

Gelslechter, Bruce

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Computation after reentitlement to benefits

The Department is not bound by the original offset computation where Department previously took reverse offset, ceased taking the offset when social security benefits were terminated, and resumed taking the offset after the Social Security Administration resumed benefits.*In re Bruce Gelslechter, BIIA Dec., 87 2600 (1989)* [Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No. 89-2-01103.]

State offset computed in same manner as federal offset

The worker was receiving both social security disability benefits and state time-loss compensation. From December 1979 to February 1, 1981 the Department took the reverse offset. From February 1981 through October 1984 the Social Security Administration took the offset. After the worker became re-entitled to social security benefits, the Social Security Administration again took the offset from December 1984 up to April 1987. When the Department took over the offset in April 1987, it used the same computation that the Social Security Administration had used. Since the worker should receive the same amount of combined benefits, regardless of which jurisdiction takes the offset, the Department's computation of the offset was correct.*In re Bruce Gelslechter, BIIA Dec., 87 2600 (1989)* [Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No. 89-2-01103.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: BRUCE D. GELSLEICHTER) DOCKET NO. 87 2600
2)
3 CLAIM NO. H-374271) DECISION AND ORDER
4

5 APPEARANCES:
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7 Claimant, Bruce D. Gelslechter, by
8 Gerald L. Casey
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10 Employer, Romaine Electric, Inc., by
11 Penser International Ltd., per
12 Glenda Ross
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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Stephen A. Eggerman, Assistant
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18 This is an appeal filed by the claimant on August 14, 1987 from an order of the Department of
19 Labor and Industries dated June 24, 1987 which adhered to a prior order of April 17, 1987 reducing
20 time-loss compensation benefits to \$0.00 effective April 1, 1987 due to the claimant's receipt of social
21 security benefits and determining an overpayment of \$830.77 due and refundable to the Department
22 for benefits paid for the period of April 1, 1987 to April 30, 1987. **AFFIRMED.**
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25 **DECISION**
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27 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
28 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
29 Proposed Decision and Order issued on May 25, 1988 in which the order of the Department dated
30 June 24, 1987 was reversed and the matter remanded to the Department to recalculate the offset by
31 using the total benefits in effect in August 1978 and to recalculate the overpayment, if any exists.
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34 This appeal presents the question of which dates should determine the level of state and
35 federal benefits for purposes of calculating the reverse offset allowed pursuant to RCW 51.32.220. Mr.
36 Gelslechter contends that December 14, 1979, when the Department first took an offset, is the
37 determinative date for both state and federal benefits. He argues that the Department may not
38 recompute the offset based on levels in effect when social security benefits are resumed after a
39 "break" in receipt of concurrent benefits. Technically, the "break" consisted of one day, November 1,
40 1984.
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45 For an understanding of the issue, a brief overview is needed of the history of Mr. Gelslechter's
46 social security claim and state industrial claim. According to Exhibit 2, Mr. Gelslechter was awarded
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1 social security disability benefits commencing August of 1978 and was determined to be no longer
2 disabled within the meaning of the Social Security Act as of January of 1981. This determination was
3 not appealed, but in November of 1982 Mr. Gelsleichter filed a new application for social security
4 disability benefits alleging continuous disability since August 7, 1978, the date of his industrial injury.
5 The social security Administrative Law Judge considered the 1982 application to be a request to
6 reopen and revise the initial determination and found that Mr. Gelsleichter had been disabled through
7 August 27, 1984, rather than January 1981.
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11 No appeal from that determination was filed, but a new application was filed on August 30,
12 1985, alleging disability from May 1, 1983. The Administrative Law Judge declined to reopen the prior
13 Administrative Law Judge's determination, but held that since the claimant had previously been found
14 to be disabled through August 27, 1984 and had received disability insurance benefits for two months
15 following that date, he could only consider disability subsequent to August 28, 1984. He determined
16 that Mr. Gelsleichter had been capable of sedentary work for seven months in 1984, up until
17 November 2, 1984, when he was hospitalized because of lumbar pain. He therefore concluded that
18 Mr. Gelsleichter had been disabled since November 2, 1984 and was eligible for social security
19 disability benefits commencing on that date. The technical result of the decision was to create a break
20 of one day wherein Mr. Gelsleichter did not receive social security disability benefits.
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22 It should be noted that throughout this time Mr. Gelsleichter was receiving Washington state
23 periodic industrial insurance benefits as a result of his August 7, 1978 industrial injury, except for brief
24 periods (April 23, 1981 through June 3, 1981, and 16 days in March 1983). His original state
25 compensation rate was \$540.00 per month. The department of Labor and Industries on December
26 14, 1979 began offsetting the time-loss compensation benefits by the social security benefits, for a
27 total time-loss compensation payment of \$70.60 per month. The time-loss compensation rate then
28 reverted to the full rate of \$630.44 effective February 1, 1981 because social security benefits were
29 terminated. On May 26, 1981 Mr. Gelsleichter's state claim was closed and on July 27, 1981 an
30 aggravation application was filed. On August 11, 1981 the Department reopened the claim effective
31 June 4, 1981. His monthly rate of time-loss compensation increased periodically due to state cost of
32 living increases.
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35 As a result of the March 1987 federal Administrative Law Judge's determination that Mr.
36 Gelsleichter was disabled and eligible for social security benefits as of November 2, 1984, retroactive
37 social security benefits were payable, offset by the state benefits. The Social Security Administration
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1 calculated the social security benefits payable by offsetting the state time-loss compensation benefits
2 received as follows, determining that federal cost of living increases after December 1984 were not
3 subject to the offset:
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- 5 1. Beginning December 1984, \$60.60, based on a monthly benefit rate of
6 \$850.10;
- 7 2. Beginning July 1985,] 46.30, based on a monthly benefit rate of \$850.10;
- 8 3. Beginning December 1985, \$72.60, based on a monthly rate of \$876.40;
- 9 4. Beginning December 1986, \$83.90, based on a monthly benefit rate of
10 \$887.70; and
- 11 5. Beginning April 1987, when the state again took the offset, the full amount
12 of \$887.70.

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16 Thus, from December 1979 to February 1, 1981 the state took the reverse offset, based on the social
17 security benefit level in effect in December 1979. From February 1981 through October 1984 the
18 Social Security Administration took the offset, apparently based on the social security benefit level in
19 effect prior to June 1981. Then, because of the reentitlement to social security benefits, the Social
20 Security Administration again took the offset from December 1984 up to April 1987, based on the social
21 security benefit level in effect in December 1984. When the Department took over the offset in April
22 1987, it used the same computation that the Social Security Administration had used, that is, the
23 Department based its offset calculation on the social security benefit level in effect in December 1984.¹

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28 The first of claimant's contentions is that the Department should include in its offset calculation
29 the claimant's expenditure of attorney's fees in obtaining his social security benefits. The Washington
30 State Supreme Court recently held otherwise in Regnier v. Department of Labor and Industries, 110
31 Wn.2d 60 (1988). As pointed out in the Proposed Decision and Order, Mr. Gelsleichter cannot
32 succeed in his contention, in light of the Regnier decision.

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36 With regard to which dates should determine the level of state and federal benefits for purposes
37 of calculating the reverse offset, a number of our prior decisions have detailed the history and intent of
38 RCW 51.32.220, the social security reverse offset statute. See, e.g., In re Lee Darbous, BIIA Dec.,
39 58,900 (1982). Therefore, we will not reiterate that discussion here. Briefly, RCW 51.32.220(1)
40 provides that the state's reverse offset should be calculated in the same manner as provided by 42
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¹ Actually the Department, apparently by mistake, used the slightly lower figure of \$850.00 rather than \$850.10.
Thus the Department must continue to use that somewhat lower figure.

1 U.S.C. § 424a. That is, the worker should be placed in the same position, whether the Social Security
2 Administration or the Department of Labor and Industries takes the offset.
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4 42 U.S.C. 424a(a)(1) provides for computation of the offset based on the benefit levels in the
5 month that the worker is entitled to both state and federal periodic benefits, provided that the secretary
6 has, in the prior month, received notice that the worker is receiving concurrent benefits. The
7 notification date is critical under both 42 U.S.C. § 424(a)(1) and RCW 51.32.220(2). The latter section
8 provides that subsection 1 of RCW 51.32.220 (which mandates that the state computation should be
9 identical to the federal computation) "shall be effective the month following the month in which the
10 department or self-insurer is notified by the federal social security administration that the person is
11 receiving disability benefits under the federal old- age, survivors and disability insurance act . . ."
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16 In the case presently before us, Mr. Gelsleichter was receiving state periodic disability benefits
17 prior to and throughout the period of time that the Social Security Administration resumed payment of
18 social security benefits. Upon resuming payment of social security benefits, the Social Security
19 Administration retroactively offset state benefits against the federal benefits paid. The state then
20 resumed taking the offset in April 1987.
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24 We have recently held that where, prior to the initiation of the reverse offset pursuant to RCW
25 51.32.220, the Social Security Administration has taken an offset pursuant to 42 U.S.C. § 424a, the
26 worker should receive the same combined amount of federal and state benefits regardless of which
27 jurisdiction takes the offset. In re Herschel E. Whitaker, Dckt. No. 86 3069 (November 15, 1988). The
28 present appeal has a slightly different twist. In this case, the Department previously took an offset,
29 ceased taking the offset when the social security benefits were terminated, and then resumed taking
30 the offset when the Social Security Administration resumed benefits.
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34 We can find no legal basis for the claimant's contention that the Department is bound by the
35 original offset computation based on the benefit level in effect in December 1979. To the contrary, 20
36 C.F.R. § 404.408(c)(4) clearly indicates that:
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39 If an individual's entitlement to disability insurance benefits terminates and
40 such individual again becomes entitled to disability insurance benefits, the
41 amount of the reduction is again computed based on the figures specified
42 in this paragraph (c) applicable to the subsequent entitlement.
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44 Thus the Social Security Administration appropriately recalculated the offset based on the December
45 1984 social security benefit level, the month after Mr. Gelsleichter became "reentitled" to disability
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1 insurance benefits. Indeed there is no suggestion in the record that Mr. Gelsleichter has challenged
2 that calculation.
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4 In addition, as we noted in In re Evelyn Berlin, BIIA Dec., 86 3615 (1987), social security cost of
5 living increases subsequent to December 1984 are protected from further offset, but state cost of
6 living increases are not. See also 20 C.F.R.] 404.408(k); 42 U.S.C.] 424a(7) and (8); 70A Am. Jur.
7 2d] 247; SSR 80-14 and 82-68.
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10 Thus, when the Social Security Administration recomputed the offset after Mr. Gelsleichter
11 became reentitled to social security benefits as of November 2, 1984, the federal benefit level in effect
12 in December 1984 was used, without regard to subsequent federal increases, while the periodic state
13 cost of living increases were taken into account. See Exhibit No. 3, at 2 and 3. Again, we see nothing
14 in the record to indicate that Mr. Gelsleichter disagrees with the Social Security Administration's
15 computation.
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21 RCW 51.32.220(1) provides that the state's reverse offset should be calculated in the same
22 manner as provided by 42 U.S.C. § 42ja. When the Department took the offset over from the Social
23 Security Administration in April 1987, it used the same benefit levels in computing the offset as the
24 Social Security Administration had used (with the slight difference of \$850.00 rather than \$850.10
25 which we have previously noted). Therefore, we must conclude that the Department's computation of
26 the offset amount as set forth in the Department order dated April 17, 1987 and reaffirmed in the order
27 of June 24, 1987 is correct. As we held in Whitaker, Mr. Gelsleichter should receive the same amount
28 of combined benefits, regardless of which jurisdiction takes the offset.² Because the Department order
29 of June 24, 1987 achieves this result, it is correct and must be affirmed.
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34 Findings of Fact Nos. 1 and 2 and Conclusion of Law No. 1, as contained in the Proposed
35 Decision and Order, are hereby adopted as the final Findings of Fact and Conclusions of Law of the
36 Board. The Board makes the following additional Findings of Fact and Conclusions of Law:
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39 **FINDINGS OF FACT**

- 40 3. The claimant received state time-loss compensation benefits as a result of
41 the August 7, 1978 industrial injury continuously, except for two periods --
42 April 23, 1981 through June 3, 1981 and 16 days in March 1983.
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45 ² As a practical matter, so long as Mr. Gelsleichter's total family benefit amount as of December 1984 is greater
46 than 80% of his average current earnings figure, his time-loss compensation amount will remain at zero.
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4. Mr. Glesleichter applied for and was awarded social security disability benefits commencing August 1978. The Social Security Administration determined him no longer disabled as of January 1981. This determination was not appealed. In November 1982 Mr. Glesleichter reapplied for social security disability, alleging continuous disability since August 1978. Subsequently a social security Administrative Law Judge considered the 1982 application to be a request to reopen, and revised the initial determination to find Mr. Gelsleichter disabled through August 27, 1984. No appeal was filed. On August 30, 1985 a new application was filed alleging disability from May 1, 1983. In February 1987, a social security Administrative Law Judge declined to reopen, but held that since Mr. Gelsleichter had previously been found disabled until August 27, 1984 and received disability insurance benefits for two months following, he could only consider disability subsequent to August 28, 1984. The Administrative Law Judge found Mr. Gelsleichter to have been under a disability since November 2, 1984, but not prior thereto and based on the August 30, 1985 application found Mr. Gelsleichter to be entitled to social security disability benefits commencing November 2, 1984.
 5. Beginning August 1978 Mr. Gelsleichter's Washington time-loss compensation benefit rate was \$540.00 per month. Commencing December 14, 1979 the Department of Labor and Industries began offsetting the social security disability benefits against time-loss compensation, resulting in an adjustment in the monthly time-loss compensation rate. On February 10, 1981 the Department stopped taking the offset, reverting the time-loss compensation rate to \$630.44, because the social security disability benefits were terminated. From February 1981 through October 1984 the Social Security Administration took the offset, based on the pre- June 1981 social security benefit level. After Mr. Gelsleichter became reentitled to social security benefits, the Social Security Administration again took the offset from December 1984 up to April 1987, based on the social security benefit level in effect in December 1984. When the Department took over the offset in April 1987, it based its offset calculation on the December 1984 social security benefit level.
 6. Based on the February 1987 social security Administrative Law Judge's decision state time-loss compensation was offset against social security benefits so that monthly social security payments were made as follows: \$60.60 beginning December 1984; \$46.30 beginning July 1985; \$72.60 beginning December 1985; and \$83.90 beginning December 1986. Beginning April 1987, when the Department took over the offset, the social security monthly payment was \$887.70. Before the Department took over the offset, the Social Security Administration computed the offset based upon state time-loss payments of \$789.54 beginning December 1984 and \$803.80 beginning July 1985, and taking into account subsequent state cost of living increases. Cost of living increases in the federal disability insurance benefits effective after December 1984 were not subject to offset. The social security benefit level used in the Social Security

1 Administration's calculation was \$850.10. The state benefit level varied
2 depending on cost of living increases.

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4 7. On March 30, 1987, the Department was notified by the Social Security
5 Administration of Mr. Gelsleichter's new entitlement to monthly social
6 security disability benefits effective November 2, 1984.

7 8. On April 17, 1987 the Department began taking the reverse offset effective
8 April 1, 1987, reducing Mr. Gelsleichter's time-loss compensation
9 payments to the monthly amount of \$0.00 from the monthly amount of
10 \$830.77. The Department's calculation of the reverse offset was based on
11 the social security benefit level of \$850.00 and the time-loss compensation
12 rate as of April 1987 of \$830.77. The correct social security figure is
13 \$850.10 but the Department mistakenly used the \$850.00 figure, which
14 inures to claimant's benefit.

15 **CONCLUSIONS OF LAW**

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17 2. The reduction of benefits pursuant to RCW 51.32.220 was properly
18 calculated by the Department of Labor and Industries so that Mr.
19 Gelsleichter receives as close as possible the same amount of benefits as
20 he would have received if the Social Security Administration had continued
21 to take the offset pursuant to 42 U.S.C.] 424a.

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23 3. The order of the Department of Labor and Industries dated June 24, 1987
24 which adhered to the provisions of a prior order reducing the monthly
25 benefits due to social security offset and instituting a new rate of \$0.00
26 effective April 1, 1987 and further determining an overpayment of previous
27 awards for the period of April 1, 1987 through April 30, 1987 inclusive in
28 the amount of \$830.77 which was due and refundable to the Department,
29 is correct and is hereby affirmed.

30 It is so ORDERED.

31 Dated this 4th day of January, 1989.

32 BOARD OF INDUSTRIAL INSURANCE APPEALS

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36 /s/ _____
37 SARA T. HARMON Chairperson

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40 /s/ _____
41 PHILLIP T. BORK Member