

## **MINIMIZING THE SOCIAL SECURITY WORKERS' COMPENSATION OFFSET**

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Q. [Anonymous lawyer] I handle worker's compensation cases. Some of my clients receive social security disability benefits. I've never understood how Social Security computes the workers' compensation offset. Why should I care?

A. There are three reasons to care about the workers' compensation offset: improving your professional abilities, obtaining more benefits for your clients, and avoiding malpractice.

Q. Okay, you have my attention. But are you saying that what I do can affect how Social Security applies the offset?

A. That's exactly what I'm saying. Attention to a few details can make a big difference in how much Social Security pays your client.

Q. Maybe you'd better tell me more.

### **The Basics**

A. Congress provided that a disabled person shouldn't collect both social security and workers' compensation benefits which together totaling more than 80 per cent of her pre-

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injury earnings. 42 U.S.C. § 424a.

Q. Sounds pretty straightforward.

A. I wish it were. The Social Security Administration (“SSA”) implemented the law with regulations found at 20 C.F.R. section 404.408, and SSA issued a couple hundred pages of POMS on the subject.

Q. What’s a “POMS”?

A. That’s SSA terminology for Program Operations Manual System.

Q. What difference does SSA’s operations manual make to me?

A. SSA uses the POMS in determining how the offset applies. And although the POMS are not law, they are “administrative interpretations” which “warrant respect.” *Wash. St. Dept. of Soc. & Health Services v. Estate of Keffeler*, 537 U.S. 371, 385 (2003). As a practical matter, SSA follows them and federal courts routinely cite them.

Q. Where can I find them?

A. They’re online. Just put “SSA POMS” into your favorite search engine.

### **Computing the Offset**

Q. Basically, how does the offset work?

A. To begin with, SSA computes your client’s “ACE,” which stands for “average current earnings.” Two methods for computing it apply in the vast majority of cases. Under the first method, SSA looks at your client’s earnings during the year in which she became disabled and the five previous years. From those years it takes the highest single year’s

earnings, and divides by 12 to get a monthly average. Under the second method, SSA looks at your client's five highest consecutive years of earnings in her lifetime, and from those five years divides by 60 to get a monthly average.

Q. Which of the two methods of computing the ACE does SSA use in determining the offset?

A. The one which produces the highest number, which is usually the first.

Q. What does SSA do after it figures the ACE?

A. Reduces the social security benefits for the client and her family so that the total of (1) non-excludable workers' compensation benefits plus (2) social security benefits for the client and her family does not exceed 80 per cent of the ACE.

### ***The Exception***

Q. Is there any exception to this rule?

A. The exception is in the unusual situation in which the total family social security benefits payable before offset exceed 80 per cent of the ACE.

Q. In that case, how does SSA compute the offset?

A. It uses the total family social security benefits payable before offset, rather than 80 per cent of the ACE, as the upper limit on the total of the two benefits. 20 C.F.R. § 404.408(c)(ii).

### ***Non-Excludable Benefits***

Q. You just referred to "non-excludable workers' compensation benefits." What

does that mean?

A. Legal costs (attorney's fees and costs) and medical costs (past and future) are excluded, meaning that they are not counted as workers' compensation benefits in computing the offset. 20 C.F.R. §404.408(d). So "non-excludable workers' compensation benefits" means workers' compensation benefits excluding legal and medical costs.

Q. What if the settlement waives future medical costs and allocates a substantial amount to future medical costs? Won't this increase excludable expenses and thereby decrease the offset?

A. Yes, but it may make your client ineligible for Medicare benefits otherwise payable for treatment of the work-related injury (42 C.F.R. sections 411.46(b)(2) and (d)(2)), and SSA can disallow any expenses which are excessive (POMS DI ["Disability Insurance"] 52150.050.E), so in my opinion this approach is not wise.

Q. What about Medicare set-aside issues with this kind of settlement?

A. Medicare set-aside issues are beyond my area of expertise.

### ***The Effect of the Offset***

Q. I think I understand excludable expenses. Let's talk about the big picture. Does the offset usually result in my client's social security benefits being reduced?

A. It depends on the client's age, her earnings record, her social security benefits, her workers' compensation benefits, and in many cases on how you draft the workers' compensation settlement or award documents.

Q. Can't you just give me a rule of thumb?

A. Some clients have their social security benefits totally offset, meaning that because of their workers' compensation benefits they receive no social security benefits; some have a partial offset; and some have no offset. There is no rule of thumb. In each case, you have to analyze how the rules apply to the particular client.

Q. Can you give me an example?

### ***The Primary Insurance Amount***

A. Sure, but first I have to explain two more social security terms. One is the "PIA," a Social Security acronym which stands for "primary insurance amount," which means the monthly social security payment the client will receive on her own social security account, excluding any benefits for spouse or children, if there is no offset. The other is the "FAM MAX," another acronym which stands for "family maximum," meaning the maximum social security benefits for the client and her family, if there is no offset.

### ***A Bad Deal for Jane***

Q. OK, now the example.

A. Let's say Jane Smith has an ACE of \$1,000. Her workers' compensation benefit before attorney's fees and costs is \$750 per month; after attorney's fees and costs, it is \$600 per month. Her social security FAM MAX is \$500 per month. Eighty per cent of her ACE is \$800. SSA will reduce her family social security benefit by \$300, to just \$200 per month, so that the total of her non-excludable workers' compensation benefits (\$600 per

month) and her social security benefits (\$200 per month) does not exceed 80 per cent of her ACE (\$800). So Jane loses \$300 per month – money she really needs for rent, food, clothing, and shelter for herself and her children.

Q. But the PIA and FAM MAX increase every year because of the cost of living allowance, so what date does SSA use?

A. In computing the offset, SSA uses the PIA and FAM MAX as of what it calls the “first considered” date. An example is the best way to explain what SSA means by the “first considered” date. If your client first received both disability and social security benefits in January, 2009, and SSA addressed the offset issue in January, 2010, and found that no offset should have been imposed until July, 2009, the offset could have been “first considered” in January, 2009, so it is the January, 2009 PIA and FAM MAX that are used in computing the offset. POMS DI 52150.020.A. This means that cost of living increases are not taken into account, so your client keeps 100% of SSA cost of living increases.

### ***Reducing the Offset***

Q. If I were Jane’s lawyer, how could I reduce the offset?

A. While workers’ compensation benefits are being paid weekly, you couldn’t. But when a lump sum settlement is negotiated (or paid after a hearing), there’s a lot you can do.

### ***Get the Earnings Record***

Q. Where do I start?

A. First, you need a copy of her earnings record (“ER”), which will show her PIA and Family Maximum (FAM MAX), and from which you can easily compute her ACE.

Q. How do I get the earnings record?

A. Send a completed SSA Form 1696 (Appointment of Representative) to SSA. Then keep after SSA until you get an ER showing the PIA. (If you went to a hearing with your client on your client’s social security disability application, the earnings record was one of the exhibits in the SSA hearing file.)

Q. What if I can’t get it?

A. If your client has the summary of lifetime earnings that SSA out every year, you can use that to compute her ACE, but it won’t have the PIA or FAM MAX.

### ***Life Expectancy and Proration***

Q. What do I do after I get the earnings record?

A. Two sections of the POMS are critical. One is DI 52150.060.D.3. It provides four rules which are used in the “priority,” meaning in the order in which they are given; as soon as a rule applies, that rule is used, and no other rules are considered. The four rules are:

(1) *The rate specified in the Lump Sum award.*

(2) If no rate is specified in the Lump Sum award, and the claimant received weekly benefit payments before the Lump Sum award was made, use the most recent weekly benefit rate.

(3) If no rate is specified in the Lump Sum award, and the claimant did not

receive any weekly benefit payments before the Lump Sum award was made, and the language of the Lump Sum award “implies a compensation rate,” use it.

(4) Otherwise use the State’s workers’ compensation maximum payment in effect on the date of injury.

Q. Why do you emphasize that first sentence?

A. It’s the key here. Let’s say Jane’s lawyer settles her workers’ compensation case for a lump sum of \$60,000, and the settlement documents don’t say anything about the rate at which the lump sum award is to be prorated. SSA will use method “2” and will continue to reduce her monthly social security benefits by \$300.

Q. How will SSA ever find out about the terms of the workers’ compensation settlement?

A. When Jane applied for social security disability benefits, one of the forms she was required to sign, under penalty of perjury, included her promise to tell SSA about any workers’ compensation benefits she receives. She will have long ago forgotten this—no one remembers all that fine print anyway—but you will know that she signed it, because all SSA applicants must do so, and to help keep her out of trouble, and maybe increase her benefits, you will advise SSA of the workers’ compensation settlement.

Q. Why might her benefits increase?

A. In many instances, a lump sum settlement, if properly drafted, will increase a client’s social security benefits. A 2001 GAO report found payment errors in 52% of

workers' compensation offset cases, and 85% of those errors occurred when beneficiaries did not report a change in their workers' compensation benefits.

Q. How long will SSA continue the \$300 per month offset? And didn't you say that some expenses (medical and legal costs) are excluded?

A. Good questions, but you're getting ahead of the story. First let's see how to get Jane the extra \$300 per month she needs for herself and her family.

Q. You have my full attention.

### ***Put Life Expectancy Into Settlement Agreement***

A. Let's say Jane is 50 years old, and that a standard table shows her life expectancy as 31.2 years. Use the following language in the settlement agreement:

“Claimant's date of birth is 1/1/60. Claimant's life expectancy is 31.2 years. Based on claimant's life expectancy, insurer agrees to pay claimant a lump sum settlement of sixty thousand dollars (\$60,000), representing \$1,923.07 per year (\$160.25 per month) for her life expectancy of 31.2 years. This lump sum settlement of benefits is intended to provide benefits of \$160.25 per month to claimant over the balance of her lifetime.”

Q. Under POMS DI 52150.060.D.3, SSA prorates the lump sum at \$160.25 per month, because that is the amount specified in the award, right?

A. Right.

Q. So how does that help Jane?

A. Because now her social security benefits of \$500 per month and her workers'

compensation benefits of \$160.25 per month total \$660.25 per month, which is less than 80 per cent of her ACE (80 per cent of \$1,000 = \$800), so instead of reducing her social security benefits by \$300 per month, SSA no longer reduces them at all.

Q. *So using the language you've given above to prorate the lump sum settlement over her lifetime is critical in reducing the offset?*

A. *It is. It's the most important thing we've discussed. Remember it even if you don't remember anything else.*

### ***Amending Existing Agreements***

Q. If I amend the workers' compensation settlement agreements I've already done to add this language, will SSA go by the original document or the amended document?

A. No. SSA promulgated Social Security Ruling 97-3, which provides that SSA "is not necessarily bound by the terms of a second, or amended, stipulation . . . . SSA will evaluate both the original and amended stipulations and disregard any language which has the effect of altering the terms in the original lump-sum settlement where the terms in the amended document are illusory or conflict with the terms of the first stipulation concerning the actual intend of the parties." So unless the amended document reflects the original intention, SSA will not consider it.

### ***What About Annuities?***

Q. What if my client receives a lump sum that is to be used to purchase an annuity?

A. Social Security Ruling 81-32 says: “a worker who chooses to receive a lump-sum amount is considered to have been paid that amount regardless of whether he or she uses it to purchase an annuity.” And see POMS DI 52150.065.D., “Structured Settlements.”

***Other Considerations***

Q. What about a case that involves mainly issues of temporary total disability and rehabilitation?

A. If the settlement agreement will extinguish your client’s claim for total permanent disability benefits, use the language I gave you in the example so that benefits are prorated over the client’s lifetime.

Q. Do the POMS have anything to say about this?

A. POMS DI 52150.060 says that a lump sum “is a final settlement, award, compromise and release, or other approved agreement that represents a final WC/PDB [workers’ compensation/public disability benefit] payment” due the worker.

Q. Can these rules for lump sum payments be applied to a lump sum payment of past-due benefits?

A. No, these rules apply to payments of future benefits only. POMS DI 52150.060.D.3.

Q. What if I have a case where even if I use this technique, there still will be a substantial offset?

A. One thing you could do is use a longer life expectancy in the settlement

agreement, because the longer the life expectancy, the lower the prorated monthly benefit. There are several accepted life expectancy tables, and some project longer life expectancies than others.

### *Life Expectancy of the Offset*

Q. How long does the offset last?

A. Here's the second critical section of the POMS. POMS DI 52150.060.E sets out three methods for prorating excludable expenses where there is a lump sum. The three methods are:

- Method A. Divide the excludable expenses by the weekly rate (as determined pursuant to POMS DI 52150.060.D.3, discussed above), resulting in a number of weeks, and do not offset for this number of weeks;
- Method B. Divide the lump sum, less excludable expenses, by the total lump sum, then multiply this percentage times the weekly rate, resulting in a reduced weekly rate; and
- Method C. Reduce the lump sum by the amount of excludable expenses before the proration.

Q. How does SSA decide which of the three methods to use?

A. POMS DI 52150.060.E says it will “use the method that is most advantageous.”

A previous version of the POMS said that SSA would “use the method most advantageous

to the total family.” Although the current version does not specify “most advantageous to whom,” I think there is no doubt that it still means “most advantageous to the total family,” because that same concept is found in other POMS.

### ***Choosing a Method***

Q. Which method usually is most advantageous to the family?

A. It depends on the situation. You have to run all three to see.

### ***Method A***

Q. How about an example?

A. Let’s go back to Jane Smith and use Method A. Let’s say that her attorney didn’t consider the social security offset, so the settlement agreement doesn’t include a lifetime proration, and the \$60,000 lump sum is prorated at \$825 per month pursuant to DI 52150.060.D.3, because \$825 per month was her gross workers’ compensation benefit before she received the lump sum. Let’s say that excludable expenses (attorney fees and costs) are \$20,000. Under Method A, divide the excludable expenses of \$20,000 by the weekly rate of \$190.53 (\$825 per month divided by 4.33 weeks per month = \$190.53 per week), which yields a figure of 104.97 weeks. SSA would not impose any offset for 104.97 weeks, but after that period was up, SSA would consider that Jane receives \$190.53 per week (\$825 per month) in workers’ compensation benefits, and impose a complete offset of her social security benefits of \$500 per month for the next 209.94 weeks (\$40,000 divided by \$190.53 per week = 209.94 weeks), because \$825 per month in workers’ compensation benefits is

more than 80% of her FAM MAX of \$800. So under Method A, SSA would not reduce Jane's social security benefits for two years, then it would eliminate them for four years.

Q. It would eliminate them completely for four years?

A. Yes, except for any social security cost of living increases effective after the offset began. Since social security COLAs are not taken into account in determining the offset, Jane gets to keep them.

#### *Method B*

Q. What would happen under the other two methods for Jane?

A. Under Method B, divide \$40,000 by \$60,000, which yields a percentage of 66.66, then multiply this percentage by the weekly rate of \$190.53, resulting in a reduced weekly rate of \$127.02, which is equivalent to \$550 per month, which would mean Jane would receive only \$250 per month in social security disability benefits (80 per cent of her ACE is \$800 per month less \$550 = \$250). Since her FAM MAX is \$500, she loses \$250 per month due to the offset. The offset continues for 109 months (\$60,000 divided by \$550/month).

#### *Method C*

Q. And Method C?

A. Under Method C, SSA would reduce the lump sum of \$60,000 by the excludable expenses of \$20,000 prior to proration, then prorate by dividing \$40,000 by \$825 per month, meaning that the offset begins immediately, and lasts 48.48 months, and during

that time Jane receives nothing, because her workers' compensation benefits of \$825 per month is greater than 80% of her FAM MAX.

Q. Which method is best for Jane and her family?

A. I think it's up to Jane. I don't know of any cases on this subject.

*Method A for Older Workers*

Q. Is there a time when one of the methods would clearly be best?

A. If the employee is 50 years old or more (and many are), Method A may be the best.

Q. Why?

A. Because it delays the start of the offset, and at age 62 or 65, the offset can be eliminated.

Q. What does age 62 or 65 have to do with it?

A. Because the offset applies only when your client is receiving disability insurance benefits. It does not apply when your client changes from disability insurance benefits to retirement benefits. Your client can start retirement benefits at age 62. And it ends at age 65, in accordance with 42 U.S.C. § 424a(a), even though the full retirement age now depends on date of birth.

Q. But if the client takes social security retirement benefits at age 62, the client receives only a percentage of the retirement benefits she otherwise would receive at full retirement age, right?

A. Right, but with a twist. Ordinarily, an election to take retirement benefits at age 62 locks the client in for life at a percentage of the benefits she otherwise would receive (the percentages are set out in <http://www.ssa.gov/retire2/agereduction.htm>). The twist is that if prior to age 62 the client has been found disabled by SSA, the client can take age 62 retirement, then at full retirement age receive 100 per cent. SSA calls this an increase due to previous “technical entitlement to DIB” (disability insurance benefits).

Q. This is some kind of trick you play on SSA, right?

A. Not at all. POMS DI 52150.030 specifically instructs SSA employees to consider using this procedure if it will increase benefits.

Q. Will SSA on its own suggest this to my client?

A. It is supposed to do so. Call me cynical, but I wouldn’t assume that what is supposed to happen always happens.

Q. Can you give me an example of how this works?

A. Let’s use Jane again, but let’s say that instead of being 50 at the time of the settlement, Jane was 60. Delaying the offset for two years could mean no offset at all, since she would be age 62 before an offset would be imposed, and at that age she could take age 62 retirement, which might cost her less until her full retirement age than the offset would cost her.

### ***Second-Guessing SSA***

Q. What if I believe SSA hasn’t computed the offset correctly?

A. You have the same procedural rights you have with respect to an unfavorable decision on disability: you can request reconsideration; if that is denied you can request a hearing with an administrative law judge; if you don't like the ALJ's decision you can appeal to the Appeals Council; and if you don't like its decision you can appeal to federal district court and then to the court of appeals.

### ***The Offset in Non-Title II Cases***

Q. We've been talking about how the offset applies to disability insurance (title II) benefits. Does the workers' compensation offset apply to SSI benefits?

A. For purposes of SSI, workers' compensation benefits are considered "unearned income," so any workers' compensation benefits (not counting excludable expenses, per Social Security Ruling 94-2p) over \$20 per month reduce SSI benefits on a dollar-for-dollar basis.

### ***A Few Final Matters***

Q. Has the United States Supreme Court ever said anything about the workers' compensation offset?

A. It held it constitutional in *Richardson v. Belcher*, 404 U.S. 78 (1971).

Q. Are there any Social Security rules that apply in particular states.

A. Yes. The POMS issues that have arisen in individual states. For state rules in the critical subject of how SSA characterizes lump sum settlements for the purpose of applying the workers' compensation offset, see POMS DI 52120.001.

Q. I have found the people in my local Social Security office pretty helpful. Are they a useful source of information in this area?

A. I have found some of them helpful, but generalizations are difficult. SSA has added a section to the POMS advising its employees to “Exercise caution in situations when attorneys or claimants seek assistance in the preparation of a WC settlement prior to the WC court approving the settlement . . . . we should not assist the attorney or claimant in determining a specific weekly rate low enough to avoid offset. This would be considered a conflict of interest.” POMS DI 52140.001.G.

Q. Does SSA try to flag settlement agreements that do not make sense, and which seem to be written solely to defeat the offset?

A. Yes, if the language is “unreasonable” or “contradictory,” SSA employees are supposed to seek guidance before proceeding. POMS DI 52150.065.A.2. So use the same good sense in drafting a settlement agreement that you would use in drafting any other kind of document.

Q. How can I learn more about everything you’ve talked about here?

A. There have been quite a few cases decided by federal courts over the years. An electronic search will find the cases.