STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PORT ST. LUCIE DISTRICT OFFICE

Kim A. Delano,
Employee/Claimant,

vs.

YRC Freight/Sedgwick CMS,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No.: 14-021576KFO

Accident date: 11/11/2009

Judge: Keef F. Owens

FINAL COMPENSATION ORDER

This cause was heard before the undersigned in Port St. Lucie, St. Lucie County, Florida on March 8, 2018, upon the Petition for Benefits filed October 6, 2017 (Docket Number (DN) 68). Mark L. Zientz, Esq. was present on behalf of the Claimant. Scott B. Miller, Esq. was present on behalf of the Employer/Carrier.

The issues which remained to be addressed at the time of the hearing included:

1. Social Security offset - correct amount.

2. Penalties, interest, costs, and attorney's fees.

The defenses raised included:

1. PTD benefits have been calculated correctly based on the correct Social Security offset.

2. No PICA due or owing.

The following documentary items were received into evidence:

Judge's Exhibits:

Exhibit #1: Petition for Benefits filed on October 6, 2017 (DN 68).

Exhibit #2: Response to Petition for Benefits filed on October 27, 2017 (DN 71).

Exhibit #3: Mediation Conference Report filed on January 22, 2018 (DN 87).

Exhibit #4: Uniform Statewide Pretrial Stipulation filed on January 26, 2018 (DN 88).

Exhibit #5: Pretrial Order and Notice of Final Hearing entered on January 29, 2018 (DN 89).

Exhibit #6: Claimant's "Trial Memo of Law" filed on February 27, 2018 (DN 91) (admitted for argument purposes only).

Exhibit #7: Employer/Carrier's "Memorandum of Law" filed on March 6, 2018 (DN 92) (admitted for argument purposes only).

Joint Exhibits:

Exhibit #1: Agreed Stipulated Facts filed on February 15, 2018 (DN 90) and attachment filed on March 21, 2018 (DN 95). During a hearing on March 21, 2018, the parties agreed to the correction of a scrivener's error within the stipulation. The parties agreed during the hearing that the correct weekly PIA amount is $423.58.

At the hearing, no witnesses were called to testify. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence/stipulations presented to me. Based on the foregoing and the applicable law, I make the following findings. The undersigned has jurisdiction of the parties and the subject matter. The stipulations of the parties are adopted and shall become part of the findings of fact herein. The documentary exhibits are admitted into evidence and shall become part of the record, unless otherwise noted.

Factual background

The claimant, Kim Delano, is a recipient of permanent total disability benefits. A social security offset has been applied to these benefits. The parties have stipulated to several facts. The parties agree that the average weekly wage is $905.13, 80% of the AWW is $724.10, the claimant's initial weekly SSDI benefit (PIA) was $423.58, the initial compensation rate was $603.45, the supplemental benefit amount in 2017 was $144.80, and 80% of the ACE is $832.00. The claimant asserts that the initial offset should be $195.03 (resulting in a 2017 weekly benefit

of $553.22). The employer/carrier assert that the initial offset should be $339.83 (resulting in a 2017 weekly benefit of $408.42).

Legal Analysis

The claimant seeks correction of the social security offset being applied to her permanent total disability benefit payments. The claimant argues that her permanent total disability supplemental benefits should not have been included within the calculation of the social security offset when the offset was initially calculated. The employer/carrier respond that the offset calculation is correct because permanent total disability supplemental benefits may be used at the time the social security offset is initially calculated.

This issue was addressed by the First District Court of Appeal in favor of the employer/carrier's position in *Jackson v. Hochadel Roofing Co.*, 794 So. 2d 668 (Fla. 1st DCA 2001). In *Jackson*, the claimant argued "that the judge of compensation claims erred in calculating the social security offset by including supplemental benefits." The claimant also argued that the initial calculation of the offset should not have included supplemental benefits at all because the purpose of supplemental benefits is to provide a cost of living adjustment. The claimant makes the same argument in the instant case.

The First District Court of Appeal affirmed the JCC's use of the claimant's supplemental benefit in the calculation of the social security offset. The court noted that although the offset may not be recalculated annually, and the offset should be calculated when the claimant is deemed permanently totally disabled (not when the offset is initially asserted), the offset should be calculated using supplemental benefits for the year when the claimant became entitled to PTD

benefits. After citing the relevant statutory provisions, the court concluded: "These provisions make clear that supplemental benefits are to be included in calculating the social security offset."

Accordingly, the issue presented in this matter has been resolved by the First District Court of Appeal. An award of the benefit sought would be contrary to *Jackson v. Hochadel Roofing Co.*, 794 So. 2d 668 (Fla. 1st DCA 2001).

An award of the benefit sought would also contradict statements made in several other opinions. In *Hunt v. Stratton*, 677 So. 2d 64, 67 (Fla. 1st DCA 1996), the court stated: "*While the existing workers' compensation supplemental benefit is considered in the initial calculation of the workers' compensation offset*, the law does not contemplate a recalculation of the offset based upon any increases thereafter." (emphasis added). In *Alderman v. Florida Plastering*, 748 So. 2d 1038, 1039 (Fla. 1st DCA 1998), the court acknowledged *Hunt*: "As we stated in *Hunt*, it is improper to recalculate a workers' compensation offset, *once the initial calculation has been made*, based upon any cost-of-living increases in collateral benefits." (emphasis added). Subsequently, in *Florida Power Corp. v. Van Loan*, 764 So. 2d 708, 710 (Fla. 1st DCA 2000), the court held: "We do, however, conclude that *the judge of compensation claims correctly determined that the offset should be calculated using supplemental benefits from the year when the claimant became entitled to disability benefits*, rather than from the year when the employer and servicing agent began taking the offset." (emphasis added). *See also State v. Hooks*, 515 So. 2d 294 (Fla. 1st DCA 1987).

The claimant also argues that the employer/carrier are not permitted to take an offset which is greater than the offset which would be taken by the Social Security Administration (SSA). The language the claimant replies upon appears in section 440.15(9)(a) and states:

"However, this provision shall not operate to reduce an injured worker's benefits under this chapter to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. s. 424(a)." The claimant argues there is no evidence that the SSA would utilize the claimant's permanent total supplemental benefits in calculating the offset. Accordingly, the claimant argues, the employer/carrier cannot utilize the claimant's permanent total supplemental benefits when calculating the offset.

The employer/carrier argue that *Hunt v. Stratton*, 677 So. 2d 64 (Fla. 1st DCA 1996), established the formula for calculation of the offset with consideration of the interplay between the Social Security Act and section 440.15(9). In *Hunt*, the First District Court of Appeal addressed the provision cited and relied upon by the claimant in this matter. The court noted that "the workers' compensation offset cannot be greater than the offset which the federal government would otherwise have taken." It also noted that the statutory language relied upon by the claimant imposed "an absolute limitation on the amount of the offset so calculated, so as not to reduce a claimant's total disability benefits more than they would have been reduced if the federal government had taken the offset." The court noted that in light of the confusion over the application of the state and federal disability benefits offset provisions, it found it "necessary to set out a formula for calculating the offset."

The court addressed the issue raised by the claimant in this matter within its detailed explanation of the method of calculating the offset:

> The next step is to determine whether the preliminary offset amount exceeds the offset which the federal government would otherwise have taken, *i.e., whether the preliminary offset amount exceeds the total amount of social security benefits due a claimant and his family*, which is the maximum federal social security offset allowed under 42 U.S.C. § 424(a), and therefore the maximum workers' compensation offset allowed under section 440.15(9)(a). (emphasis added).

Accordingly, the First District Court of Appeal interpreted the relevant language in section 440.15(9)(a) to mean that the preliminary offset cannot exceed "the total amount of social security benefits due a claimant and his family." In *Hunt*, as the court went on to apply its formula to the facts of the case, the court identified "the total amount of social security benefits due the claimant and his family" as the claimant's weekly social security benefit amount. As a result, per *Hunt*, the preliminary offset amount complies with the limiting language of section 440.15(9)(a) so long as it does not exceed the claimant's weekly social security benefit amount.

In the instant case, the parties have stipulated that the claimant's initial weekly social security benefit amount is $423.58. Accordingly, the offset amount asserted by the employer/carrier ($339.83) does not exceed the total amount of social security benefits due to the claimant. In conclusion, the methodology utilized by the employer/carrier to calculate the offset is consistent with *Hunt.* More specifically, the methodology utilized by the employer/carrier to calculate the offset is consistent with *Hunt*'s interpretation and application of the language of section 440.15(9)(a) related to the limit of the amount of the offset vis-à-vis the federal offset.

Lastly, it is noted that the Florida Administrative Code specifically requires the inclusion of permanent total supplemental benefits due at the time of permanent total acceptance or adjudication when calculating the social security offset of permanent total disability benefits. *See* rule 69L-3.01945(5)(b), F.A.C.

For all the foregoing reasons, the claim for correction of the social security offset is denied. In light of this denial, no attorney's fees or costs are due in conjunction with the final hearing of March 8, 2018.

There may be entitlement to an attorney's fee due to a correction of the offset made subsequent to the filing the petition at issue but prior to the final hearing. During the course of the hearing, the employer/carrier acknowledged that the initial offset calculation was incorrect, an adjustment was made prior to the hearing, and the adjuster was paying the past benefits with penalties and interest. Notably, the offset cited by the employer/carrier within their response to the petition is less that that cited in the written stipulation of agreed facts. The exact timing of the correction is not clear from the evidence submitted, but the employer/carrier's attorney's use of the present tense in indicating that the adjuster "is paying the past benefits with P and I" suggests that these benefit had not been fully paid as of the date of the final hearing which was well after the 30th day following the filing of the petition for benefits. Accordingly, the claimant's attorney may be entitled to an attorney's fee and costs with respect to the correction and payment of benefits, and the undersigned reserves jurisdiction over this issue, including the amount of the attorney's fees and costs due, if the parties cannot amicably resolve the same.

It is **ORDERED and ADJUDGED**:

1. The claim for correction of the social security offset is denied.

2. No attorney's fees or costs are due in conjunction with the final hearing of March 8, 2018, or this order, but the undersigned reserves jurisdiction over the issue of attorney's fees and costs due pursuant to the Petition for Benefits filed on October 6, 2017, as a result of the employer/carrier's prior correction of the offset and payment of additional benefits with penalties and interest if the parties cannot amicably resolve the same.

Done and electronically served on Counsel and Carrier this 23rd day of March, 2018, in Port St. Lucie, St. Lucie County, Florida.

Keef F. Owens
Judge of Compensation Claims

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