

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: JAMES R. LORKOWSKI (DEC'D)) DOCKET NO. 23 13625
CLAIM NO. SD-66952) DECISION AND ORDER

In 2009, James Lorkowski sustained an industrial injury in the course of employment with The Boeing Company. He filed a claim with the Department of Labor and Industries. The Department allowed the claim and paid benefits. The Department eventually placed Mr. Lorkowski on an industrial insurance pension due to his permanent total disability. Mr. Lorkowski opted to have his pension benefits actuarially reduced under Option II of RCW 51.32.067(1)(b) so his wife, Paula Peak, could have the right of survivorship if he died from a cause unrelated to the industrial injury. After Mr. Lorkowski began receiving Social Security retirement benefits, the Department calculated the offset as is required under state and federal law when an industrial insurance pensioner is also receiving Social Security retirement. Mr. Lorkowski appealed the Department order that set the benefit amount after applying the Social Security offset. Later he died, and his surviving spouse and beneficiary, Ms. Peak, was substituted as the appealing party. Ms. Peak moved for summary judgment. She asserted that the Department incorrectly calculated the Social Security offset based upon the reduced amount Mr. Lorkowski was entitled to receive after electing an actuarially reduced benefit under Option II, rather than calculating the offset consistent with the procedures and limitations that apply to offsets under RCW 51.32.220 when a worker is receiving Social Security disability benefits. The Department filed a response and request summary judgment in its favor. Our industrial appeals judge denied Ms. Peak's motion, granted summary judgment in favor of the Department, and affirmed the Department's order. Ms. Peak petitioned for review. We agree with our industrial appeals judge that the Department's Social Security offset calculation was correct, but granted Ms. Peak's Petition for Review to amend the Findings of Fact and Conclusions of Law. The Department order dated February 8, 2023, is **AFFIRMED**.

DISCUSSION

In her Petition for Review, Ms. Peak argues that the Department incorrectly calculated the Social Security offset after Mr. Lorkowski's pension benefit was reduced as a result of his electing to receive an actuarially reduced benefit under Option II under RCW 51.32.067(1)(b). Ms. Peak contends that the Department's method of calculating the offset results in an impermissible, sequential reduction in the pension benefit. We disagree.

1 Regarding his Industrial Insurance pension, Mr. Lorkowski chose Option II under
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3 RCW 51.32.067(1)(b). It provides:

4 **Option II.** An injured worker selecting this option shall receive an actuarially reduced
5 benefit which upon death shall be continued throughout the life of and paid to the
6 surviving spouse, child, or other dependent as the worker has nominated by written
7 designation duly executed and filed with the department.

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9 Under this statute, the reduced monthly pension payment is an actuarial reduction based upon
10 Mr. Lorkowski's choice—not an offset taken by the Department. Regarding the offset for Social
11 Security retirement benefits, RCW 51.32.225(3) provides: "(3) Any reduction in compensation made
12 under chapter 58, Laws of 1986, shall be made before the reduction established in this section."

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14 That is what the Department did here. Offsets for Social Security retirement benefits are to be
15 calculated under the provisions of RCW 51.32.220, which addresses offsets for Social Security
16 disability benefits.¹ Of particular concern to Ms. Peak's argument is RCW 51.32.220(5), which
17 provides: "In no event shall the reduction reduce total benefits to less than the greater amount the
18 worker may be entitled to receive under this title or the federal old-age, survivors, and disability
19 insurance act."
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23 We are not persuaded by Ms. Peak's argument that the statute's reference to "may be entitled
24 to receive" requires the Department to look back and consider the monthly benefit amount the
25 claimant might've been entitled to if he hadn't elected to provide a lifetime pension extension to his
26 surviving spouse under RCW 51.32.067. The statutes themselves don't support this approach, and
27 Ms. Peak does not point to any other convincing authority. By choosing Option II, Mr. Lorkowski did
28 not change what he is entitled to receive. Mr. Lorkowski *chose* to defer some of the monthly amount
29 he receives in the event he predeceased his spouse so that monthly payments continue. In fact, it
30 would appear that for workers who may meet the minimum benefit threshold provided by
31 RCW 51.32.220(5), with the reduction taken for a survivorship option before the calculation of a
32 Social Security offset as mandated by RCW 51.32.225(3), those who do, or even can, choose a
33 survivorship option ultimately may have less of an offset of Social Security benefits than those who
34 do not or cannot choose a survivorship option.
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¹ RCW 51.32.225(2).

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DECISION

In Docket No. 23 13625, the claimant, James A. Lorkowski, filed an appeal with the Board of Industrial Insurance Appeals on April 4, 2023, from an order of the Department of Labor and Industries dated February 8, 2023. In this order, the Department corrected and superseded an order dated January 27, 2023, and reduced the amount of his monthly pension benefit effective July 16, 2022, because he was receiving Social Security benefits. The order dated February 8, 2023, is correct and it is affirmed.

FINDINGS OF FACT

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1. On August 11, 2023, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
 2. On June 11, 2009, James Lorkowski was injured in the course of his employment at The Boeing Company. On October 16, 2009, the Department of Labor and Industries allowed Mr. Lorkowski's workers' compensation claim and paid benefits.
 3. On July 28, 2020, the Department determined that Mr. Lorkowski was permanently, totally disabled as a result of his work injury and placed him on an industrial insurance pension effective August 16, 2020.
 4. On September 18, 2020, Mr. Lorkowski elected pension Option II under RCW 51.32.067(1)(b), which meant he would receive an actuarially reduced benefit in exchange for his spouse continuing to receive his pension benefits during her lifetime if he died from a cause unrelated to the industrial injury.
 5. On January 29, 2021, the Department issued an order correcting and superseding the order dated July 28, 2020, and changed the effective date of his pension to April 25, 2020.
 6. On July 29, 2022, the Department adjusted Mr. Lorkowski's monthly pension benefit effective July 16, 2022, because he began receiving monthly Social Security retirement benefits, resulting in a compensation rate of \$3,303.17 a month. The Department calculated the offset based upon Mr. Lorkowski receiving Social Security payments totaling \$2,345 and 80 percent of the highest year's earnings in the amount of \$0 a month, as provided by Social Security.
 7. On September 26, 2022, Mr. Lorkowski protested the Department order dated July 29, 2022.
 8. On January 27, 2023, the Department issued an order correcting and superseding the order dated July 29, 2022, resulting in a new compensation rate of \$3,388.27 a month. The Department recalculated the offset based upon Mr. Lorkowski receiving Social Security payments

1 totaling \$2,345 and 80 percent of the highest year's earnings in the
2 amount of \$89,999 for 2007.

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4 9. On February 8, 2023, the Department issued an order correcting and
5 superseding the order dated January 27, 2023, which was the same
6 compensation rate of \$3,388.27 a month as was set on January 27, 2023,
7 but was based upon Mr. Lorkowski receiving Social Security payments
8 totaling \$2,345 and 80 percent of the highest year's earnings in the
9 amount of \$85,999 for 2007.
- 10 10. The Department's February 8, 2023 order, which reduced his
11 compensation rate because he was receiving Social Security retirement
12 benefits, was calculated based upon the amount of the pension benefit
13 Mr. Lorkowski was entitled to receive after electing to receive pension
14 benefits under Option II of RCW 51.32.067(1)(b).
- 15 11. On April 4, 2023, Mr. Lorkowski appealed the Department order dated
16 February 8, 2023.
- 17 12. On April 5, 2023, Mr. Lorkowski died, and on May 8, 2023, the Department
18 approved Paula Peak's application to claim Mr. Lorkowski's pension
19 benefits as his surviving spouse and beneficiary. The BIIA amended the
20 caption of Mr. Lorkowski's appeal and substituted Ms. Peak as the
21 claimant in the appeal.
- 22 13. Ms. Peak moved for summary judgment based upon stipulated facts,
23 asserting that the offset required as a result of her husband's receipt of
24 Social Security retirement benefits limited the amount of the offset in the
25 same way the offset is limited under RCW 51.32.220(5), which applies to
26 offsets required when a worker is receiving Social Security disability
27 benefits.
- 28 14. The pleadings and evidence submitted by the parties demonstrate that
29 there is no genuine issue as to any material fact.

32 **CONCLUSIONS OF LAW**

- 33 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
34 and subject matter in this appeal.
- 35 2. RCW 51.32.225(3) requires the Department of Labor and Industries to
36 calculate the offset required when a pensioner is receiving Social Security
37 retirement benefits based upon the amount the pensioner is entitled to
38 receive after electing how to be paid the pension under
39 RCW 51.32.067(1).
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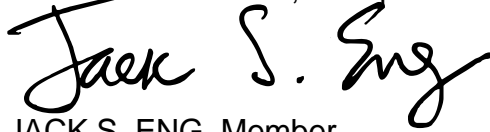
- 1 3. The Department is entitled to a decision as a matter of law as
2 contemplated by CR 56.
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4 4. The Department order dated February 8, 2023, is correct and it is
5 affirmed.
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7 Dated: March 25, 2024.
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9 BOARD OF INDUSTRIAL INSURANCE APPEALS
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12 HOLLY A. KESSLER, Chairperson

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14 JACK S. ENG, Member
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**Addendum to Decision and Order
In re James R. Lorkowski (Dec'd)
Docket No. 23 13625
Claim No. SD-66952**

Appearances

Beneficiary, Paula Peak, Beneficiary, by Causey Wright, per Brian M. Wright
Self-Insured Employer, The Boeing Company, by SBH Legal, per Aaron J. Bass
Department of Labor and Industries, by Office of the Attorney General, per John S. Barnes

Petition for Review

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 November 16, 2023, in which the industrial appeals judge affirmed the Department order dated February 8, 2023.

Summary Judgment Evidence Considered

Pursuant to CR 56(h), the following documents were submitted and reviewed:

1. Claimant James R. Lorkowski's (Dec'd) Motion for Summary Judgment dated August 15, 2023.
2. Declaration of Brian M. Wright, Claimant's attorney, dated August 15, 2023, with the following attached exhibits:
 - a. Exhibit 1, Department of Labor and Industries (Department), July 28, 2020 Notice of Decision.
 - b. Exhibit 2, Letter from the Department to the Claimant dated August 10, 2020, regarding pension options.
 - c. Exhibit 3, pension option selection form signed by Mr. Lorkowski, selecting option 2, signed August 21, 2020.
 - d. Exhibit 4, Department Notice of Decision dated September 18, 2020, noting Mr. Lorkowski selected pension option 2.
 - e. Exhibit 5, Department Order and Notice dated March 29, 2017, establishing Mr. Lorkowski's wage rate.
 - f. Exhibit 6, Social Security Administration benefit verification letter dated August 15, 2022, detailing Mr. Lorkowski's current Social Security benefits.
 - g. Exhibit 7, Department Notice of Decision dated July 29, 2022, detailing the Department's adjustment to Mr. Lorkowski's Industrial Insurance Act (IIA) benefits offsetting his Social Security benefits, and establishing a new rate for his monthly IIA compensation benefits.
 - h. Exhibit 8, Department Notice of Decision dated February 8, 2023, detailing the Department's adjustment to Mr. Lorkowski's IIA compensation after offsetting of his Social Security Administration benefits.

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- i. Exhibit 9, State of Washington Department of Health Certificate of Death regarding James Richard Lorkowski, on April 5, 2023.
 - j. Exhibit 10, Department Beneficiary Application for Claim Benefits by Paula Peak, spouse of James Lorkowski, dated April 10, 2023.
 - k. Exhibit 11, Department Notice of Decision dated May 8, 2023, approving Ms. Peak's claim for benefits under Mr. Lorkowski's IIA claim.
 - l. Exhibit 12, Department's answers, responses, and objections to Claimant Arthur C. Beard's first set of interrogatories and requests for production issued in Board Docket No. 23 11002.
3. Department's Response to Claimant's Motion for Summary Judgment, dated August 31, 2023.
4. Declaration of John S. Barnes in support of the Department's response in opposition to the claimant's motion for summary judgment.
- a. Exhibit 1, Department Notice of Decision dated July 28, 2020, finding medical fixity; finding total and permanent disability; placing Mr. Lorkowski on a pension effective August 16, 2020; and terminating time-loss compensation benefits as paid through August 15, 2020.
 - b. Exhibit 2, Department form dated August 10, 2020, with Mr. Lorkowski's signature dated August 21, 2020, selecting pension option 2, providing a pension to Ms. Peak in the event Mr. Lorkowski predeceases her.
 - c. Exhibit 3, Department Notice of Decision dated September 18, 2020, confirmed Mr. Lorkowski's selection of pension option 2.
 - d. Exhibit 4, Social Security Administration Benefit Verification Letter dated August 15, 2022, confirming Mr. Lorkowski's Social Security benefits.
 - e. Exhibit 5, Department Notice of Decision dated July 29, 2022, confirming adjustment of Mr. Lorkowski's IIA compensation benefits and the amount of his Social Security benefits to be deducted or offset from Mr. Lorkowski's compensation benefits from the Department.
 - f. Exhibit 6, Department Notice of Decision dated February 8, 2023, confirming Mr. Lorkowski's IIA compensation benefits after deduction or offset for the Social Security compensation benefits he received.
 - g. Exhibit 7, Chapter 58, Washington State Substitute House Bill No. 1873, Washington Laws 1986, regarding pension options.
5. Claimant's Summary Judgment Reply.
6. The September 12, 2023, hearing on the parties' Motion for Summary Judgment.
7. The record before the Board.