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THE SOCIAL SECURITY-WORKMEN'S COMPENSATION OFFSET IN PRACTICE

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The present social security offset provision for workmen's compensation benefits states that the social security disability benefit for any month shall be reduced to the point where the combined social security and periodic workmen's compensation benefit does not exceed 80 percent of the individual's average current earnings.¹

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1. The key passages of § 424 of the Social Security Act, omitting a number of detailed and specialized provisions, are as follows:

(a) If for any month prior to the month in which an individual attains the age of 62—

(1) such individual is entitled to benefits under section 423, and

(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

the total of his benefits under section 423 for such month and of any benefits under section 402 for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of—

(3) such total of benefits under section 423 and 402 for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan, exceeds the higher of—

(5) 80 per centum of his "average current earnings," or

(6) the total of such individual's disability insurance benefits under section 423 for such month and of any monthly insurance benefits under section 402 for such month based on his wages and self-employment income, prior to reduction under this section

When disability benefits were first added to the Social Security Act in 1956, a rather crude offset provision was included. Generally, this provision reduced benefits by the amount of compensation received from other systems. In 1957, this was amended to make it inapplicable to service-connected veteran's disability benefits, and in 1958 the entire offset provision was quietly repealed. In 1965, an offset provision was again enacted. While this provision was somewhat more carefully drafted, an ambiguity in the definition of "average current earnings" led to some confusion on whether the alternate five-year earnings test was subject to the artificial maximum on covered earnings imposed for purposes of figuring contributions and benefits. This confusion was remedied by a 1967 amendment that made it explicit that no such ceiling applied.

The principal purpose of this article is to examine how the offset provision is being interpreted and applied in practice. Since the constitutionality of the offset has only recently been upheld by the United States Supreme Court,² it might be appropriate to begin by indicating very briefly the background of case law in the lower courts on this issue and the principal lines of argument. All but one of the decisions on the constitutional issue in federal district and circuit courts had held the

For purposes of Clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a) and 411(b)(1)) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest

(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a)

(d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423.

42 U.S.C. § 424(a) (1970).

2. *Belcher v. Richardson*, 404 U.S. 78 (1971).

offset constitutional.³ The basis of constitutionality was well expounded in the Sixth Circuit's opinion in *Lofty v. Richardson*.⁴ The court began with the Supreme Court's formulation of the "invidious classification" rule in *Flemming v. Nestor*:⁵

[W]e must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.⁶

The primary basis of attack in *Lofty* was that Congress did not also create an offset for such benefits as private insurance proceeds and recoveries in damage suits. The court reviewed the development of Supreme Court cases establishing a very broad congressional discretion in adopting classifications for legislative purposes. It then examined the legislative history of the offset, stressing that the main purpose was elimination of duplication of benefits that in many instances resulted in total benefits exceeding actual previous wages while working. The court set out in full a table "purporting to show that continued duplication of benefits under terms of the then pending bill would mean at least some payments in excess of prior average 'take home pay' in every state, and up to a maximum of 247% in the instance of Arizona."⁷ The adverse effect of this situation on incentives to become rehabilitated and to return to work was noted.

As to the invidious classification argument, the court adduced three answers: The first was that there had been widespread complaints about double coverage as to compensation and social security, but no such complaints as to the proceeds of private insurance or negligence actions. The second was that administratively it would be relatively simple to enforce the compensation offset, while to calculate and apply

3. *Benjamin v. Richardson*, Civil No. 20,714 (6th Cir., April 29, 1971), *affg sub nom.* *Benjamin v. Finch*, Civil No. 32,816 (E.D. Mich., May 23, 1970); *Lofty v. Richardson*, 440 F.2d 1144 (6th Cir. 1971), *affg sub nom.* *Lofty v. Cohen*, 325 F Supp. 285 (E.D. Mich. 1970); *Rodatz v. Finch*, Civil No. 69-170 (E.D. Ill., Sept. 4, 1970); *Miley v. Finch*, Civil No. 33,560 (E.D. Mich., June 12, 1970); *Bailey v. Finch*, 312 F Supp. 918 (N.D. Miss. 1970); *Bartley v. Finch*, 311 F Supp. 876 (E.D. Ky. 1970); *Gambill v. Finch*, 309 F Supp. 1 (E.D. Tenn. 1970). *Contra*, *Belcher v. Richardson*, 317 F Supp. 1294 (S.D. W Va. 1970), *rev'd*, 404 U.S. 78 (1971).

4. 440 F.2d 1144 (6th Cir. 1971).

5. 363 U.S. 603 (1960).

6. *Id.* at 611.

7. *Lofty v. Richardson*, 440 F.2d 1144, 1148-49 (6th Cir. 1971).

a reduction for private insurance and civil damages might offer severe difficulties. The third reason was the most important:

Finally, it is entirely conceivable to us that Congress may have considered Social Security benefits and Workmen's Compensation benefits to be more arguably duplicative of one another than could appropriately be claimed concerning Social Security benefits and the other two types of payments. Both Social Security and Workmen's Compensation are social welfare legislation.⁸ Private accident or disability insurance is a private contract, frequently paid for entirely by the recipient. And, of course, court awards for injuries are private rights derived from the common law involving the principle of compensation for negligence or fault.

Most of the argument for the Workmen's Compensation offset came from employers who generally pay all of the costs for Workmen's Compensation and half of the costs of the Social Security benefits. Their argument before Congress was that they were paying twice for the same injury. This argument would have, of course, no merit at all in relation to a damage action award or to the proceeds of privately purchased accident or disability insurance.⁹

TO WHAT ACTS AND PAYMENTS THE OFFSET APPLIES

The statute applies the offset to benefits "under a workmen's compensation law or plan of the United States or a State."¹⁰ The offset thus

8. It was on this point that the district court in *Belcher v. Richardson*, 317 F. Supp. 1294 (S.D. W. Va. 1970), *rev'd*, 404 U.S. 78 (1971), parted company with the majority. The court argued that workmen's compensation is not a public benefit, but rather a matter of private contract "sanctioned by law." The court equated "public benefit" with "a gift from the public largesse"—a term which might fit public assistance, but which certainly does not fit any social insurance program, including social security itself. Nor is workmen's compensation merely "sanctioned" by law. It is compelled in many states directly, and in most others indirectly. The decision was particularly curious because the court stressed West Virginia law, and in West Virginia the method of financing is an exclusive state fund. But because the fund is supported entirely by employer contributions, the court argued that no public funds were involved, forgetting that all public funds ultimately come from some category of private taxpayers or contributors. In any event, even if the method of financing were private insurance, this does not alter the essentially public purpose and character of the system as a whole. See A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 97.20 (1952) [hereinafter cited as LARSON].

9. *Lofty v. Richardson*, 440 F.2d 1144, 1151-52 (6th Cir. 1971).

10. 42 U.S.C. § 424(a)(2) (1969).

clearly applies to the Longshoremen's Act,¹¹ but it has been held by administrative decision not to apply to recoveries under the Jones Act.¹² It has also been administratively decided that payments under the "Black Lung" act¹³ are periodic benefits under a federal workmen's compensation law for purposes of the offset.¹⁴

Since the design of the offset is to prevent actual duplication of income benefits, it is obviously only fair and logical to exclude from any compensation benefit such amounts as represent medical and legal expenses, and the regulations of the Department of Health, Education and Welfare explicitly so provide.¹⁵ The problem that this sometimes raises in connection with lump-sum awards or settlements is discussed in the next section.

Is the offset provision any less applicable because the compensation award was for a scheduled injury and was therefore not based on actual wage loss? The United States District Court for the Southern District of Mississippi has ruled that the scheduled nature of the injury does

11. *See, e.g.,* *Ladner v. Secretary of Health, Educ. & Welfare*, 304 F. Supp. 474 (S.D. Miss. 1969).

12. Appeals Council Decision, S.S.R. 70-57a (Nov. 1970). Claimant was being paid \$42 a week by the employer's insurance carrier pending a Jones Act settlement.

13. 30 U.S.C. § 901 (1965). For a detailed discussion see *LARSON*, *supra* note 8, § 41.12 (note 47, supplement).

14. S.S.R. 70-39 (July 1970).

15. Amounts included in the workmen's compensation award which are specifically identifiable as being for medical, legal or related expenses paid or incurred by the individual in connection with his workmen's compensation claim, or the injury or occupational disease on which such award or agreement is based, are excluded in computing the reduction under paragraph (a) of this section.

20 C.F.R. § 404.408(d) (1971).

Note, however, that if because of state maximum limits on compensation medical benefits the claimant had to pay some medical expenses out of his own pocket, these private outlays cannot be deducted from the offset. *Iglinsky v. Richardson*, 433 F.2d 405 (5th Cir. 1970). Nor is this construction invalid for inequality of treatment of claimants in different states, because the inequality is the result of state legislation, not the federal act.

Note also that workmen's compensation hospital and medical benefits are deducted from medicare payments. The Social Security Act § 1862(b) provides:

Payment under this title may not be made with respect to any item or service to the extent that payment has been made, or can reasonably be expected to be made (as determined in accordance with regulations), with respect to such item or service, under a workmen's compensation law or plan of the United States or a State. Any payment under this title with respect to any item or service shall be conditioned on reimbursement to the appropriate Trust Fund established by this title when notice or other information is received that payment for such item or service has been made under such a law or plan.

not change the basic nature of the benefit as a periodic payment for disability¹⁶ Claimant had received an award for 52.5 percent loss of use of his right leg, which entitled him to 151.2 weeks of compensation under the Longshoremen's Act. He was paid 55.8 weeks of compensation on a weekly basis, and then received a lump-sum payment for the remaining 95.4 weeks. Claimant contended that the offset should not apply to scheduled injuries at all, on the theory that a distinction should be drawn between a claim based on loss of a scheduled member, which is not dependent on a showing of actual loss of earning capacity, and a claim based on the same loss under the Social Security Act, which requires a showing of actual inability to engage in substantial gainful activity. The court rejected this distinction on the ground that the scheduled injury itself conclusively establishes loss of earning capacity for the period specified, and from that point on the incidents of actual and schedule disability are the same. In this case, the result was reinforced by the fact that the claimant had already been receiving his benefits on a periodic basis, exactly as if they had been for a non-scheduled injury.

This holding is clearly in line with the generally accepted concept in the United States that schedule awards are indeed awards for loss of earning capacity, the only difference from other awards being that the loss is conclusively presumed. However, there is a view in some quarters that schedule awards are at least in part a compensation for physical loss as such.¹⁷ It would not be surprising, then, to see an effort made to resist the offset as to lump-sum awards for scheduled injuries in the small minority of states where the physical impairment theory has some vogue. When, as in the usual case, the schedule award is expressed in a number of weeks, it would presumably be particularly difficult to make the distinction between schedule and non-schedule awards hold. One can, however, see interesting questions approaching on the horizon when the award, as in some disfigurement statutes, is expressed not in weeks but in dollars, often in the rather broad discretion of the administrator. Here again, the sounder theory is that the award is based on presumed impairment of earning capacity,¹⁸ but

16. *Ladner v. Secretary of Health, Educ. & Welfare*, 304 F. Supp. 474 (S.D. Miss. 1969). See also *Knapczyk v. Ribicoff*, 201 F. Supp. 283 (N.D. Ill. 1962), in which the offset compensation award was for 141 weeks for a shoulder and arm injury, although no actual time was lost.

17. See LARSON, *supra* note 8, § 57.10.

18. *Id.* § 58.32.

admittedly the form of the award might complicate the task of asserting and applying the offset.

Although ordinarily the disabilities involved under the two systems would flow from the same illness or injury, it has been held in at least one case under the earlier version of the offset provision that compensation benefits may be offset even when the social security benefit is occasioned by an unrelated disability¹⁹ The claimant had received a lump-sum award for 141 weeks for an arm and shoulder injury, beginning as of June, 1956. In November, 1956 she suffered an unrelated heart attack. It was held that the benefits for the arm injury must be offset against the social security disability benefits for the heart attack. The court, in reaching this conclusion, relied mainly on an inference drawn from the fact that the first offset provision had been amended in 1957 to exclude service-connected veterans' benefits. Obviously, reasoned the court, Congress could not have intended to limit the offset to disabilities stemming from the same injury, since if this had been the case it would have been unnecessary to exempt service-connected injuries that presumably arose before the disabling event under social security. Congress could not be presumed to have enacted useless legislation.

Under the current statute, which explicitly speaks of a "workmen's compensation law or plan of the United States or a State" instead of the more vague periodic federal benefits concept contained in the earlier offset provision, there has been no need for the exemption of veterans' service-connected disability benefits, and consequently this rationale is not directly available. However, with this ruling on the books, Congress, in the later offset provision, applied the offset to periodic benefits for—not "such" or "the same" disability—but "a total or partial disability." It is therefore difficult to see how a limitation to the same disability could be read into the section, both in view of its literal language and the scant legislative and judicial background.

APPLYING THE OFFSET TO LUMP SUMS

When a lump-sum payment is a commutation of or substitute for periodic payments, the regular offset applies,²⁰ and the great majority of reported decisions dealing with ordinary lump-sum payments have

19. *Knapczyk v. Ribicoff*, 201 F. Supp. 283 (N.D. Ill. 1962).

20. 42 U.S.C. § 424(b) (1969).

found them to be subject to the offset for this reason.²¹ This conclusion may be buttressed by state decisions holding that compensation redemption agreements are normally, at least in part, a commutation of weekly payments,²² as well as by reference to the language of the lump-sum award, which sometimes expressly uses some such phrase as "in lieu of weekly payments."²³ However, it is the real nature and purpose of the payment, rather than the words used to describe it, that ultimately controls.²⁴ And, if what the claimant gives up in exchange for the settlement is his right to periodic payments, it does not matter that the calculation of the lump-sum amount itself cannot be shown to have been arrived at by actuarial methods applied to the value of future periodic payments; the offset must still be applied.²⁵

As noted earlier, so much of a compensation payment as is attributable to medical or legal expenses is not to be offset.²⁶ If it appears that this adjustment has been made, the burden is on the claimant to show that the lump sum included some additional medical expense not accounted for in the adjustment.²⁷ But if it is not clear that medical expenses have been deducted from the award before the offset was ap-

21. See, e.g., *Benjamin v Richardson*, Civil No. 20,714 (6th Cir., April 24, 1971); *Rodatz v. Finch*, Civil No. 69-170 (E.D. Ill., Sept. 4, 1970); *Miley v. Finch*, Civil No. 33,560 (E.D. Mich., June 12, 1970); *Bailey v. Finch*, 312 F Supp. 918 (N.D. Miss. 1970); *Nieves v. Secretary of Health, Educ. & Welfare*, Civil No. 63-68 (D.P.R., May 20, 1969); *Ladner v. Secretary of Health, Educ. & Welfare*, 304 F Supp. 474 (S.D. Miss. 1969).

22. *Benjamin v Richardson*, Civil No. 20,714 (6th Cir., April 29, 1971), citing *Wehmeier v. W. E. Wood Co.*, 377 Mich. 176, 139 N.W.2d 733 (1966), for the proposition that, under the Michigan law, a redemption settlement of this type always constitutes in part a commutation of periodic payments. Accord, *Rodatz v. Finch*, Civil No. 69-170 (E.D. Ill., Sept. 4, 1970), citing *Knapczyk v. Ribicoff*, 201 F Supp. 283 (N.D. Ill. 1962); *Miley v. Finch*, Civil No. 33,560 (E.D. Mich., June 12, 1970) (applying Michigan law); *Bailey v. Finch*, 312 F Supp. 876 (N.D. Miss. 1970) (applying Mississippi law); *Nieves v. Secretary of Health, Educ. & Welfare*, Civil No. 63-68 (D.P.R., May 20, 1969) (citing the holding of the Supreme Court of Puerto Rico); *Walters v. Flemming*, 185 F Supp. 288 (D. Mass. 1960) (applying Massachusetts law); S.S.R. 71-15a (March 1971) (the Appeals Council, applying Missouri law, found the lump-sum compromise settlement to be a substitute for periodic payments)

23. *Benjamin v. Finch*, Civil No. 32,816 (E.D. Mich., May 25, 1970).

24. *Nieves v. Secretary of Health, Educ. & Welfare*, Civil No. 63-68 (D.P.R., May 20, 1969). See also *Rodatz v. Finch*, Civil No. 69-170 (E.D. Ill., Sept. 4, 1970). The settlement spoke of "all disputed claims .for future medical and attendant care," but the examiner found that the settlement was really a commutation of periodic payments, and the court affirmed for the reasons stated by the examiner.

25. *Walters v. Flemming*, 185 F Supp. 288 (D. Mass. 1960).

26. See 20 C.F.R. § 404.408(d) (1971).

27. *Benjamin v. Richardson*, Civil No. 20-714 (6th Cir., April 24, 1971).

plied, the case will be remanded for a specific calculation of how much of the payment was for periodic benefits and how much for past and future medical expenses.²⁸

In *Slone v. Finch*,²⁹ the court was confronted with a lump sum of \$8,000 made in settlement of the entire controversy. The administrator, after deducting \$2,000 for attorneys' fees, divided the remainder by approximately \$40, the amount per week that the claimant had been paid up to that time, and applied the offset to the number of weeks so calculated. The court, however, rejected as unsupported by the record the administrator's finding that the entire payment was intended as a substitute for periodic payments. The claimant had in fact incurred medical expense of about \$2,600 during the first year after the injury. The court observed that in the Ohio statute there are two sections dealing with lump sums, one which authorizes a straight commutation of benefits to a lump sum³⁰ and another which authorizes approval of settlements, in connection with which the application must set forth "the nature of the controversy"³¹. The latter, in the court's opinion:

deals with setting at rest something that has never arrived at the periodic payment stage—else why should one, in applying for a final settlement, be required to set forth "the nature of the controversy" ³²

The court then distinguished the simple commutation cases, and added:

In this record there never occurred any event based on which either the period involved in a periodic payment or the amount involved in a periodic payment was determined. The only thing that was determined in this case by the action of the Commission was that \$8,000.00 was a fair amount to pay, not in any commutation, but in exchange for a release of whatever claim it was this claimant made. We point out that the claimant, as part of this settlement, not only released any basic claim he had for periodic payment but also released any claim which he might ever have in the future

28. *Slone v. Finch*, Civil No. 6-70-N (E.D. Va., Nov. 24, 1970); *Miley v. Finch*, Civil No. 33,560 (E.D. Mich., June 12, 1970).

29. Civil No. 6-70-N (E.D. Va., Nov. 24, 1970).

30. OHIO REV. CODE ANN. § 4123.64 (Page 1959).

31. OHIO REV. CODE ANN. § 4123.65 (Page 1959).

32. *Slone v. Finch*, Civil No. 6-70-N (E.D. Va., Nov. 24, 1970).

for any medical or hospital expense—during the period of his disability prior to the settlement such payments amounted to about as much as the periodic in-lieu-of-wages payments.³³

The case was accordingly remanded for specific findings on how much of the lump sum represented a substitute for future medical expense and how much a substitute for periodic payments.

STATE COMPENSATION OFFSET FOR SOCIAL SECURITY AND OTHER FEDERAL BENEFITS

Three states, Colorado, Montana, and Minnesota, apply some kind of deduction to compensation benefits for social security benefits.

The Colorado provision states:

In cases where it is determined that periodic disability benefits granted by the federal old-age, survivors, and disability insurance act are payable to an individual, the weekly benefits payable pursuant to this section shall be reduced, but not below zero, by an amount equal as nearly as practical to one-half such federal periodic benefits for such week; provided, that if provisions of the federal old-age, survivors and disability insurance act should be amended to provide for a reduction of an individual's disability benefits thereunder because of compensation benefits payable under this chapter, then the reduction of compensation benefits provided herein shall be decreased by an amount equal to such federal reduction.³⁴

The Montana provision³⁵ is identical to Colorado's with two exceptions: in place of the words "to an individual," it contains the words, "on account of such injury;" and it omits completely the proviso in the second half of the sentence following the semicolon.

The Minnesota offset is in some ways more limited, and in other ways less. In the subdivision on permanent total disability, there appears this passage:

This compensation shall be paid during the permanent total disability of the injured employee but after a total of \$25,000 of weekly compensation has been paid, the amount of the weekly

33. *Id.*

34. COLO. REV. STAT. ANN. § 81-12-1(4) (1963).

35. Montana Senate Bill 115, Ch. 174, enacted March 3, 1971, effective July 1, 1971.

compensation benefits being paid by the employer shall be reduced by the amount of any disability benefits being paid by any government disability benefit program if such disability benefits are occasioned by the same injury or injuries which give rise to payments under this subdivision. Such reduction shall also apply to any old age and survivor insurance benefits.³⁶

Several observations may be made about these statutes on the strength of the statutory language itself. As to the identity of the social security benefits for which an offset is applied, it may be noted that Montana has carefully limited the offset to benefits for the same injury. Perhaps this was done to avoid the contrary result under the social security offset in *Knapczyk v. Ribicoff*,³⁷ a result which remains possible under the Colorado wording. The Minnesota statute, however, is not even limited to social security disability benefits, since it expressly applies to old age and survivors' benefits. Indeed, for a time Minnesota's reduction applied only to old age and survivors' benefits and not to social security disability benefits.³⁸ This was changed when the act was amended in 1967 to cover any government disability benefits. Note that like Montana, Minnesota has confined the disability benefit offset to benefits occasioned by the same injury.

It is interesting to note that the Colorado-Montana reduction applies only to one-half of the federal benefit. This has obviously been done in response to the familiar argument, repeatedly heard in debates on the Social Security Act offset provision, that, since the employee has contributed half of the "premium" for his social security coverage, it is unfair to deduct anything from an insurance benefit paid for by his own contribution.

One tantalizing problem that arises from a comparison of the literal wording of the Colorado and federal statutes is that of the simultaneous

36. MINN. STAT. ANN. § 176.101(4) (Supp. 1971).

37. 201 F Supp. 283 (N.D. Ill. 1962).

38. *Telle v. Northfield Iron Co.*, 278 Minn. 129, 153 N.W.2d 270 (1967). After receiving the statutory maximum in benefits, claimant was entitled to further benefits if they were credited with amounts he was eligible to receive under Old Age and Survivors Insurance. At the time he was receiving disability benefits under the federal Social Security Act. At age 62, he could have received old-age benefits by giving up the disability benefits, but since the latter were higher, he did not do so. At age 65, the disability benefits were automatically changed into old-age benefits. The court held that federal disability benefits were not to be credited against state benefits, but the lesser amount of old-age benefits claimant could have received at 62 should be so credited, and the benefits received at age 65 were all to be credited.

mutual offset. The federal statute says that its offset shall not apply to a state compensation law that offsets social security benefits, and while the Colorado statute does indeed offset social security benefits, it does so with the proviso that this offset shall be decreased by the amount that the federal benefits are reduced to offset state compensation benefits. This is the kind of rotating relationship that can induce a distinct sense of giddiness if contemplated too long. It is of little help to suggest that the locus of the offset should be fixed by reference to the point at which the claimant actually first seeks his benefits, because Colorado has held in *Hurtado v. C.F.&I. Steel*³⁹ that its offset applies when the claimant is *entitled* to the federal benefit, whether or not he has actually applied for or received it. But how much is the social security benefit to which Hurtado was entitled—the full benefit, or the benefit reduced by offsetting the Colorado compensation benefit? The federal act says that the social security benefit shall not be reduced if the state act provides for the reduction of state benefits to account for federal payments, which the Colorado act does. Or does it? In view of the proviso stipulating that the state reduction shall itself be reduced by the federal reduction, is there any state reduction left on which to base the exception to the federal reduction? It is the sort of thing one would prefer not to have to think about.⁴⁰

The Colorado provision, having been enacted before the current federal offset provision was adopted, could not anticipate the exact form the federal offset would take—including the exception for state offsets that has produced the circular situation just described. It is significant that Montana, with the advantage of having the federal statute before it at the time of drafting its version, omitted the Colorado proviso. Complications can still be foreseen, due among other things to the differing formulas controlling the amount of offset—the

39. *Hurtado v. C.F.&I. Steel Corp.*, 168 Colo. 37, 449 P.2d 819 (1969). Colorado provides for a reduction in weekly benefits when a claimant is also entitled to receive periodic disability benefits from federal social security. Claimant was entitled to such benefits, but did not claim nor receive them. Employer held entitled to reduce weekly benefits, notwithstanding claimant's failure to receive social security benefits, since he had a duty to obtain them if possible. The court further held that in the event the employee disagreed with the amount of reduction, the industrial commission had jurisdiction to determine if federal social security benefits were payable, and if so the amount.

40. Informal inquiries leave the impression that the administrators so far are living with this tangle by adopting a sort of Alphonse-and-Gaston give-and-take handling of these cases as they arise.

state limitation to half of the federal benefit and the federal limitation of the combined benefits to 80 percent of "average current earnings."

Colorado has softened the impact of the offset significantly in the case of occupational diseases. Although Colorado generally pays total permanent disability benefits for life, it has a fixed maximum aggregate amount payable for occupational diseases.⁴¹ A claimant was awarded benefits for permanent total disability due to silicosis, but since he was also receiving federal social security benefits, the weekly amount was reduced by the industrial commission, along with the maximum aggregate amount. The court, however, held that since the statute only referred to weekly benefits, it was error to reduce the aggregate amount claimant was entitled to receive in compensation benefits.⁴² Thus, if the claimant survived long enough to consume the maximum aggregate compensation amount he would ultimately have received the same number of dollars as if there had been no offset, although in smaller weekly installments.

Apart from specific offset provisions,⁴³ the receipt of federal benefits

41. As of 1970, this total maximum was \$18,623.50.

42. *Indus. Comm'n v. Rowe*, 162 Colo. 248, 425 P.2d 274 (1967).

43. As to offsetting National Guard benefits, see the following cases:

Contois v. State, 95 R.I. 296, 186 A.2d 741 (1962). A member of the National Guard died as a result of a compensable heart attack. The Rhode Island statute [R.I. GEN. LAWS ANN. § 28-31-11 (1956)] provides that state workmen's compensation benefits shall be payable to a member of the national or state guard, but reduced by the amount received "from the United States." The court held that full state compensation death benefits were payable to the dependent widow without reduction for amounts paid by the Veterans' Administration, since § 28-31-11 was silent as to death benefits.

Coletta v. State, — R.I. —, 263 A.2d 681 (1970). The Rhode Island statute provides that when payments received from the United States by an injured member of the National Guard are *less* than the workmen's compensation to which he is entitled, the payments from the United States shall be deducted from the compensation payable. In the present instance, the payments received from the United States were more. The court held that the obvious purpose was to establish an offset, and that to fail to apply it when the amount of federal payments was more than the compensation would lead to an absurd and unreasonable result, in contravention of the clear intention of the legislature. The court also held, however, that a schedule award for an eye should not be subjected to the offset, since here the statute was ambiguous, and the claimant should have the benefit of the doubt under the liberal construction principle.

As to coordination with veterans' medical benefits, see, *Theriot v. Schlumberger Well Surveying Corp.*, — La. App. —, 131 So.2d 94 (1961). The Veterans' Administration provided free medical care upon the claimant's statement that he was unable to pay the costs. Thereafter the claimant could not claim medical benefits for the V.A. hospital expenses. The V.A. could not be awarded payments directly, nor could the V.A. subsequently charge the claimant for the free service.

does not ordinarily affect a worker's right to workmen's compensation benefits,⁴⁴ although it may be relevant to the issue of dependency when a relative is required to establish actual dependency⁴⁵

CONCLUSION

Although the Social Security Act's offset provision is still the object of intense criticism, it seems probable that this time the offset is here to stay. The 80 percent ceiling on combined benefits is itself the target of a great deal of pressure, and some upward revision of that ceiling, even to 100 percent, is not to be ruled out. Difficult questions both of amendment and interpretation still lie ahead, but the difficulties should not be insuperable if the central purpose of the offset idea is kept firmly in view: to provide the beneficiary with the fullest possible protection to which he is entitled under a coordinated social insurance system, while always respecting the cardinal social insurance principle that the benefits for disability must never be more attractive than the corresponding earnings for active employment.

44. *Cudahy Packing Co. v. Indus. Comm'n*, 7 Ariz. App. 335, 439 P.2d 307 (1968). After becoming totally disabled, claimant was entitled to social security disability benefits. Held, these benefits were not to be considered in determining loss of wage-earning capacity.

Meyers v. Walsh Constr. Co., 12 App. Div. 2d 371, 211 N.Y.S.2d 590 (1961). A seventy-year-old claimant had quit work and elected to receive Social Security benefits. The court stated that his actions did not control his right to compensation, nor would it justify a finding that the claimant had removed himself from the labor market.

Aguillina v. Victor Adding Mach. Co., 26 App. Div. 2d 869, 273 N.Y.S.2d 988 (1966). Prior to claimant's hearing, but after his injury, he had been found totally disabled by reason of an unrelated stomach ailment, by the Veterans' Administration and the Social Security Administration. Finding that present disability was due to the compensable accident and award of benefits affirmed.

Snead v. Adams Constr. Co., 72 N.M. 94, 380 P.2d 836 (1963). Compensation award for 100 percent disability granted in addition to a previous award for 60 percent disability granted by the Veterans' Administration for a service-connected disability.

Cf. the special subsequent-injury provision involved in *Subsequent Injuries Fund v. Indus. Acc. Comm'n*, 217 Cal. App. 2d 322, 28 Cal. Comp. 144, 31 Cal. Rptr. 508 (1963). The claimant was adjudged totally disabled—31.75 percent due to the industrial accident and the remaining 68.25 percent due to preexisting conditions. The Subsequent Injuries Fund claimed credit for "monetary payments received by the employee from any source whatsoever for or on account of said preexisting disability" [CAL. LABOR CODE § 4753 (1955)]. The amount the claimant received under Social Security Disability Insurance Benefits (42 U.S.C.), being paid for his entire disability were credited to the extent of 68.25 percent, as representing the portion of benefits applicable to the preexisting condition.

45. See, e.g., *Peterson v. Thief River Falls Welding Co.*, 245 Minn. 212, 72 N.W.2d 75 (1955). Held, that Social Security payments should be taken into account in determining dependency of parents.