

The Social Security Administration Has Created a New Malpractice Trap for Attorneys Who Handle Worker's Compensation Cases

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If you handle worker's compensation cases, I hope the title of this article got your attention, because the Social Security Administration ("SSA") has once again changed the rules relating to what language should and should not be in a worker's compensation settlement in order to avoid the reduction of social security benefits for injured workers who also become disabled under SSA's rules. I don't know if failing to draft the settlement properly will really rise to the level of malpractice, but I strongly believe that this is an issue that worker's comp attorneys should be aware of in order to do the best job for their clients.

Attorneys who handle workers' compensation cases already know that the Social Security Administration ("SSA") will reduce the benefits paid for injured workers who also receive worker's comp benefits. Most attorneys also know that their client's Social Security benefits can be protected by ensuring that language is put in the worker's compensation settlement order that pro-rates the worker's comp settlement over the lifetime of the injured worker.

In September 2008, SSA set out a new internal policy¹ that changes the requirements of what should be in a Tennessee worker's compensation settlement order before SSA will recognize the lifetime proration language. SSA says they will still recognize the lifetime proration language, but ONLY in those settlements that do not set out how the amount of the benefits was calculated (the comp rate times the number of weeks.) If the worker's compensation settlement order contains both the SS lifetime language and the math showing how the worker's comp lump sum was calculated using the number of weeks times the comp rate, SSA will calculate it in such a way as to increase the offset, and will ignore the lifetime proration language.

Thus, SSA will still recognize the lifetime proration language, and will not reduce Social Security benefits if the settlement order is properly drafted, but the order must be more carefully drafted than before.

¹ See, POMS DI 52120.235 Tennessee Workers' Compensation (WC), found at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0452120235>. SSA tried to make a similar change through notice and comment rule-making a few years ago, but that rule was withdrawn after SSA received many adverse comments from state worker's compensation commissions and other interested parties. Now SSA has made the same change through the POMS, which is an internal SSA policy document that is not subject to notice and comment rulemaking.

How the offset law works and why the language is important:

Federal Law requires that individuals who receive both workers' compensation and Social Security disability benefits cannot receive a total amount of benefits greater than 80% of the worker's pre-injury income.² The Social Security Administration uses a formula to determine the maximum total benefits, from both programs, that a claimant can receive then they reduce the Social Security disability benefits to stay below that figure.

In order to calculate the total amount of benefits that can be received from both programs, the Social Security Administration will first determine the 80% maximum

² 42 U.S.C. § 424a. Reduction of disability benefits:

(a) Conditions for reduction; computation

If for any month prior to the month in which an individual attains the age of 65--

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month to--

(A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State, or

(B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of the United States, a State, a political subdivision (as that term is used in section 418(b)(2) of this title), or an instrumentality of two or more States (as that term is used in section 418(g) of this title), other than (i) benefits payable under Title 38, (ii) benefits payable under a program of assistance which is based on need, (iii) benefits based on service all or substantially all of which was included under an agreement entered into by a State and the Commissioner of Social Security under section 418 of this title, and (iv) benefits under a law or plan of the United States based on service all or substantially all of which is employment as defined in section 410 of this title,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of--

(3) such total of benefits under sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under such laws or plans, exceeds the higher of--

(5) 80 per centum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.. .

See also 20 C.F.R. §404.408.

allowance then they will convert it to a maximum total combined monthly benefit.³ The Social Security Administration will then calculate the amount of workers' compensation benefits received in temporary checks and determine the amount received each month.⁴ Social Security will then subtract the worker's compensation monthly amount from the 80% maximum monthly amount; the difference is the maximum that Social Security will pay each month, even if the disabled individual's normal Social Security disability benefit would be much higher.⁵

In the case of large monthly workers' compensation benefits, or low past wages, the reduction may be total, thus the individual may not be entitled to Social Security benefits at all during the time the individual gets periodic workers' compensation benefits.

When a lump sum is awarded in a worker's compensation case, or a worker's compensation case settles for a lump sum, the Social Security Administration does not have a "monthly" amount to use to calculate the offset, but that does not mean that the offset will end. Instead, by default, they treat the lump sum as if the temporary checks have continued. The purpose of the Social Security language in the worker's compensation order is to avoid the default.

Without the Social Security language in the worker's compensation order, Social Security takes the amount of the settlement, exclusive of attorney's fees, medical expenses, and other case expenses, and divides by the monthly amount of worker's compensation benefits that the disabled worker has been receiving in temporary periodic payments. The result of this calculation is the number of months the full offset will continue; thus, the offset will remain the same even though the individual is no longer getting temporary checks from workers' compensation.

³ Social Security uses several formulas to determine the past wage. The most common, called the "high five" approach, uses the last five years before the year of injury, plus the year of injury itself; whichever year is the highest will be used in the formula (the maximum benefit will be 80% of the highest year). The highest year's income, divided by 12 and multiplied by .8, is the maximum monthly benefit. The alternative method used by Social Security is to look for the highest five consecutive years, add them together and divide by 60 to determine the monthly income amount (this amount times .8 is the maximum allowable combined benefit).

⁴ i.e. if the injured worker received weekly checks, that amount is multiplied by 52 and divided by 12, bi-weekly checks are multiplied by 26 and divided by 12. Since Social Security Benefits are paid monthly, all worker's compensation benefits are converted into an equivalent monthly rate.

⁵ In Tennessee, in order to comply with the Federal cap, the disabled person's Social Security benefits are reduced; Tennessee is a "traditional" offset state. Other states, such as Florida and Ohio are "reverse" offset states, in which the full Social Security benefits are paid, and the employer/worker's compensation insurance carrier is allowed to reduce the worker's compensation benefits paid to keep the injured worker under the cap.

For example, if your client were to receive \$400.00 per week in temporary workers' compensation checks, then were to get a lump sum settlement of \$40,000.00 (after attorney's fees and expenses), then the offset would continue for 100 weeks after the settlement.⁶

The language that should be in the order:

--The lifetime proration language:

In order to keep the Social Security Administration from continuing the same offset, the law allows the workers' compensation settlement to contain a "life expectancy" clause. This clause indicates that the lump sum is not just a continuation of the temporary checks commuted to one payment, but is instead a settlement of a disputed case, and is to compensate the worker for the lifetime of future impairment. The clause states that the settlement is the equivalent of much smaller monthly payments over the lifetime of the worker. This language is permitted in the settlement by TCA §50-6-207 (6):

(6) For social security purposes only, as permitted by federal law or regulation, in an award of compensation as a lump sum or a partial lump sum under this chapter for permanent partial or permanent total disability, the court may make a finding of fact that the payment represents a payment to the individual to be distributed over the

⁶ Because the Social Security Administration pays monthly benefits, they would convert 100 weeks by into months (by dividing by 52 weeks times 12 months) so that the offset would be applied over 23 months. If the client's highest pre-injury wage were \$2000 per month, then the 80% maximum he could collect in total of worker's compensation and Social Security benefits is 1600. In this example, the \$40,000 is applied over 23 months, or \$1739.13 per month, so that the injured worker would get no Social Security benefits for the 23 months to which the offset applies.

By Comparison, if the worker were 40 years old at the time of the settlement, and her life expectancy, according to the TCA were to age 80 (40 more years), then the worker's compensation benefits would \$1000 per year, or \$83.33 per month.

For a worker with a hypothetical benefit amount of \$750 per month in Social Security (which is a little below average for a Tennessee worker) the cost for failing to put the language in the order would be \$17,250 in lost Social Security benefits for the disabled worker. In other words, in this example, if the worker's attorney left the language out, the attorney cost his client \$17,250.

With the language in the order, the worker would be deemed to receive only \$83.33 in worker's compensation benefits. Because the combined Social Security disability benefit (\$750 per month) and the deemed worker's compensation benefits (\$83.33) total of \$833.33 is less than \$1600 (the 80% maximum) the worker's total benefits are below the cap and she would be paid her full Social Security benefits, with no offset.

individual's lifetime based upon life expectancy as determined from mortality tables from Tennessee Code Annotated.

The actual language that should be included is not set out by statute anywhere, so that it does not have to be word-for-word, but the following language has been used successfully in many cases:

After payment of the attorney's fees and costs, the claimant will receive the net amount of \$_____. The mortality tables set forth in Table VI⁷ of the Tennessee Code Annotated indicates that because the Plaintiff is age _____, Plaintiff has a life expectancy of _____ years or _____ months. The amortized monthly benefit received by the Claimant is \$_____ divided by _____ months or \$_____ per month and represents a future income replacement. This paragraph is not intended to apply to disability retirement benefits from the Tennessee Consolidated Retirement System, pursuant to Tennessee Code Annotated Section 50- 6-207, as amended by Public Chapter 919, effective July 1, 1996.

This language has no effect on the amount of the worker's compensation settlement itself; all it does is preserve Social Security benefits to the greatest extent possible. Inclusion of the language can reduce, or sometimes eliminate, the offset.

The calculation over the lifetime of the worker will usually result in an equivalent monthly rate of workers' compensation payments that is much smaller than the temporary checks received by the worker. This allows the Social Security Administration to subtract a much lower amount of monthly workers' compensation benefits from the 80% maximum, thus allowing for greater Social Security disability benefits. This method of calculation was first approved in Sciarotta v. Bowen, 837 F.2d 135 (3d Cir.1989), which was eventually adopted by the Social Security Administration.⁸

The importance of the life expectancy language in the workers' compensation order is to give the Social Security Administration a basis to calculate how the lump sum is to be received. By giving the Social Security Administration a new monthly figure with the life expectancy language, they will not use the default, which is to treat the lump sum as if temporary periodic workers' compensation benefits had continued.

⁷ There is more than one life-expectancy chart found in the TCA Appendix. You should use the one that gives your client the longest life-expectancy, so that the monthly benefits will be the lowest possible. The Social Security Administration has no policy requiring use of any particular chart, so long the language is in an approved order.

⁸ Recognizing pro-ration over a claimant's lifetime is acknowledged implicitly in the Social Security Act and explicitly in the Agency's Program Operations Manual System. 42 U.S.C. § 424a(b); POMS § DI 52001.555.

-- Excludable expenses should not be included in the lump sum that is prorated.

Social Security Administration POMS DI 52150.050⁹ sets out those items that are “Excludable Expenses” that should be excluded from the lump sum. “Expenses that are excludable from offset within the limits set by law include documented medical, legal, or related expenses actually paid, incurred, or to be incurred by the worker in connection with the workers’ compensation/public disability benefit (WC/PDB) claim.” Id. The POMS rule specifically allows exclusion of any money paid for medical expenses, legal fees or attorneys fees or “related expenses.” However, “ Garnishment (e.g., for taxes, or child or spousal support) is not an excludable expense.”

The POMS specifically explains that attorneys fees that are incurred in connection with the claim are excludable, but “Legal fees paid or incurred by the employer, the WC carrier, or someone other than the claimant are not excludable.” Id. As for medical expenses, the POMS allows exclusion of “Medical expenses paid, incurred, or to be incurred by the worker in connection with the WC/PDB claim are excludable.” Id. Future medical expenses are also excludable, but only “if specified in the WC/PDB award. Id. If medical expenses are not set out, they may still be excluded when they are incurred. Id. Home health care benefits are also excludable, “if they represent equipment, furniture, home adaptations, skilled nursing care, or physical or speech therapy to aid the disabled individual” but are not excludable, “if the expenses are for household tasks such as bathing, cleaning, etc.”

What language should NOT be in the order:

The Social Security Administration’s new policy put in an additional requirement. In order to recognize the lifetime proration language, SSA says that the settlement agreement or order must also NOT set out a basis for the lump sum calculation. In other words, the order or agreement should not set out the number of weeks, comp rate, impairment rating and multiplier used to calculate the lump sum. Specifically, the new policy, published in September 2008 at POMS DI 52120.235, (see footnote one, *supra*) explains:

Tennessee WC Lump Sum Payments (LS)

...

NOTE: Award language - “For Social Security Purposes Only”

Tennessee WC may award benefits based upon a periodic rate to be paid over a specified time period. This same award may include a calculation for proration based upon life expectancy that is “**for Social Security purposes only**”. Do not accept the “for Social Security purposes only” language if it contradicts other language in the settlement. For example, if at one point the settlement language indicates the settlement amount

⁹Found at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0452150050>

represents 300 weeks at \$250 per week, and later says that for Social Security purposes only it represents \$150 per month based on a life expectancy of 500 months, we would use the \$250 per week rate to prorate the [lump sum]. However, if the original settlement did not make mention of any periodic rate other than the one “for Social Security purposes only” we would use that rate since it is the rate specified in the settlement, provided the life expectancy period shown is reasonable based on actuarial tables.

Watch out for additional pitfalls and exceptions:

--Actual periodic payments will trump the language.

Even if the order does not set out how the lump sum was calculated based on the weekly rate, SSA may still ignore the lifetime proportion language if the order or settlement sets out that the benefits are paid in an annuity or other periodic payments. Social Security first looks at the actual monthly benefits received by the worker, and only when the worker gets a lump sum do they calculate an equivalent monthly rate. In other words, the life expectancy language will not be considered during any time that the client gets temporary checks. If a lump sum is paid out over time in some form of a structured settlement, the language of the settlement must be very clear that the settlement is for a lump sum, and that the payments overtime are a structured pay-out of the lump sum, and are not continued periodic worker’s compensation benefits.

--The Social Security Administration will only recognize the language in an original order.

In the past, it was common for worker’s compensation attorneys to leave the language out of a settlement unless the injured worker was going to apply, or had already applied for Social Security disability. If the injured worker later applied for Social Security disability, an attorney could have the worker’s compensation order amended to include the language.

Social Security will recognize the life expectancy language only if it is found in the original settlement. Social Security has a policy to refuse to recognize the language if it is only found in an amendment to the settlement (i.e. in an agreed order to modify the decree). On October 3, 1997, The Commissioner issued a ruling, SSR 97-3, 1997 WL 620432, stating that the Defendant would not recognize the life-expectancy language if it were contained in an amended worker’s compensation settlement.¹⁰

¹⁰ In 1997 the Commissioner of Social Security originally proposed a change in the regulations that would not recognize pro-ration language in worker’s compensation orders at all. 62 FR 46682, September 4, 1997. However, after receiving over 1400 comments during the notice-and-comment period, the Commissioner never enacted that regulation, and, withdrew the proposed regulation on February 11, 1999. 64 FR 6824.

--It does not matter if the worker's compensation injury is related to the person's disability.

The Social Security rules do not differentiate between work-related and non-work-related injuries, but rather considers all impairments in combination. The offset rules set the maximum combined benefits at 80% no matter what injury the worker's compensation benefits were paid for. For that reason, even if an injured worker gets worker's compensation benefits for a relatively minor injury, that could never possibly cause a person to be totally disabled, the language should still be put in the settlement. For example, a worker who settles a carpal tunnel worker's compensation case for \$20,000 could suffer a heart attack or be involved in a catastrophic auto accident, and become totally disabled. If the language is not in the worker's compensation settlement order, then she could still risk losing benefits.

Conclusion

There is no good reason not to include the Social Security language in a worker's compensation settlement order. The language does not cost the employer or worker's compensation carrier anything, but its absence can cost the injured worker thousands in Social Security benefits. Also, if there is no reason to put in the math behind how a lump sum was calculated, that information should be left out; otherwise SSA will ignore the lifetime proration language.

The Social Security policy, to refuse to recognize an amended order, and to only recognize the language in an original order, was put in place in 1997, so attorneys should be well-aware that these issues should be addressed up front in the original order.

Addendum:

The above article is going to appear in the Tennessee Trial Lawyer's next issue. As that magazine was going to press, Richard Murrell of the TN Department of Labor ("DOL") had a chance to review it, and gave me a call.

Mr. Murrell explained that he is trying to draft a template settlement agreement to be used by the DOL in settlements. He is very interested in ensuring that the settlements/final orders are drafted in such a way as to protect the Social Security offset.

Mr. Murrell understands that putting too much information into the final order may trigger the offset; however, he explained that his department needs to ensure that certain information is included in case there is ever a motion to reopen an order or if there is a subsequent injury. Mr. Murrell explained that, for now, he does expect the orders will contain the total lump sum settlement, the employee's average weekly wage, and the percentage of industrial disability. He and I both hope that this will not be enough information to cause SSA to apply an early offset.

I also explained to Mr. Murrell that I recommended that the sample language not state “for social security purposes only.” I explained to him that language is used by LTD carriers to offset LTD benefits at a higher rate than the social security offset, in that the LTD company will argue that lifetime proration language can be ignored because of that language. Mr. Murrell also agreed with me that the language “for social security purposes only” is not necessary.

Another point Mr. Murrell raised is that attorneys who represent claimants should learn a little more about how the math works, so that attorneys can recognize those cases that don't need the language, or the cases where the language would make the situation worse. Generally speaking, the language should be in any case where the amount of the settlement would represent ongoing comp checks for six months or more after the person is injured. But, if the settlement is smaller than that, then there is almost no way it could offset Social Security benefits; therefore, the language is not necessary. The exception to that exception is that if the person is already getting social security and tried to return to work, and was injured after a brief return to work, then the language should be included, because the person's SSA benefits would still be reduced.

About the author:

Eric Buchanan represents policyholders nationally in both ERISA and non-ERISA disputes, especially in the areas of disability, life and health insurance. He also represents disabled people before the Social Security Administration, having represented approximately 1200 people in Social Security hearings. In 2007 Eric Buchanan was certified as a specialist in Social Security Disability Law by the Tennessee Commission on Continuing Legal Education and Specialization.

Eric Buchanan regularly speaks to both national and local audiences on disability insurance, ERISA, disability litigation and Social Security disability.

Eric is the immediate past-chair (2007-2008 chair) of the AAJ (formerly ATLA) Social Security Disability Section, past chair (2006-2007 chair) of the AAJ Health Care Finance and Disability Litigation Group, is a past President of the Chattanooga Trial Lawyers, and is past-chair (2005-2006 chair) of the Tennessee Bar Association Disability Law Section. He is a life-time member and executive committee member of the Board of Governors of the Tennessee Association for Justice (formerly TTLA).

Eric graduated from the Washington and Lee University School of Law Magna Cum Laude; while in Law school he was also inducted into the Order of the Coif and the Omicron Delta Kappa honorary leadership fraternity. Eric is also a graduate of the Virginia Military Institute, and served as an officer in the U.S. Navy from 1989 to 1994 where he served as a naval aviator and plane commander of P-3C Orion aircraft.

