

WARMING UP TO THE GOVERNMENT
SOCIAL SECURITY OFFSETS

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SOCIAL SECURITY DISABILITY OFFSETS

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A. INTRODUCTION

When a claimant is a recipient of disability benefits under the Social Security Act, 42 U.S.C. §301, et seq., and receives workers' compensation benefits, the claimant's Social Security disability benefits may be reduced or offset by the amount of the workers' compensation payments. 42 U.S.C. §424a(a). The determination of whether Social Security disability benefits are reduced because of workers' compensation payments depends on a variety of factors and calculations. Fortunately, when a workers' compensation claim is settled, the Social Security disability offset can be controlled to a large degree by the language of the settlement contract. This chapter discusses the

calculation of the offset and strategies that can be used to minimize or eliminate the Social Security disability offset.

B. STATUTORY AUTHORITY FOR OFFSET

Section 224 of the Social Security Act (42 U.S.C. 424a) places a ceiling on an individual's combined Social Security disability insurance benefits and state workers' compensation benefits. The statute provides that where an individual is receiving both Social Security disability insurance benefits and state workers' compensation benefits on account of a disability, his or her Social Security benefits "shall be reduced" by the amount necessary to ensure that the sum of the state and federal benefits does not exceed 80 percent of the individual's pre-disability average current earnings. 42 U.S.C. 424a(a); *see also*, 20 C.F.R. 404.408. By limiting total state and federal benefits to 80 percent of the employee's average earnings prior to the disability, section 224 of the Social Security Act reduces the duplication inherent in the programs and at the same time allows a supplement to workers' compensation where the state payments are inadequate. *Richardson v. Belcher*, 404 U.S. 78, 83 (1971). The offset applies until the claimant reaches 65 years of age.

The Social Security offset affects low income workers more often, and more dramatically, than higher income workers. The lower the worker's average earnings prior to the disability, the more likely that the Social Security disability benefit combined with workers' compensation benefit will reach the 80 percent threshold which triggers an offset. The higher the earnings, the less likely the 80 percent threshold will be reached.

SEC. 224. [42 U.S.C. 424a]

(a) 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 223, 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 218(b)(2)), or an instrumentality of two or more States (as that term is used in section 218(g)), other than (i) benefits payable under title 38, United States Code, (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 218, 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 210,

the total of his benefits under section 223 for such month and of any benefits under section 202 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 223 and 202 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 223 for such month and of any monthly insurance benefits under section 202 for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 223 and 202 for a month (in a continuous period of months) reduce such total below the sum of--

- (7) the total of the benefits under sections 223 and 202, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and
- (8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the largest of (A) the average monthly wage (determined under section 215(b) as in effect prior to January 1979) used for purposes of computing his benefits under section 223, (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 209(a)(1) and 211(b)(1)) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest, or (C) one-twelfth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 209(a)(1) and 211(b)(1)) for the calendar year in which he had the highest such wages and income during the period consisting of the calendar year in which he became disabled (as defined in section 223(d)) and the five years preceding that year.

(b) If any periodic benefit for a total or partial disability under a law or plan described in subsection (a)(2) is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in

such amounts as the Commissioner of Social Security finds will approximate as nearly as practicable the reduction prescribed by subsection (a).

(c) Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 203, but before deductions under such section and under section 222(b).

(d) The reduction of benefits required by this section shall not be made if the law or plan described in subsection (a)(2) under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this title on the basis of the wages and self-employment income of an individual entitled to benefits under section 223, and such law or plan so provided on February 18, 1981.

(e) If it appears to the Commissioner of Social Security that an individual may be eligible for periodic benefits under a law or plan which would give rise to reduction under this section, he may require, as a condition of certification for payment of any benefits under section 223 to any individual for any month and of any benefits under section 202 for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Commissioner of Social Security may, in the absence of evidence to the contrary, rely upon such a certification by such individual that he has not filed and does not intend to file such a claim, or that he has so filed and no final decision thereon has been made, in certifying benefits for payment pursuant to section 205(i).

(f)(1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 223 and any benefits under section 202 based on his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Commissioner of Social Security shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decrease in the total amount of benefits payable under this title on the basis of such individual's wages and self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1), the individual's average current earnings (as defined in subsection (a)) shall be deemed to be the product of--

- (A) his average current earnings as initially determined under subsection (a); and
- (B) the ratio of (i) the national average wage index (as defined in section 209(k)(1)) for the calendar year before the year in which such redetermination is made to (ii) the national average wage index (as so defined) for the calendar year before the year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability).

Any amount determined under this paragraph which is not a multiple of \$1 shall be reduced to the next lower multiple of \$1.

(g) Whenever a reduction in the total of benefits for any month based on an individual's wages and self-employment income is made under this section, each benefit, except the disability insurance benefit, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefits shall then be applied to such disability insurance benefit.

(h)(1) Notwithstanding any other provision of law, the head of any Federal agency shall provide such information within its possession as the Commissioner of Social Security may require for purposes of making a timely determination of the amount of the reduction, if any, required by this section in benefits payable under this title, or verifying other information necessary in carrying out the provisions of this section.

(2) The Commissioner of Social Security is authorized to enter into agreements with States, political subdivisions, and other organizations that administer a law or plan subject to the provisions of this section, in order to obtain such information as he may require to carry out the provisions of this section.

Source: http://www.ssa.gov/OP_Home/ssact/title02/0224.htm

C. CALCULATION OF OFFSET

1. Factors that determine the offset

The offset is calculated by considering three factors: (1) the claimant's monthly workers' compensation benefit, (2) the claimant's monthly Social Security disability benefit, and (3) the claimant's average current earnings (ACE). The combined workers' compensation benefit and Social Security disability benefit cannot exceed 80 percent of the claimant's ACE. See Social Security Administration's (SSA's) Program Operations Manual System (POMS). [SSA POMS DI 52001.600](#)

The following example illustrates the process to calculate the offset:

- (1) The weekly workers' compensation benefit is \$341.76 per week or \$1,480.90 per month.
- (2) Annual prior earnings \$26,929 so the ACE is \$26,929 divided by 12 or \$2,244 per month.
- (3) 80 percent of the ACE is \$1,795.20.
- (4) Monthly Social Security disability benefit is \$970.

To calculate the offset, make the following calculations:

First, subtract the monthly workers' compensation benefit from 80 percent of the ACE: $\$1,795 - \$1,480 = \$315$. This figure represents the maximum Social Security disability benefit given the current monthly workers' compensation benefit.

Second, compare the maximum Social Security benefit to the current disability benefit (the total family benefit). In our example $\$970 - \$315 = \$655$ or a \$655 monthly offset. In this case, the monthly Social Security disability benefit is reduced from \$970 to \$315 because of the workers' compensation benefit.

2. Calculation of Average Current Earnings (ACE)

Aside from the amount of the workers' compensation monthly benefit, the average current earnings (ACE) is one of the most important factors in determining the offset. SSA calculates ACE as the highest of three different numbers:

- (1) High-1 formula: Based on the 1 calendar year in which the worker's covered earnings were highest during the 5 previous years (used 95 percent of the time).
- (2) High-5 formula: Based on the 5 consecutive years after 1950 with the highest covered earnings.
- (3) AMW formula: Upon which the unindexed Social Security disability payment is based. SSA POMS DI 52001.510

The calculation of ACE is different than the calculation of the average weekly wage under the Workers' Compensation Act, 820 ILCS 305/1, et seq. Under the SSA guidelines, the "high-1" ACE is calculated by dividing the worker's gross earnings for the previous 12 months by 12 regardless of how many weeks the worker actually worked during this period. POMS §DI 52001.510. Similarly, under the "high-5" formula, the worker's highest earnings during a five year consecutive period after 1950 are divided by 60 regardless of the worker's attendance at work during this period. The "high-1" formula is used most of the time for the calculation of ACE.

D. DURATION OF THE OFFSET

1. Effective Date of Offset

Social Security disability benefits are offset for any month in which the worker was entitled to both Social Security disability benefits and workers' compensation benefits regardless of when the SSA was notified of entitlement to or changes in the workers' compensation benefits. SSA POMS DI 52001.100

2. Ending Date of Offset

Section DI 52001.110 of the Social Security Administration's Program Operations Manual System provides that the offset is removed (or not imposed) effective on the earliest of the following dates:

- (1) Worker attains age 62/65 per SSA POMS DI 52001.112.
- (2) Workers' compensation/public disability benefit (WC/PDB) is reduced due to a recognized reverse offset plan per SSA POMS DI 52001.080.
- (3) Periodic workers' compensation benefits end. (*See, SSA POMS DI 52001.075.10.*)
- (4) Lump sum proration ends.
- (5) Social Security disability insurance benefits cease.
- (6) Worker dies.
- (7) Election of reduced retirement insurance benefits.

SSA POMS DI 52001.110

3. Normal Retirement Age Per SSA

As noted above, the Social Security offset ends when an individual takes Social Security retirement benefits. The following table sets forth the normal retirement age for individuals based on their date of birth.

Year of Birth	Full Retirement Age
1937 or earlier	65
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1941	65 and 8 months
1942	65 and 10 months
1943-1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

<http://www.ssa.gov/retirechartred.htm>

E. MINIMIZING THE OFFSET

1. Strategies To Minimize or Eliminate the Offset

The Social Security disability offset can be minimized or eliminated through careful preparation of settlement documents. If a case is tried, the offset will be determined by using the disability rate expressed in the award and as calculated above. Settlement documents can be used to reduce or eliminate the offset by excluding certain fees and expenses from the workers' compensation payments and spreading the lump sum settlement over the life expectancy or work life expectancy of the claimant.

2. Excludable Expenses

Payments for legal fees, medical expenses, future medical expenses, and skilled home health care may be excluded from the gross workers' compensation settlement when calculating the offset. SSA POMS DI 52001.535 Medical expenses paid by Medicare are not excludable. Further, any expenses or fees must be carefully documented or the SSA will not allow the deduction of the fees and expenses from the workers' compensation payments.

3. Spreading Workers' Compensation Payments

The most important strategy to used reduce the Social Security offset is to reduce the amount of the monthly workers' compensation benefit. This is accomplished during settlement by spreading the lump sum settlement over the life expectancy or work life expectancy of the claimant. There has been a question in the past about whether it is appropriate to spread the lump sum over the claimant's life expectancy or work life expectancy. Some Social Security experts feel it is safer to spread the lump sum over the time remaining to retirement rather than life expectancy. Section DI 52001.555 of the Social Security Administration's Program Operations Manual System specifically states, "If the LS award specifies a rate based on life expectancy, use that rate to prorate the LS." The best practice is to spread the settlement over the work life expectancy or normal retirement date unless spreading the settlement over the life expectancy is necessary to further reduce or eliminate the offset.

4. Life Expectancy Tables

When spreading workers' compensation payments, government life and work life tables are commonly used to form the basis for the spread. These documents can be located at the following sources:

- a. National Center for Health Statistics life tables, which are available at www.cdc.gov/nchs/products/pubs/pubd/lftbls/life/1966.htm; and
- b. tables of work life expectancies from the Bureau of Labor Statistics of the United States Department of Labor, published in Bulletin 2254, Work Life Estimates:

Effects of Race and Education, (Feb. 1986), which is available at www.bls.gov/cps/cpsb2254.pdf.

F. CONTRACT LANGUAGE

1. Spread Language

The language used in the settlement contract to spread the lump sum is the key to reducing or eliminating an offset in Social Security disability. First, subtract from the lump sum any attorneys' fees, past medical expenses and documented future medical expenses. Then, spread the remaining lump sum over the time remaining to petitioner's retirement or life expectancy. Some Social Security experts feel it is safer to spread the lump sum over the time remaining to retirement rather than life expectancy. POMS DI 52001.555 states "If the LS award specifies a rate based on life expectancy, use that rate to prorate the LS . . .". The best practice is to spread the settlement over the work life expectancy or normal retirement date unless spreading the settlement over the life expectancy is necessary to avoid an offset.

Reductions due to past and future medical expenses must be supportable with documentation.

Example Spread Language:

TERMS OF THE SETTLEMENT: Respondent agrees to pay and Petitioner agrees to accept the sum of \$** as a full, final and complete settlement of any and all claims, past, present or future, the loss of time, medical, surgical or hospital expenses arising or to arise out of the accident described herein. The parties hereto further agree to waive the right to re-open or review said claim under Sections 8(a) and 19(h), or any other provision of the Workers' Compensation Act of the State of Illinois. Respondent to pay and Petitioner to accept the sum of \$**, which after attorney's fees \$** and expenses \$**, leaves a net recovery due to the Petitioner of \$**. Based upon the anticipated life expectancy of the Petitioner of **years according to the National Vital Statistics Report, United States Life Tables, 2000, Table 8, this settlement represents a yearly payment to Petitioner of \$**. Respondent agrees to pay and hold Petitioner harmless from all medical bills as set forth herein within sixty days of the date of approval of this agreement by the Illinois Industrial Commission, Respondent shall pay such additional expense. This settlement shall not be construed as a commutation of or a substitute for periodic payments, rather it represents a compromise of a disputed claim and this settlement has been effected to terminate litigation.

Courtesy of R. Wayne Harvey

2. Failure to Allocate in the Settlement Terms

If the settlement contract fails to set forth the payment rate, the offset will be calculated pursuant to the Program Operations Manual System (POMS) which recommends using the rate stated in the agreement or state's maximum TTD rate for the date of injury. SSA POMS DI 52001.555

See also, *Sanfilippo v. Barnhart*, 325 F.3d 391 (3d Cir. 2003).

3. Subsequent Addenda to Lump-Sum Settlements

The Social Security Administration (SSA) states that it is not bound by the terms of a second or amended stipulation in determining whether and by what rate a disabled worker's Social Security disability should be offset on account of a workers' compensation lump sum settlement. Filing an amended settlement contract in an attempt to change the setoff is a red flag for SSA and will likely be rejected. Thus, get the offset language correct in the original contract. SSA POMS DI 52001.021

4. Annuities and Trusts

If the workers' compensation settlement includes an annuity payment, the amount of the annuity payments are used to offset the Social Security disability payments. However, if the claimant has the option of receiving a lump sum as an alternative to the annuity payments, the amount of the lump sum or purchase price of the annuity, not including interest, is offsettable according to the normal proration rules. SSA POMS DI 52001.020

5. 81-20 Plan

Certain trusts set up by the employer can be used to avoid an offset. This type of trust is the subject of 20 C.F.R. 404.408. If the establishment of the trust was mandatory, meaning setup and required by the employer as a part of the settlement, then SSA will apply the offset using the payments made from the trust. 20 C.F.R. 404.408

6. Vocational Rehabilitation Payments

SSA treats vocational rehabilitation benefits as offsettable if the benefits are paid in lieu of workers' compensation benefits. SSA POMS DI 52001.025

G. TAXATION CONSIDERATIONS

The Internal Revenue Code, 26 U.S.C. §1, et seq., provides that Social Security benefits are taxable while State workers' compensation benefits are not. 26 U.S.C. §86(d)(3). When Social Security disability benefits are reduced due to receipt of workers' compensation benefits, federal income tax liability attaches to the full amount of Social Security disability benefit before the offset. SSA POMS DI 52001.565. Thus, it is the unreduced Social Security disability benefit amount that is counted for income tax

purposes. The SSA reports Social Security disability benefit payments to the IRS via Form SSA-1099.

The net result is that the failure to minimize the offset not only reduces the claimant's Social Security disability benefit but also increases the claimant's tax burden. It is important to inform the claimant of his or her tax liability before a case is tried or settled..

H. TRIAL OR SETTLEMENT CONSIDERATIONS

When considering trial or settlement of a case, it is important to understand the impact the Social Security offset has on the net amount received by a claimant under either scenario. A claimant should be advised by counsel about the impact of the offset on the net proceeds prior to trial or settlement. As stated in §7.18 above, the claimant should also be advised of the tax consequences. Since the offset can be minimized or eliminated by settlement contract language, settlement is often the preferred method of resolving a claim from the claimant's perspective.

Employers should understand that a claimant often has a tremendous incentive to settle a case because of the offset. Since the claimant cannot reduce or eliminate the offset without the agreement of the employer, settlement of the claim may also be negotiated on terms favorable to the employer. Savvy respondents will insist on a discounted permanency settlement in exchange for agreeing to Social Security spread language.

The following example illustrates the savings that can be realized in a settlement:

Example:

Date of Accident:	1/1/2003
Prior Yearly Earnings:	\$53,202.76
PPD Rate:	\$542.17
TTD Rate:	\$682.09
Average Weekly Wage:	\$1,023.13
Claimant's Age:	40
Life Expectancy:	36 years or 432 months
Months to Retirement:	324
Lump Sum Settlement:	\$120,000
Lump Sum over Life Expectancy:	\$277
Monthly Social Security Disability:	\$1,659
Assumed Award if tried:	60 percent MAW
ACE:	\$4,433
80% ACE:	\$3,546 (Maximum WC and DIB combined)

Case Tried:

Monthly WC Payment:	\$2,349 (\$542.17 per week)
Social Security Offset:	\$- 462
Social Security after Award:	\$1,197
Taxable Monthly Income:	\$1,659

Settlement Spread over Life Expectancy:

Monthly WC Payment over Life Expectancy:	\$277 (\$120,000 divided by 432)
Social Security Offset:	\$0
Social Security after Award:	\$1,659
Taxable Monthly Income:	\$1,659

Savings to Claimant by Settlement

Disability Savings to Claimant:	\$462 per month for 69.25 months
Tax Savings to Claimant: (Assuming 30% tax bracket)	\$138 per month for 69.25 months
Total Savings to Claimant:	\$600 per month for 69.25 months \$41,550

I. OTHER CONSIDERATIONS

1. Third-Party Settlements

In some cases, workers' compensation benefits are awarded for an injury resulting from the action or negligence of a party other than the employer. The worker may file suit and recover amounts for which the third party is liable. If the worker is awarded payments from the negligent party he/she may be required to repay the employer. This results in the worker being in the same position he would have been in had he never received any workers' compensation benefits, but had simply sued for personal injuries.

SSA's policy is that amounts paid by a third party do not offset Social Security disability benefits. Workers' compensation payments made pending a third-party settlement are offsettable. If the third-party settlement reimburses the employer for workers' compensation payments, all offsets are removed retroactively. SSA POMS DI 52001.090

2. Social Security Disability Unrelated to Workers' Compensation Disability

At least one case has ruled that the offset applies when the causes for the two disabilities do not overlap. *Knapczyk v. Ribicoff*, 201 F.Supp. 283 (N.D. Ill.1962).

3. Payments Not Subject to Offset

- (1) Payments made under the Federal Employers Liability Act (Railroad Workers);
- (2) Sickness benefits paid under the Railroad Unemployment Insurance Act;
- (3) Unemployment Compensation;
- (4) Company sick or disability plan benefits;
- (5) State payments for non-work-related disability;
- (6) Part B Black Lung benefits;
- (7) Jones Act benefits;
- (8) VA and Welfare benefits;
- (9) Private pension or insurance benefits; and
- (10) Public disability benefits (except Workers' Compensation) payable to a public employee based on employment covered under Social Security.

J CONCLUSION

If a claimant is receiving Social Security disability benefits or may be entitled to such benefits in the future, the language of the workers' compensation settlement contract should be written to reduce or eliminate the offset taken by SSA. This is especially true for lower income workers. The failure to allocate the settlement will result in an offset based on SSA's normal proration rules which will most likely be based on the claimant's temporary total disability rate. The failure to account for the offset may also unnecessarily increase the claimant's tax liability.