under that federal program. Having been paid no such benefits on a contemporaneous basis, no overpayment of benefits had been made by the Department.
- 5. The passage of time between the claimant's final adjudication entitling him to have his claim reopened for aggravation of condition and establishing him as a temporarily totally disabled worker and the effective date of that status was not due to improper administration and management of Mr. Conrad's claim, but was due to a bona fide dispute concerning the question of aggravation of his condition and the time necessary to properly resolve that issue.

CONCLUSIONS OF LAW

- 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and subject matter to this appeal.
- 2. The provisions of RCW 51.32.220(2) and RCW 51.32.230 limiting recovery of overpayment of benefits for a period not to exceed six months immediately preceding the date of notification that overpayment has occurred are not applicable to the circumstances of the claimant in view of the facts herein.

3. The order of the Department of Labor and Industries dated August 19, 1984, adhering to the provisions of a prior order implementing reduction by offset of periodic temporary total disability benefits, is correct, and should be affirmed.

It is so ORDERED.

Dated this 16th day of December, 1985.

/s/	
GARY B. WIGGS,	Chairperson
<u>/s/</u>	
PHILLIP T. BORK	Member

BOARD OF INDUSTRIAL INSURANCE APPEALS