Workers' Compensation & Social Security Payment Effects

By Erin Schmidt

For many workers' compensation clients, their injuries lead them to also apply for Social Security disability. Later, most are upset to find out that some or even all of their Social Security benefits are offset by their workers' compensation payments (some states offset workers' compensation benefits, others Social Security). The windfall provision, under the Social Security Act (SSA), allows for the offset of benefits when the combination of Social Security and other public benefits, including workers' compensation, exceed 80 percent of the person's average current earnings (ACE) (*see 42 USC* 424a) or the family limit, whichever is higher. Social Security determines a person's ACE in one of three ways: the highest unindexed yearly total in the last five years, the highest five consecutive year average, or the average unindexed covered earnings. Social Security will use the highest of these three as the ACE for offset purposes. Minimizing the impact on Social Security benefits is a must. While little can be done about ongoing weekly payments through the workers' compensation system, specific steps taken, when settling these cases, will drastically reduce the client's offset and put more money into their pockets.

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Social Security calculates the lump sum payment offset by establishing the weekly rate in one of three ways: the rate specified in the lump sum award; the latest periodic payment rate paid prior to the lump sum award; or when the award does not specify the amount and there were no previous periodic payments, the implied compensation rate should be used. If no rate is implied, SSA will us the state's workers' compensation maximum in effect on the date of injury or illness (for more, *see SSA POMS* 52150.060). Further, if a rate is specified in the lump sum award, Social Security must determine if that rate was determined before or after excludable expenses, such as attorney fees and medical expenses. If the rate was determined after excludable expenses were removed, the rate must be recalculated to reflect those expenses. Social Security will compare the offset, based on each proration rate to determine which is the most advantageous for the claimant. Generally, this is the specified rate in the lump sum award.

To best protect your client's Social Security benefits, worker's compensation attorneys must be aware of the different rates and how this may affect their client. Most awards will specify the rate, spread out over the life expectancy of the client with large lump sum awards, but even smaller awards may need this language to protect the client. A $10,000 award to a 55-year-old that does not specify a rate and a date of injury in 2012 results in $775 a week offset for your client. This would result in the client's Social Security benefits being offset for three months, at a potential rate of $3,000 a month. If the client had been getting payments before that, of $1,000 a month, it would result in a $1,000 a month potential offset for 10 months. But specifying a rate would make that potential offset only about $30 a month by spreading out the rate over the life expectancy of 27 years. Further, Social Security can review the rate to make sure that it is reasonable. Thus, you cannot extend the payments out over an unreasonable life span or have the monthly rate rise after retirement age.

Even if your client has not yet applied for disability or has applied and is going through the appeal process, the windfall provision is retroactive. In addition, the provision is applied even if the workers' compensation injury is not what leads to disability. An example would be the client with a work-related back injury who becomes disabled after having a heart attack. The workers' compensation payments and settlement would still be offset under the windfall provision. Social Security will create an offset for any month in which they received or would have received both Social Security benefits and workers' compensation payments. This includes the months following the settlement, to which the period payment rate applies. Social Security can pay Title II benefits retroactively one year from application. Thus, if your client applies for benefits within a year of receiving the lump sum or prior to settling the case, it is very likely the windfall provision will affect them.

By taking the time to set a monthly rate into each of your client's workers' compensation, you will be able to limit the offset of your client's benefits and avoid any nasty surprises later on.