



California Workers' COMPENSATION ENQUIRER

A MAGAZINE FOR THE PROFESSIONALS IN AND ASSOCIATED WITH THE WORKERS' COMPENSATION FIELD

VOLUME 13 NUMBER 11

MAY 1996 \$7.50

**CHSWC
Symposium
Hyatt Regency
San Francisco**



The Interrelationship of Workers' Compensation, Social Security Disability & Long-Term Disability Benefits

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In the increasingly complex field of workers' compensation, it is more important than ever to insure that a worker's recovery is

maximized given the different types of benefits that the worker is eligible for. Different requirements include definitions of disability and offset provisions.

In addition, employer's who offer long-term disability programs, particularly those that are self-insured, are also increasingly concerned about shifting the potential cost of paying for disability benefits by requiring eligible individuals apply and receive Social Security Disability benefits, a benefit which is advantageous to both applicant and employer.

It is, therefore, necessary to address the issues of: I. Definitions of Disability; II. Administration of Programs; III. How Each Program Treats Receipt of Benefits from Other Programs; IV. Suggestions for Maximizing Recovery to the Worker, and Minimizing Costs to the Employer.

I. DEFINITIONS OF DISABILITY

A. SOCIAL SECURITY

The Social Security Administration (SSA) administers three distinct programs which must be understood in order to assist an injured worker.

The first program, which most individuals are most familiar with, is SSA's retirement program for workers

who are over age 65, with 80% of full retirement available to the age 62 worker. While workers' compensation benefits may produce an offset of an individual's Social Security Disability benefits, there is no reduction in Social Security Retirement benefits due to receipt of workers' compensation benefits. **CAVEAT: If an individual is also eligible for Long-Term Disability (LTD) benefits, LTD benefits may be reduced for receipt of early retirement benefits, and an individual on LTD, should generally NOT apply for early (age 62) retirement benefits.** An individual receives Medicare at age 65 with retirement benefits, but not age 62.

SSA also administers two types of disability benefits, Supplemental Security Income benefits (SSI), which is administered under Title XVI of the Social Security Act. Such benefits are in effect a federal welfare program for aged and disabled individuals, and have a strict need and income and resource test. In California, a needy individual who is receiving no other benefits may receive up to approximately \$604.00 of S.S.I.—S.S.I. recipients are immediately eligible to receive medical benefits (stickers) for medical treatment.

The second disability-based

program which Social Security administers is administered under Title II of the Social Security Act, and is called Disability Insurance Benefits (DIB). In order for an individual to obtain their Disability Insurance Benefits they must meet the same definition of disability as an S.S.I. recipient, and must have sufficient work to have earned enough quarters of coverage to be considered fully insured by the Social Security Administration (SSA). Generally, an individual must have worked five out of the last ten years before they became disabled at covered employment (employment in which Social Security taxes were taken out of the individual's paycheck) in order to receive Social Security Disability benefits.

CAVEAT: Some individuals (particularly low wage earners) may be entitled to both Social Security Disability and S.S.I. benefits, and the two checks may equal up to approximately \$624.00 per month in California. Individuals entitled to DIB (Title II Disability Benefits) are eligible to receive Medicare 29 months after they have been found disabled.

SOCIAL SECURITY DISABILITY: In order to receive Social Security Disability benefits, an individual must be totally disabled. Total disability is

defined as the inability to perform substantial gainful activity based upon age, education, and prior work experience. The disability must be permanent (greater than 12 months duration) or be expected to result in death. A five-step sequential analysis is utilized in order to determine whether the individual meets the Social Security criteria. Disability need not be work related, and the guidelines are heavily weighed in order to make it more accessible for the older worker.

The nature of the disability, or whether or not it is work related, has no bearing on receipt of benefits. To date, psychological disability is treated equally with physical limitations. Recently, Congress has limited benefits based primarily upon drug or alcohol addiction to essentially three years lifetime cap, with the requirement that the individual must be in treatment. Several bills have been proposed by Congress which may even more severely or totally curtail benefits based upon drug or alcohol addiction. Benefits are payable permanently if the person remains disabled. If a person does not improve medically, but attempts to return to work, he may be eligible for a **trial work period** which may allow him to work for up to a total of nine months before terminating his disability benefits.

B. WORKERS' COMPENSATION BENEFITS

Workers' compensation benefits are payable for partial disability, that is less than total disability from any and all occupations. However, before any benefits are payable under workers' compensation, the injury must be work related, or exacerbated by employment. The injury/impairment may be a specific injury or cumulative trauma. Some restrictions have been placed upon recovery for psychological injury in that there must be a measurable and significant correlation to work activity rising to a specific level of impairment. Workers' compensation may compensate for temporary, total, and partial disability.

C. EMPLOYER-SPONSORED GROUP LONG-TERM DISABILITY BENEFITS (LTD)

Social Security Disability benefits (SSA) are administered by the federal government. The schedule for workers' compensation benefits is state-

mandated, and the appeal process is administered through the state of California, Workers' Compensation Appeals Board. Most employer-sponsored group LTD (Long-Term Disability benefits) benefits are payable through a group insurance policy, or benefits are payable by the employer as in a self-insured plan administered typically through an insurance carrier. The length of disability payments, definitions of disability, provisions for offset for receipt of workers' compensation or Social Security Disability benefits vary from company to company, and even vary within the plans provided by a single employer. CAVEAT: It is therefore critical to review the definitions to determine the duration of disability benefits, the definition of disability, any limitations due to the nature of the disability. The benefits described in the benefits pamphlet should be given to the applicant, and the applicant's attorney should request a summary of the plan and copy of the plan. Generally speaking, employer-sponsored group Long-Term Disability benefits (LTD) are different from privately purchased Long-Term Disability benefits in that private LTD plans may or may not have an offset for Social Security and workers' compensation benefits. Almost all employer-sponsored group Long-Term Disability plans (LTD) require an offset. The information provided herein is illustrative of a typical Long-Term Disability (LTD) plan, but many plans differ from the requirements of a specific LTD plan significantly.

Some plans are for a set number of years, e.g., five years. Other plans provide a fixed percentage of the wage earners' income (e.g., 60%) through age 65. Virtually all plans terminate at age 65, with the exception of individuals who become disabled after a certain age (e.g., 62), in which case some plans may provide for five years of disability benefits.

Long-Term Disability benefits are similar to Social Security in that they do not require that the individual be disabled due to a work-related injury. This is in contrast to workers' compensation benefits. Some plans adopt a definition similar to Social Security and, in fact, some union plans require that the individual be awarded their Social Security Disability benefits

(e.g., construction unions before a union disability pension will be awarded). Some plans have a more liberal definition of disability, such as inability to engage in "own occupation" for first two years, and then any occupation for which the individual is reasonably able to perform for the duration of the time that disability benefits are payable. In addition, many plans have restrictions on receipt of benefits for drug and alcohol addiction or psychological ailments, specifically limiting the receipt of such benefits for a maximum of 24 months.

Some plans have provisions for awarding partial disability benefits after a defined period of total disability. In addition, LTD carriers potentially are a fruitful source of vocational rehabilitation funds in appropriate cases.

II. ADMINISTRATION OF PROGRAMS

The litigation/administrative path for the three types of benefits are quite different:

A. Social Security is administered by an independent federal agency. Application for disability benefits are typically handled as administrative proceedings, with an initial denial, request for reconsideration, after denial at the reconsideration level, a request for hearing before a federal administrative law judge. If the action is denied by an administrative law judge (ALJ) the individual has the right to appeal to the Appeals Council in Arlington, Virginia, and, ultimately, to file an action against the S.S.A. in the federal district court. The pertinent regulations are contained in 20 Code of Federal Regulations 404, et. seq.

B. Workers' compensation actions are handled through the Workers' Compensation Appeals Board. This is state administered and the requirements for workers' compensation; the forum for litigation of such actions is regulated by the State of California, and workers' compensation programs vary from state to state.

C. In contrast, since Long-Term Disability benefits are voluntary by the employer, and therefore not state-mandated, the types of benefits offered vary. This is the case whether they are employer provided, whether through a self-insured plan, or through an insurance carrier. If a dispute arises

under an employer-sponsored Long-Term Disability plan, they are typically covered under the jurisdiction of ERISA litigation (Employee Retirement Income Security Act of 1974 29 U.S.C. Section 1001, et. seq.).

III. HOW EACH PROGRAM TREATS RECEIPT OF BENEFITS FROM OTHER PROGRAMS

A. Social Security Disability benefits—The Social Security Administration does not deduct for LTD benefits under Title II Disability or Title II Retirement benefits. They are considered private insurance benefits and do not effect non-SSI Social Security benefits.

With regards to the effect of workers' compensation benefits on Title II Social Security Disability benefits, the general rule is that for disability benefits (not for age 62 or 65 retirement benefits) the applicant may not receive in combination of the workers' compensation benefits and Social Security Disability benefits more than 80% of his average current earnings in the highest of the last five years before he became disabled. Furthermore, Social Security, while it considers the actual amount of temporary or permanent disability benefits if they are paid out weekly, allows the consideration of formulas for apportionment of lump sum settlements. Such settlements may be apportioned over the individual's lifetime (CAVEAT: A recent 9th Circuit case which originated in Oregon, *Hodge v. Shalala*, 27 F.3d 430, (9th Cir. 1994) apportioned a workers' compensation settlement not over the applicant's lifetime but under Oregon workers' compensation law, over the individual's working lifetime, to age 65. Furthermore, while SSA does not offset Social Security Disability benefits for amounts set aside for future medical, such set asides may drastically alter the individual's eligibility for Medicare, and Medicare may require proof that the entire amount was spent for the covered medical condition before it will pay for said treatment.

B. Workers' compensation—typically does not offset for benefits received from Social Security or Long-Term Disability. However, the characterization of settlement proceeds in a workers' compensation Compromise and Release, whether



benefits are for future medicals or temporary or permanent disability benefits, may effect how other programs reduce their benefits.

C. Long-Term Disability—because LTD benefits are contractual in nature, the exact contractual provisions vary from insurance carrier and employer. It is critical to review the exact provisions of the policy which are typically contained in both a summary and the actual LTD plan. They can often be obtained from the employer's program administrator. Most plans are "income protection plans" and safeguard a set percentage (e.g., 60 - 70% of the injured worker's salary) for a set period of time that the worker cannot perform his prior work or, depending on the definition of disability, any form of substantial gainful activity. It is possible to limit the effect of the workers' compensation settlement on the LTD benefits by insuring that before any negotiations are completed between the applicant's attorney and the workers' compensation insurance carrier and their representative, that the written approval of the LTD carrier is

obtained to any portion of the agreement that effects their right to recovery. It is also important in reviewing the LTD plan to determine what benefits they consider as an offset, e.g., some plans may consider temporary and permanent disability as an offset, but not future medical payments.

CAVEAT: Future medical payments may adversely affect the individual's ability to obtain Medicare coverage for the covered condition, and that may be the only medical benefits available to the individual.

Virtually all disability plans provided by the employer, even with some employee contribution, have an offset for receipt of Social Security Disability benefits. Many plans have a requirement that the individual apply for Social Security Disability benefits, and if the person is found eligible for such benefits, the plan will offset the amount initially received by the individual for their S.S.A. benefits less any attorney fees, as well as their future monthly checks. The applicant would still receive the cost of living increases

awarded on a yearly basis by the Social Security Administration.

An individual cannot negotiate to receive a lump sum in lieu of his or her Social Security benefits with the federal government. It is generally beneficial to both the applicant and the LTD carrier that an individual apply for and receive Social Security benefits, since most plans offered by reputable insurance carriers will allow the individual to keep their cost of living increases after the initial monthly amount of benefits are awarded.

CAVEAT: Sometimes, a plan will attempt to also recoup any future cost of living increases that the individual receives after he is first placed on Social Security Disability. Most reputable carriers will not attempt to do so and, in fact, it is a "selling feature" to encourage the individual to apply for Social Security Disability that the individual and his family will get to keep any future cost of living increases. In point of fact, California Insurance Code sections 10127.1 and 10127.15 states that "Any provision contained in a policy of disability insurance, or a self-insured employee welfare benefit plan, for a reduction of loss of time benefits during a benefit period because of an increase in benefits payable under the federal Social Security Act, as amended, shall be null and void with respect to any such increase which occurs on or after the effective date of this section." (Added by stats. 977, effective July 8, 1977).

IV. SUGGESTIONS FOR MAXIMIZING RECOVERY TO THE WORKER, AND MINIMIZING COSTS TO THE EMPLOYER

A. Social Security—S.S.I. is a different program (in effect, a federal welfare program for the aged and disabled), any income received is considered a dollar-for-dollar for reduction for benefits in the month it was received and a resource thereafter. An individual with greater than \$2,000.00 in resources (\$3,000.00 for a couple) is ineligible for any benefits.

Social Security retirement age 65 (Title II) benefits do not offset for SSA, neither does age 62 early retirement benefits, but age 62 early retirement benefits do not come with Medicare.

Social Security Disability benefits (Title II)—there is no offset for LTD

benefits. There is an offset for workers' compensation permanent or temporary disability benefits. If the case is settled with regards to such benefits, such as with a C & R, it may be beneficial in appropriate circumstances to place appropriate language in the Compromise and Release apportioning the recovery over the applicant's lifetime (commonly referred to as the "Hartman formula," and approved in the S.S.A. P.O.M.S. (Program Operation Manual—SSA's internal regulations) at 52001 et. seq. This is typically most helpful where it will reduce the amount of permanent disability benefits from the maximum rate to a lower number, and the applicant would otherwise have had a significant offset because he was a low wage earner. On rarer occasions, the use of other formulas suggested in the P.O.M.S. might be more appropriate, for example for an individual who is closely approaching 65, and has substantial medical and legal expenses, may deduct those first, and the balance of the C & R will be considered as if it was awarded the claimant after age 65 and is therefore excluded.

B. Workers' Compensation: Does not offset for SSA or LTD.

C. Long-Term Disability: Generally offsets for SSA and WC benefits, look to the plan. Since there is an offset for SSA benefits, advise a client receiving such LTD benefits to never take early SSA retirements (age 62 benefits).

Ascertain what applicant's LTD plan is, who the insurance carrier is, and whether the employer is self-insured (even if administered through an insurance carrier). You should include prior to completing any negotiations that will affect the interest of the LTD carrier, the written approval of the carrier. Ascertain what benefits are and are not considered for reduction in LTD benefits. Make sure that the applicant is aware of his responsibility and the plan requirements. A client who is unaware of how such benefits will affect LTD, and is "surprised" by same when his benefits are reduced, is not a "happy client." The best approach is to be up-front with both the applicant, carrier, employer and LTD insurance company and resolve settlement issues before the Compromise and Release is completed rather than have problems arise thereafter.

Despite the fact that almost all LTD plans will offset for SSA, it is in the applicant's best interest to apply for and receive SSA, in almost all instances, as such Social Security will include future cost of living increases which can be significant over the individual's lifetime, and because once an individual receives SSA their earnings record is frozen, which will mean that they will not have a series of "dead" no earnings years prior to their retirement, which will drag down their age 65 retirement benefits. In addition, after two years and five months of eligibility, an individual is entitled to receive, when they obtain their SSA disability benefits, Medicare which for a nominal monthly sum provides coverage which is superior to many individual's COBRA conversion insurance benefits, and is also less costly.

The only instance where the application for SSA benefits may wish to be deferred is where an employer grants indefinite health insurance benefits to the individual and his family, and the award of Medicare will terminate the benefits to the individual and their family. Such provisions are rare.

In conclusion, by reviewing the differing types of benefits an individual is eligible, it is possible to better understand the complex inter-relationship between workers' compensation, Social Security and Long-Term Disability. Advance planning can often be an effective means in maximizing recovery, and insuring that the injured worker is aware of what benefits are available to him, minimizing confusion as to offset provisions, and insuring that any such issues are resolved.

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