

SOCIAL SECURITY DISABILITY AND ITS EFFECTS ON WORKERS' COMPENSATION

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## I. INTRODUCTION

Social Security Disability benefits greatly enhance an injured worker's quality of life. If the injured worker is insured under Social Security and unable to work due to a severe impairment, the worker may qualify for Social Security Disability. In most cases, the monthly Social Security Disability benefit equals the worker's primary insurance amount at the time of disability, subject to offset. Medicare benefits may also be available. When a totally disabled injured worker qualifies for Social Security Disability, offset usually applies. Offset reduces either the Social Security benefit or the workers' compensation benefit. The total combined benefit of workers' compensation and Social Security Disability equals 80% of the worker's highest year's earnings.

## II. SOCIAL SECURITY DISABILITY OVERVIEW

Social Security Disability (Title II) is best thought of as an insurance policy. The injured worker must be insured in order to collect benefits. To qualify for Social Security Disability, most workers are required to have paid into Social Security five of the ten years (20 of the 40 quarters) prior to the onset of disability. The specific rules regarding the credits required based on the injured worker's age at date of disability can be found at <http://www.ssa.gov/retire2/credits3.htm>. If the injured worker is not presently insured, Social Security Disability may still be available. The injured worker must prove disability as of the date last insured.

Unlike Social Security Supplemental (SSI - Title XVI), Social Security Disability is not need-based. Anyone can receive Social Security Disability benefits if insured at the time of disability. Income and other resources are not relevant.

Disability is defined as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. sec. 423(d)(1)(A). The individual's physical and/or mental impairment(s) must be "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. sec. 423(d)(2)(A).

In order to prove disability, it must be shown that the claimant: 1) is not engaging in substantial gainful activity; 2) has a "severe" impairment expected to last twelve continuous months or result in death; and 3) the impairment meets or equals a listing, or is unable to engage in any substantial work that exists in the national economy. 20 C.F.R. sec. 404.1520. The monthly amount considered "substantial gainful activity" for any given year may be found at <http://www.ssa.gov/OACT/COLA/sga.html>. A "severe" impairment is one that significantly limits the claimant's physical or mental ability to do basic work activities. The Social Security Administration should consider the combined effects of all conditions when determining whether the impairment is "severe".

The third requirement is that the claimant's impairment meets or equals a listing, or the claimant is unable to engage in any substantial work that exists in the national economy. The "listing of impairments" describes impairments considered severe enough to prevent an individual from performing any gainful activity. The "listing of impairments" may be found at:

<http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm>.

Listings most likely to be seen in the workers' compensation setting include 1.04 (disorders of the spine), 1.05 (amputation), 1.06 and 1.07 (fractures of the lower and upper extremity), 3.02 (chronic pulmonary insufficiency), and 12.04 (affective disorders). If the claimant's impairment meets or equals a listing, the claimant is entitled to benefits. The ability to engage in substantial work becomes irrelevant.

If the claimant's impairment does not meet or equal a listing, the impairment must be severe enough to prevent the claimant from engaging in any substantial work that exists in the national economy. Most cases are focused on this step. The claimant must first prove he or she is unable to perform any past relevant work. Past relevant work is that performed by the claimant within fifteen years prior to the onset of disability. Once the claimant proves inability to perform past relevant work, the claimant must also prove inability to perform other work that exists in substantial numbers in the national economy when considering the claimant's residual functional capacity, age, education, past work experience and transferable skills.

Social Security Disability benefits begin after a five-month waiting period. For example, if a claimant becomes disabled on January 31<sup>st</sup>, 2009, benefits will not begin until July 2009. Social Security Disability benefits can be paid retroactively up to twelve months prior to the application date.

If a claimant returns to work following a period of disability, the claimant may be entitled to a "closed period" of benefits even though he or she is not entitled to ongoing benefits.

### III. THE ADMINISTRATIVE PROCESS

The application for disability benefits may be initiated over the phone, in person, or online. However initiated, the application is not complete until the forms are signed and returned to the Social Security Office. The initial determination is made by Disability Determination Services (DDS), a state agency. DDS will review the application form, order medical records from the providers listed on the application form and order examinations if necessary for the proper adjudication of the claim. The initial decision will take approximately 90 to 120 days. Social Security sends a "Social Security Notice" advising the claimant whether benefits are approved or denied.

If the claim is denied, a Request for Reconsideration must be filed within 60 days. The reconsideration paperwork should include all new providers, new treatment, and new conditions in addition to medical providers not mentioned at the time of application and those unmentioned in the Disability Determination Rationale. DDS obtains the new records and makes a second

determination. Very few denials are overturned at reconsideration stage. Social Security sends a "Social Security Notice of Reconsideration" advising the claimant whether benefits are approved or denied.

If the claim is denied at the reconsideration stage, a Request for Hearing must be filed within 60 days. The wait time for a Social Security hearing in Washington currently is approximately 18 months.

Prior to the hearing, the claimant will be sent an exhibit list detailing the records contained in the Social Security file. Updated medical records and reports should be ordered and forwarded immediately to the Office of Hearings and Appeals. Records contained in the workers' compensation file should be provided as well.

The file itself will be either electronic (contained on a CD) or paper. The Office of Hearings and Appeals will schedule an appointment at the claimant's request to review and copy the paper file.

The hearing is informal. Rules of evidence are not strictly applied. The hearing is not adversarial. No attorney appears for the Social Security Administration. The Administrative Law Judge (ALJ) will review the evidence, listen to testimony, and decide the case. The ALJ may schedule a vocational expert and/or medical expert to attend the hearing, review the evidence, and answer questions as to the nature and extent of the claimant's disability. The hearing will last about one hour and the ALJ will issue a written decision six to eight weeks following the hearing. The hearing is the claimant's best opportunity to obtain benefits.

If the decision is favorable, the claim will be processed by the payment center. If the decision is unfavorable, the claimant has 60 days to appeal to the Appeals Council. The Appeals Council may decide that the hearing decision was correct, that the case should be remanded for a new hearing, or that the hearing decision should be reversed and benefits allowed.

If benefits are denied by the Appeals Council, the claimant has 60 days to appeal to Federal Court.

#### IV. OFFSET

Workers' compensation and Social Security Disability benefits can be paid concurrently; however, the receipt of Social Security Disability benefits and workers' compensation benefits may result in an offset of benefits. The offset in Washington is governed by RCW 51.32.220 and RCW 51.32.225. The statute provides that the State of Washington may take the reduction in benefits where an injured worker is receiving benefits under both workers' compensation and Social Security Disability.

An injured worker is entitled to receive either 80% of his or her highest year's earnings or the time loss rate, whichever is higher. The average current wage provisions of 42 U.S.C. 424a, not the

definition of wages under Washington State workers' compensation law, govern the calculation of wages for purposes of calculating the Social Security offset reduction. The highest year's earnings is defined as any one year in the five-year period preceding the onset of Social Security Disability, or the average of any consecutive five-year period during the worker's life, whichever is greater. The worker's earnings statement may be obtained from the Social Security Administration. The earnings statement is an important tool in confirming whether offset was correctly calculated.

The reduction in workers' compensation benefits applies only to ongoing benefits. If the injured worker is receiving time loss compensation and becomes entitled to Social Security Disability retroactively, Social Security is entitled to the offset on the retroactive benefits. The retroactive Social Security Disability benefits are reduced. With regard to the ongoing benefits, Social Security Disability will pay the full benefit while the workers' compensation benefit is reduced.

The effective date of the Social Security Disability offset is the first month after the Department of Labor and Industries notifies the worker of its intent to take the offset. RCW 51.32.220(4). The Department of Labor and Industries may only recoup benefits paid for a period of six months prior to the date the Department notifies the worker that an overpayment has occurred. RCW 51.32.220(2). The Social Security Administration has no such limitation with regard to an overpayment.

In most cases, the Department of Labor and Industries will perform a triennial redetermination of benefits once every three years following the original offset order. The 80% figure and total family benefits are redetermined, along with the claimant's time loss rate. The 80% figure is adjusted for cost-of-living increase, Social Security is contacted to obtain the new total family benefit figures, and those figures are recalculated with the claimant's new time loss rate. If the recalculation is favorable, the claimant's time loss rate increases. The time loss rate will not go down as a result of the triennial redetermination.

## V. MEDICARE

Medicare is the Federal health insurance program for those entitled to Social Security Disability. Medicare Part A covers hospital care, limited nursing home care, and hospice care. Medicare Part B covers physician services, outpatient hospital services, and durable medical equipment.

Medicare is available to those entitled to Social Security Disability. There is a two-year waiting period from the time the claimant is entitled to Social Security Disability benefits. Medicare Part A (hospital insurance) usually does not cost the claimant anything. The premium for Medicare Part B (medical insurance) is currently \$96.40 per month for single individuals earning less than \$85,000 per year. The Part A deductible is \$1,068 for a hospital stay of 1-60 days. The Part B deductible is \$135 per year. After the deductible, Part B pays 80% of the Medicare approved amount. <https://questions.medicare.gov> provides updated information regarding Medicare premiums and co-insurance rates.

Medicare is cheap insurance; as such, it is one of the primary reasons an injured worker should apply for Social Security Disability. Medicare covers the medical conditions not covered under the workers' compensation claim. Medicare can be used for treatment of conditions not yet covered under the claim. Medicare can be used when the workers' compensation claim closes, allowing the claimant to continue treating, which may help overturn the closure. Medicare is very important when the worker becomes totally and permanently disabled as ongoing treatment is typically no longer allowed under the workers' compensation claim once the pension is approved.

## VI. ATTORNEY FEES

Attorney fees in Social Security Disability cases are limited by 42 U.S.C. sec. 406(a)(2)(A). The fee is limited to 25% of past-due benefits with a maximum fee of \$5,300 (scheduled to increase to \$6,000 effective June 22, 2009). If the fee agreement is approved, the Social Security Administration typically withholds the fee from the past-due benefits and directly pays the attorney.

## VII. POTENTIAL TAX CONSEQUENCES

The claimant must be aware that there are potential tax consequences with regard to Social Security Disability. Some people must pay Federal income taxes on Social Security benefits. Basic tax guidelines may be found on the Social Security web site at <http://www.socialsecurity.gov/planners/taxes.htm>. The Social Security Administration sends a 1099 form to recipients of Social Security benefits. Although Social Security Disability benefits may be reduced by the receipt of workers' compensation benefits, the offset is included as benefits received for income tax purposes. The claimant should be advised to seek guidance from a competent tax professional.

## VIII. CONCLUSION

Obviously, the interaction between Social Security Disability and workers' compensation is quite complicated. However, the benefits of obtaining Social Security Disability in addition to workers' compensation cannot be underestimated. The total monthly benefit usually increases when Social Security Disability is approved. It is easier to develop a Social Security Disability case where there is an ongoing workers' compensation claim. In many cases, the injured worker has already been off work for twelve consecutive months by the time an attorney is consulted. If the injured worker thereafter returns to work, a closed period may still be allowed. If time loss is terminated, the Social Security Disability benefit provides needed income for the injured worker. The Medicare benefit alone makes the Social Security Disability claim worth pursuing. In addition to paying for unrelated medical expenses, Medicare can be used to secure treatment for related medical expenses when trying to overturn an unfavorable decision from the Department of Labor and Industries. On a final note, the Social Security Administration maintains very useful websites at [www.ssa.gov](http://www.ssa.gov), and [www.medicare.gov](http://www.medicare.gov). The National Organization of Social Security Claimant's Representatives (NOSSCR) also maintains a useful website at <http://www.nosscr.org>. All three sites are worth

bookmarking for those who regularly practice Social Security Disability and workers' compensation law.