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Workers' Compensation Settlements –Drafting agreements that Minimize or Eliminate Social Security Disability Offsets

By: Jerry Schneiberg, Esq., Cleveland, OH

INTRODUCTION

In some cases, the hard fought efforts at negotiating a favorable workers' compensation settlement is only the beginning of the battle. Having negotiated a good settlement, the last thing a workers' compensation practitioner wants is an angry client, frustrated that his or her workers' compensation settlement results in a substantial reduction in his or her client's Social Security Insurance disability benefits (DIB). If a client is receiving DIB, or maybe eligible in future for this benefit, thoughtful efforts must be put into drafting an agreement to ensure the injured worker's DIB potential offset is minimized or eliminated.

THE OFFSET

42 U.S.C §424a, provides for an offset of DIB when the claimant is also receiving state workers' compensation benefits. In *Richardson v. Belcher*, 404 U.S. 78, 84 (1971), the Supreme Court noted that the offset "reduce[s] the duplication inherent in the programs and at the same time allow[s] a supplement to workmens' compensation where the state payments [are] inadequate."

In Ohio, when the combined workers' compensation benefit and DIB exceed eighty percent of the injured workers' average current earnings (ACE), SSA will take a dollar for dollar offset to the extent that the combined benefit exceeds that eighty percent. This can have the effect of reducing the DIB to zero. 42 U.S.C. §424a(a). ACE is calculated by SSA using the injured worker's pre-injury earnings record. The offset provision will continue until such time as the workers' compensation benefit is discontinued or until the claimant reaches age 65. 20 C.F.R. §408.408(a).

TAKING CONTROL THE OFFSET WITH A WORKERS' COMPENSATION SETTLEMENTS

Individuals subject to a reduction of DIB because of the receipt of a workers' compensation benefits can reduce or eliminate a DIB offset by negotiating a settlement of the workers' compensation claim. By amortizing the settlement proceeds over the injured workers' life expectancy, the rate of compensation maybe significantly reduced. In some cases, it can reduce the combined workers' compensation and DIB benefit below the eighty percent of ACE.

SSA has the authority to determine the appropriate method of prorating a lump sum award. 42 U.S.C. § 424a(b) . SSA utilizes a procedure outlined in its Program Operation Manual System (POMS). POMS DI 52001.555C.4 sets forth a priority for prorating the lump sum award, and first priority is given to the rate detailed in the terms of the settlement agreement. If the lump sum award specifies a rate based on life expectancy, that rate is used to prorate the lump sum. *Rodlin v. Secretary of HHS*, 750 E Supp. 146, 149 at 151 (D.N.J. 1990), illustrates *an* excellent example of how a practitioner's failure to amortize the settlement in the terms of the agreement can have real and meaningful consequences. In *Rodlin*, the injured worker was receiving temporary total disability (TT) at the rate of $269 per week and later the injured worker was also awarded Social Security disability benefits. Eventually, he settled his workers' compensation case for $35,000. Unfortunately, no verbiage was included in the settlement documents to specify the amortization of the award. Since no rate was specified SSA divided the $35,000 by the $269 rate he was previously being paid which equaled 130 weeks of offset. In this case, SSA reduced his monthly DIB from $535.50 to $27.20 over those 130 weeks. However, because it would have brought the total of amortized workers’ compensation proceeds and the DIB under the eighty percent of his ACE, had the settlement expressed the in its terms amortized the award over the injured workers’ life expectancy, there would have been no reduction in the injured worker’s DIB. *Rodlin at 150.*

Another consideration is SSA must also determine which expenses are excludable from the lump-sum award. This includes amounts specified for medical, legal, or related expenses paid. 20 C.F.R. § 404.408(d). The expenses can be placed at the beginning (front loading method) or spread evenly (steam rolling method) throughout the specified period of the amortization. POMS DI 52001.555H.

Under the front loading method, the excludable expenses will be considered as if paid out first. Since expenses are excluded from the offset, and since according to the terms of the settlement the expenses are being considered first, there will be no offset for the time period that legal expenses and other expenses are being amortized. This works best in older individuals approaching age since the amortized rate after age 65 is of no consequence because there is no offset after age 65. For example, assume that a 63 year old claimant settles his workers' compensation claim for $100,000 and has legal fees of $30,000. Also assume he is not receiving DIB because of the combined benefit triggers an offset of DIB. The settlement amortized over the individual’s life expectancy equates $230 per week. The legal fees of $30,000 would be divided by the $230, which would result in no offset for the first 130 weeks following the settlement. If in that case, the amortization of the settlement would eliminate any future offset for the injured worker since the amortization of legal fees are excluded from offset. However, the practitioner only has to use this method if the amortized rate still creates an offset of DIB.

The most commonly used method is the steam rolling method. Under this method, the excludable expenses are spread over the entire period of offset. The excludable expenses are treated as a percentage of the total award. That percentage is then multiplied by the weekly rate, resulting in a reduced weekly rate of payment. For example, consider a $200,000 settlement with $66,000 legal fee and $34,000 in future medical costs. One hundred thousand dollars is excludable from the award representing the total of the legal fee and the future medical costs. That is fifty percent of the total award. Assuming a fifteen year life expectancy or 780 weeks, the amortization of the settlement would be $256 per week which would be reduced by fifty percent to $128 to account for the excludable expenses. Again the amortization over the injured workers life expectancy will possibly provide a reduction in the DIB offset in comparison to the client continuing to receive an ongoing award.

CONCLUSION

Since SSA allows for the workers’ compensation practitioner to amortize the proceeds of the settlement to benefit the injured worker, thoughtful planning at settlement of a workers' compensation award can mean saving the client potentially thousands of dollars by eliminating or reducing an offset of DIB.