WORKERS’ COMPENSATION BASICS – COORDINATION OF BENEFITS

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I. Introduction

A comprehensive knowledge of government and private social insurance programs and the alternatives for structuring workers’ compensation to minimize offsets and reimbursement obligations in these programs is essential in representing injured employees on their workers’ compensation claims. The effect of workers’ compensation payments on other social insurance benefits is a key component in maximizing the recovery for the injured employee.

II. Social Security Disability Workers’ Compensation Offset

The Social Security Act provides for several different types of benefits. These include retirement benefits, disability insurance benefits, and survivor's benefits. In most states, when an injured employee receives both disability insurance benefits under federal law and workers’ compensation benefits, the Social Security Act requires an offset against the social security disability benefit for workers’ compensation received.

The 1965 amendment to Section 224 of the Social Security Act, 42 U.S.C. §424a, introduced the offset for periodic workers’ compensation benefits paid to recipients of social security disability insurance benefits. The offset is imposed without regard to whether the social security disability insurance benefits and workers’ compensation benefits are based on the same injury or illness.
The offset provisions are the subject of regulations at 20 C.F.R. §404.408, et seq., and are dealt with extensively in the Social Security Administration’s Program Operations Manual System (“POMS”).

The Supreme Court in 1971 sustained the offset as a valid exercise of congressional authority intended to prevent a duplication of disability benefits that would result in the employee receiving in benefits more than the employee’s take-home pay prior to the injury. *Richardson v. Belcher*, 404 U.S. 78 (1971).

An employee’s social security disability insurance benefit will not be reduced in states (“reverse offset states”) that before February 18, 1981 provided a “reverse offset” for reduction of workers’ compensation benefits when the employee also is receiving social security disability benefits. 42 U.S.C. §424a(d); 20 C.F.R. §404.408(b). Reverse offset states include Alaska, California, Colorado, Florida, Louisiana, Minnesota, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Washington, and Wisconsin. POMS DI 52105.001.

A. The offset is applicable only to disability insurance benefits.

The offset is applicable only to employees (and their dependents) who are entitled to social security disability insurance benefits. The offset may reduce future social security benefits payable to the disabled employee and to dependent family members entitled to benefits because of the employees’ disability. The offset also may result in an overpayment and claim for reimbursement of prior benefits received by the employee. 42 U.S.C. §§404, 424a(a).

The offset is, however, inapplicable to social security survivor’s benefits and to social security retirement benefits for which employees can qualify beginning at age 62 at
a reduced benefit level. 42 U.S.C. §424a. It thus may be in the interest of injured employees age 62 to 64, in some cases, to reject disability insurance benefits in favor of the reduced retirement benefits.

B. **The offset cannot last beyond retirement age.**

The offset is imposed in any month in which the employee is also receiving periodic workers’ compensation benefits because of total or partial disability, whether characterized as temporary or permanent. The offset will continue when otherwise applicable until the periodic workers’ compensation benefit stops but not past the month prior to the injured employee’s reaching age 65. 42 U.S.C. §424a(a).

C. **The offset applies when social security plus workers’ compensation exceeds 80 percent of earnings before disability.**

The offset will apply only when (1) the social security disability benefits payable to an employee and his or her dependents and (2) an employee’s “periodic” workers’ compensation benefit exceed 80 percent of the employee’s “average current earnings” before the beginning of disability. “Average current earnings” is defined as the highest of:

a. The average monthly earnings used by Social Security to compute the employee’s social security primary insurance amount; or

b. The average monthly earnings from employment and self-employment during the highest five consecutive years after 1950; or

c. The average monthly earnings based on the one calendar year of highest earnings during a period consisting of the year in which the employee became disabled and the five years preceding that year.

42 U.S.C. §424a(a).
The social security disability benefits of the injured employee and of the dependents will be reduced by the amount the total monthly benefits paid by Social Security and workers’ compensation exceed the higher of 80 percent of the “average current earnings” or the total social security benefits. In no event will the total benefits be reduced below the total social security disability benefits to which the employee and dependents would have been entitled in the absence of payment of workers’ compensation. 42 U.S.C. §424a(a); 20 C.F.R. §404.408(c). The offset is first applied proportionately to benefits received by dependents as a result of the employee’s disability and lastly to the employee’s own disability insurance benefit. 42 U.S.C. §424a(g); 20 C.F.R. §404.408(h).

D. **The offset applies to periodic benefits and lump sums paid in lieu of periodic benefits.**

Only “periodic” workers’ compensation benefits payable to the claimant “on account of . . . total or partial disability (whether or not permanent)” are offset against social security disability insurance benefits. 42 U.S.C. 424a(a)(2). Weekly compensation for scheduled awards of permanent partial disability as well as awards for temporary total, temporary partial or permanent and total disability, are subject to the offset. 42 U.S.C. §424a(a),(b).

A lump sum, “to the extent that it is a commutation of, or a substitute for, periodic payments,” is also subject to the offset. 42 U.S.C. §424a(b).

The Social Security Administration’s policy regarding lump sum compensation or lump sum settlement payments is to consider as “offsettable” lump sums received in lieu of periodic payments, as commuted future periodic benefits, and as settlements made to avoid possible future proceedings under the workers’ compensation laws. POMS DI
The courts have held that where a lump sum settlement extinguishes the right to and liability for periodic benefits, “the settlement can only be regarded as a ‘substitute’ for the payments.” *Black v. Schweiker*, 670 F.2d 108, 110 (9th Cir. 1982).

The Social Security Administration is authorized to allocate such lump sums to such times and in such amounts as it finds “will approximate as nearly as practicable” the requirement to offset benefits payable on a periodic basis. 42 U.S.C. §424a(b); see *Worley v. Harris*, 666 F.2d 417 (9th Cir. 1982) ($33,000 workers’ compensation settlement prorated over the years before claimant attained age 62 and offset from disability benefit). The offset in such cases continues until the last month in which a lump sum proration by the Social Security Administration ends.

E. Computation of offset.

In addition to a determination of the employee’s “average current earnings” and the total of the social security and workers’ compensation benefits available to the employee and subject to the offset, computation of the offset also requires a determination of (1) the periodic workers’ compensation rate on a monthly basis and (2) the total “medical, legal, or related expenses in connection with the claim” (which are excluded from the offset). 20 C.F.R. §404.408(d).

When workers’ compensation is paid weekly pursuant to an agreement or award, the weekly compensation rate is multiplied by 4-1/3 to determine the monthly rate. Where the award or other documents specifically designate a weekly amount for legal expenses, the periodic workers’ compensation rate will be reduced by the designated amount for the period specified in the award.
A lump sum award or settlement, when a substitute for “periodic payments,” will be prorated at a periodic rate whether the lump sum is received as a result of a compromise settlement agreement, payment of compensation in a lump sum, or accrued compensation paid pursuant to an award. The Social Security Administration’s POMS sets forth the rules for the starting date of the proration and the amount at which the lump sum is to be prorated. The lump sum is to be allocated to the period specified in the lump-sum award. If a date is not specified, and periodic payments were made prior to the lump-sum settlement, the lump sum is prorated beginning the day after the day on which the periodic payments ended. If the lump-sum award does not specify a beginning date, and the worker did not receive prior periodic payments, the lump sum is allocated to the period beginning with the date of injury, or, in the case of an occupational disease, the date the worker’s employment in the industry terminated. POMS DI 52150.060D.

Lump sum awards are prorated at a weekly rate to be determined by the Social Security Administration in the following priority: (1) the rate specified in the lump-sum award; (2) the periodic rate paid prior to the lump sum if no rate is specified in the lump-sum award; and (3) if neither is available, the state maximum workers’ compensation rate in effect in the year of the injury. POMS DI 52150.060D.

The POMS recognize that a lump sum award will be prorated at “a rate based on life expectancy” where this rate is specified in the “award”. POMS DI 52150.065A.

In Sciarotta v. Bowen, 837 F.2d 135 (3rd. Cir. 1988), the Social Security Administration imposed an offset from the injured employee’s disability benefit using the state maximum compensation rate over 4.3 years, where no weekly rate was specified in the settlement agreement. The court, however, found “extremely forceful” the
employee’s argument that the $40,000 lump sum settlement should have been prorated over the employee’s remaining life expectancy of 24 years from the date of the settlement at approximately $28 per week, with the effect of eliminating the offset. The employee argued to the court that this settlement represented the only workers’ compensation he would receive. It was, therefore, irrational to apportion the settlement over just 4.3 years when the settlement was designed to last for his entire lifetime. Moreover, using the maximum compensation rate was inappropriate since the settlement represented a “compromised claim in which each party reduced its demands in order to reduce the risk of trial.” 837 F.2d at 141. The court agreed that the Administration’s proration of the lump sum was “irrational,” but remanded the claim to the district court to make a final determination.

Unless an award or settlement agreement specifies the manner in which excludable legal, medical and related expenses are to be deducted in prorating a lump sum award, the Social Security Administration has established three methods for proration and directs that the most advantageous to the employee and dependents be used. The expenses must be allocated in accordance with a Commission award if it specifies how they are to be deducted. POMS DI 52150.060E.

The three methods are discussed in POMS DI 52150.60E. These are:

**Method A**

Method A excludes the expenses from the beginning of the proration period thereby delaying the imposition of offset.

Method A is more likely to be advantageous if, for example,

- the worker is nearly age 62/65, or
- a closed period of disability insurance benefits exists.
To prorate using Method A:

- Divide the excludable expenses by the weekly rate, resulting in a number of weeks
- Delay imposing offset for this number of weeks beginning with the date disability insurance benefits would be have been offset (the offset first considered date or the day after periodic payments end, whichever is later).
- Impose offset when the resulting number of weeks expire.

**Method B**

This method of proration spreads the expenses out over the life of the award.

To prorate using Method B:

- Subtract the expenses from the lump sum
- Divide the result by the total lump sum
- Multiply this percentage by the weekly rate, resulting in a reduced weekly rate.
- Use the new weekly rate determined above to offset the lump sum

**Method C**

This method excludes the expense from the end of the proration period, thereby shortening the offset period. This removes offset at the earliest possible time. The proration could potentially expire prior to the first possible month of offset.

To prorate using Method C:

- Subtract the expenses from the lump sum
- Prorate only the balance determined above.

POMS DI 52150.060E.

**F. Changes in rates.**

An employee is required to document legal, medical and related expenses to be excluded from the offset.

The amount of the offset may change with a change in the periodic workers’ compensation rate or in the social security disability benefit rate, or as a result of the
Social Security Administration’s “triennial redetermination” of the average current earnings.

Cost of living increases in social security benefits after the first month of offset are added to the employee’s social security benefits and do not affect the offset. The increase is simply added to the benefits payable. See 42 U.S.C. §424a(a); 20 C.F.R. §404.408(j).

The Social Security Act requires periodic redetermination (“triennial redetermination”) of the offset to reflect increases in the national earnings level. The offset is recomputed in the second calendar year after it is first imposed and each third year thereafter. 42 U.S.C. §424a(f). As part of the redetermination, the “average current earnings” used as a basis for determining the offset is adjusted in proportion to any increase in the national average wage since the time the “average current earnings” was originally calculated. 20 C.F.R. §404.408(1).

G. **Mitigating the offset.**

Counsel can often reduce or eliminate the offset by careful structuring within the law. For example, it is usually possible to reduce the offset and, in effect, have litigation expenses and attorney’s fees reimbursed to the injured employee by Social Security from the offset that would otherwise be imposed.

Agreement on an appropriate weekly compensation rate and the inclusion of this rate in the settlement agreement is usually the primary factor in successful mitigation of the offset. After careful evaluation of the impact of a recovery on an employee’s social security benefit, in lieu of the higher rate for total disability, the attorney may determine that the claim can be resolved, for example, by paying the compensation for partial
disability at a reduced weekly rate and thereby eliminate or minimize the offset. The impact of the offset may in some circumstances be further reduced by specifically allocating to a particular period or prorating over a particular period the excludable legal expenses and medical expenses when the settlement is in the form of a final agreement.

When the injured employee’s claim is for lifetime compensation for total and permanent disability, settlement may be negotiated and completed on the basis of a lump sum payment representing compensation for the employee’s anticipated life expectancy at a compensation rate less than the full rate for total disability. The POMS specifically mentions a “rate based on life expectancy” when specified in the “award” and a proration of a settlement on this basis generally is accepted by the Social Security Administration. POMS DI 52150.065A.

III. Unemployment Benefits

States address the interaction between unemployment benefits and workers’ compensation in several ways. Unemployment compensation is paid to employees out of work because of economic conditions while workers’ compensation is paid to employees who have a loss of wages because of an injury or occupational disease. The employee applying for unemployment benefits represents that he or she is able and available to work.

Most state unemployment statutes prohibit an employee being paid workers compensation for total disability from receiving unemployment benefits. 3 Lex Larson, Larson's Workers’ Compensation, §157.02 (desk ed. 2011); e.g., N.C. Gen. Stat. § 96-13(a)(4) (employee receiving or applying for total disability benefits shall not be deemed able to work and thus disqualified from unemployment benefits).
There are also states that prohibit payment of workers compensation for total disability when the injured employee has received unemployment compensation for the same period. Mass. Ann. Laws ch. 152 §36B. And a number of state workers’ compensation statutes specifically include an offset against workers’ compensation for unemployment benefits received by the employee.


IV. Coordination with employer-sponsored disability plans.

Coordination of benefits issues frequently arise for an employee receiving workers’ compensation or in the process of settlement of a workers’ compensation claim because of concurrent benefits available under employer-sponsored short-term disability and long-term disability plans. These plans typically are covered by the Employee Retirement Income Security Act, ERISA.

Some of these disability plans exclude from receiving benefits altogether an injured employee who currently is entitled to workers’ compensation. Other short and long-term disability plans reduce the benefits payable to an employee receiving workers’ compensation based on a formula set forth in the plan document. In both cases, the plan
document typically will have a reimbursement provision that requires the injured employee to reimburse the plan for an overpayment occurring when the injured employee is awarded workers’ compensation following receipt of the short or long-term disability benefit. Some plan language specifically describes the effect on the short or long-term disability benefit of a lump sum settlement of the workers’ compensation claim.

A typical long-term disability plan may provide, therefore, that the disability benefit will be calculated at 60 percent of the injured employee’s pre-disability monthly earnings but the benefit will be reduced by workers’ compensation benefits and social security benefits received. The plan, however, may provide for a minimum monthly benefit of $100, for example. Moreover, a plan often may provide that workers’ compensation received in a lump sum payment will be prorated on a monthly basis over the time period for which the sum was given or, if no time period is stated, on monthly basis to the end of the employee’s maximum benefit period.

While generally the employer-sponsored short term or long-term disability plans will either exclude employees entitled to workers’ compensation or coordinate their disability benefits with workers’ compensation, some state workers’ compensation statutes provide for an offset against periodic workers’ compensation payments for benefits received from employer-funded short and long-term disability plans. Georgia, for example, offsets the employer-funded portion of disability plan payments. Ga. Code §34-9-243. The employers in Ohio and North Carolina are entitled to offset benefits from a non-occupational disability insurance or plan funded fully by the employer. Ohio Rev. Code §4123.56; N.C. Gen. Stat. §97-42.
Federal preemption is an issue when there are coordination of benefits provisions in an ERISA short or long-term disability plan in a state which also provides an employer with a credit against workers' compensation owed for these disability benefits. In these cases, ERISA preempts the state statutory credit insofar as the state statute prevents an ERISA plan from obtaining reimbursement from a workers’ compensation award or settlement. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504(1981) (ERISA preempted New Jersey statute prohibiting reduction of pension by workers’ compensation received).

V. **Workers’ Compensation Social Security Retirement Benefit Offsets**

Some states have chosen to offset all or a portion of an injured employee’s social security retirement benefit against weekly workers’ compensation. An employee may qualify for an early social security retirement benefit at age 62 and the full retirement benefit presently at age 66. 42 U.S.C. §416(1).

In Michigan, for example, weekly workers’ compensation is subject to an offset for one-half of the social security retirement benefit being received by the employee. Mich. Comp. Laws §418.354(1)(a). This also is true in Maine. Me. Rev. Stat. Ann. tit. 39-A, §221. In North Carolina, for injuries occurring after June 23, 2011, the weekly workers’ compensation benefit for total disability is offset by 100 percent of the social security retirement benefit but only after 500 weeks from the first date of disability and only if the injured employee has reached social security full retirement age. N.C. Gen. Stat. §97-29(c).

VI. **Conclusion**

The foregoing discussion is intended to note the most significant coordination of benefits questions that arise in representing an injured employee in a workers’
compensation claim. Current statutes, regulations and agency materials, and private
disability plans, of course, should always be consulted in advising a client about the
alternatives for pursuing and resolving a workers’ compensation claim. This is important
to maximize the workers’ compensation recovery and to properly advise the client on the
effect of the workers’ compensation claim on his or her receipt of other social insurance
benefits.