

Social Security and Medicare Set Asides and Workers' Compensation



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How do we pay for Social Security?

- ▶ Approximately 12.4% of Gross Wages (F.I.C.A) pay for Social Security.
- ▶ That is approximately 6.2% paid by the employer and employee up to \$118,500.00 in wages usually through payroll deductions.



What does it cover?

- ▶ Social Security is meant to cover retirement, blind persons, and disability (SSD-I and SSI) programs.
- ▶ The current maximum monthly Social Security Retirement benefit is \$2,663.00.



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Social Security



- ▶ There are three types of Social Security Benefits.
- ▶ Social Security Disability Benefits
- ▶ Social Security Retirement Benefits
- ▶ Social Security Death Benefits

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Social Security



- ▶ So what's the difference and how does that affect workers' compensation anyway??
- ▶ The difference is; they each have specific criteria and requirements to collect benefits.
- ▶ Age eligibility is not the only factor!



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Social Security Fun Facts

- ▶ According to the social security's most recent online publication; 1 in just over 4 of today's 20 year olds will become disabled before they reach the retirement age of 67.
- ▶ According to the California Department of Aging, the elderly age group will have an overall increase of 112% during the period from 1990 to 2020.



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Social Security Fun Facts

- ▶ The age group considered as elderly was 60 and older... Yikes!!
- ▶ More than half the counties in the state of California will have over a 100% increase and the majority of this growth is to take place in the years between 2000–2020.



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Social Security Fun Facts

- ▶ There was a study done by UCLA in 2006 that reflected the median age of an injured worker was 42 years.
- ▶ 46% of that study were females and 54% males.
- ▶ The study consisted of all different ethnic backgrounds.



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Social Security Disability Qualifiers

- ▶ A candidate must have worked in a job that is covered by Social Security, another words paid into Social Security.
- ▶ They must meet the “credit” criteria.
- ▶ They must have a medical condition that meets the “Social Security definition” of disability.



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Social Security Disability Credits

- ▶ You must have worked long enough and recently enough.
- ▶ The number of work credits you need to qualify for disability benefits depends on your age when you become disabled.
- ▶ Generally, you need 40 credits, 20 of which were earned in the last 10 years.



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Social Security Disability Credits

- ▶ You can earn up to four credits each year.
- ▶ In 2014, for example, you earn one credit for each \$1,200 of wages.
- ▶ When you've earned \$4,800 you've earned four credits.
- ▶ In 2015 you will need to earn \$1,220 for every one credit or \$4,880 for four credits.



Social Security Disability Credits

- ▶ Younger workers may qualify with fewer credits.
- ▶ Social Security always gives consideration to special circumstances.



Social Security Disability Definition

- ▶ Disability under Social Security is based on your inability to work.
- ▶ Social Security does not pay for partial disability or short-term disability.
- ▶ The disability must be considered total disability or permanent.



Social Security Disability Definition

- ▶ Does that mean that only injured workers who are deemed 100% disabled can apply for Social Security Disability?
- ▶ Not necessarily!
- ▶ The rules say the person “cannot do work they did before”; “cannot adjust to other work”; and the disability has lasted or is expected to last for at least one year or to result in death.



Social Security Disability Definition

- ▶ According to Social Security, this is a strict definition of disability.
- ▶ So lets compare:
 - Workers' Compensation disability is on the basis of a limitation of a person's ADL's.
 - Social Security considers disability based on an inability to work their Regular job or an Alternative job.



Social Security Disability

- ▶ Workers' Compensation medicals address both impairment and work restrictions.
- ▶ We often see these medicals being used to support a Social Security Disability Claim.
- ▶ In reviewing many large loss files the ages of injured workers' applying for Social Security Disability are younger.



Social Security Disability

- ▶ So if you are off work at least a year.
- ▶ If your condition interferes with basic work-related activities.
- ▶ If you work 10 years and have 40 credits.
- ▶ And, if it meets the list of conditions Social Security considers disabling you may qualify.



List of Body Systems Accepted

- ▶ Adult Listings (Part A)
- ▶ Musculoskeletal System – Arthritis
- ▶ Special Senses and Speech
- ▶ Respiratory System



List of Body Systems Accepted

- ▶ Cardiovascular System
- ▶ Digestive System– Sounds like some add on's
- ▶ Genitourinary Disorders
- ▶ Hematological Disorders
- ▶ Skin Disorders



List of Body Systems Accepted

- ▶ Endocrine Disorders– Diabetes aggravations
- ▶ Congenital Disorders that affect Multiple Body Systems
- ▶ Neurological– Sounds like some add on's
- ▶ Mental Disorders– Psyche components
- ▶ Malignant Neoplastic



Expedited Disability Claims

- ▶ There are three compassionate allowances that expedite the process.
- ▶ Acute Leukemia
- ▶ Lou Gehrig's (ALS)
- ▶ Pancreatic Cancer



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Benefits Provided

- ▶ Cash benefits for people who are unable to work for a year or more.
- ▶ Benefits continue until the person is able to return to work on a regular basis.
- ▶ If you receive Social Security Disability Benefits and then reach the age of full retirement the benefits automatically convert, but remain the same amount.



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Social Security Retirement

- ▶ This is a more straight forward benefit.
- ▶ You can begin getting Social Security Retirement benefits as early as 62.
- ▶ If you receive the benefit early, benefits are reduced as much as 30%.



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Social Security Retirement

- ▶ Full retirement age is 66 years.
- ▶ If you are born in 1959 you are still eligible for full retirement benefits at the age of 66.
- ▶ If you were born in 1960 the full retirement age has increased to age 67.



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Social Security Retirement

- ▶ You must have enough credits to obtain Social Security Retirement or 40 credits which if you earn four credits per year is 10 years of work.
- ▶ You must have paid into Social Security.



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Social Security Death Benefits

- ▶ Social Security Survivor benefits because of being widowed.
- ▶ As of 2014 there are approximately five million widows and widowers receiving monthly benefits based on their deceased spouse's earnings records.



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Social Security Death Benefits

- ▶ Widow and Widowers can receive:
- ▶ Reduced benefits as early as age 60 or full benefits at full retirement age or older.
- ▶ Benefits as early as age 50 if he or she is disabled and their disability started before or within seven years of the death of their spouse.



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Offsets

- ▶ Offsets were originally instituted in 1956 and then eliminated in 1958.
- ▶ They were finally reinstated in 1965 to present.
- ▶ An offset occurs when an injured worker is concurrently receiving workers' compensation and social security.

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Offsets

- ▶ The offset can be based on a periodic payment like a stipulation or F&A
- ▶ It can also be based on a lump sum payment like a compromise and release agreement.
- ▶ The combined amount cannot exceed 80% of the workers' average current earnings.



Offsets

- ▶ The combined payments can never be less than the amount of total Social Security disability benefits.
- ▶ The average current earnings are defined as the highest of:
- ▶ The average monthly wage on which the unindexed disability primary insurance amount is based.



Offsets

- ▶ The average monthly earnings from covered employment and self-employment during the highest five consecutive years after 1950, or
- ▶ The average monthly earnings in the calendar year of highest earnings from covered employment during the five years ending with the year in which disability began.



Offsets

- ▶ The offset of Disability Insurance benefits applies to disabled workers under the age of 65 and their families.
- ▶ The purpose of an offset is to disallow what would be considered excessive payments.
- ▶ In 1981 the offset was also extended to certain public disability benefits such as CAL Pers.



Offsets

- ▶ As of December 2003 there were about 7.6 million beneficiaries.
- ▶ 1.3 million or about 17% had some connection to workers' compensation.



Things not subject to SSD Offset

- ▶ Attorney fees
- ▶ SJDB
- ▶ RTW Benefits
- ▶ Penalties and Interest
- ▶ Right to file a petition to reopen
- ▶ Death Benefits
- ▶ Mileage reimbursement
- ▶ Insurance deductibles and co-payments including those for Medicare Parts A, B, and D.



Addendums

- ▶ The WCJ needs to pay attention to them.
- ▶ There needs to be a specific allocation and it must be evidence based for SSA approval.
- ▶ If the WCJ does not approve allocation of the C&R proceeds then SSA will use the whole C&R as SSD offset at the TTD maximum weekly rate until the total amount of the C&R is paid out.



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Order Approval of a C&R

- ▶ It protects the applicant against SSD offset.
- ▶ It must be written on the original OAC&R and not on a supplemental order page.
- ▶ It may be difficult to avoid an SSD offset on large settlements.



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Trends in Social Security Disability Benefits and Workers' Comp

- ▶ According to the board of directors of Social Security when Social Security flattens out there is an increase in workers' compensation and vice versa.
- ▶ No official study has been done to determine when one benefit becomes harder to receive based on reforms, if the other becomes more in demand.



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Ogilvie/Le Boeuf

LeBoeuf v. WCAB (1983) 48 CCC 587

If injury prevented injury worker from being retrained (VR), then injured worker found to be 100% permanently and totally disabled.

Ogilvie v. WCAB (2011) 76 CCC 624

Vocational evidence can be used to rebut diminished future earning capacity ranking in 2005 Schedule for Rating Permanent Disability. No practical guidance regarding how to rebut rating, other than in cases of 100% loss of future earning capacity.



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Ogilvie/Le Boeuf (cont'd)

- ▶ Some WCALJ's are relying on the VR expert's % of loss of earning capacity as the rebuttal % of PD. NO BINDING SUPPORT FOR THIS APPROACH.
- ▶ In *LeBoeuf* situations analysis is required of how much inability to return to work (loss of earning capacity) is actually due to work injury.



To Submit or Not to Submit Medicare Set Asides? That Remains the Question!

- ▶ According to the CMS's own publications, there are no statutory or regulatory provisions requiring that you submit a Workers Compensation Medicare Set Aside (WCMSA) amount proposal to CMS for review.
- ▶ If a proposed WCMSA meets the review thresholds the proposal can be submitted to CMS for approval.
- ▶ If the parties to a WC settlement stipulate to a WCMSA but do not receive CMS approval, then CMS is not bound by the set-aside amount.



Medicare Set Aside

- ▶ If CMS disagrees they can refuse to pay for future medical expenses.
- ▶ Since Medicare always considers themselves the second payer in workers' compensation cases, the risk for non-approval of an MSA is on the first payer which is usually the insurance company.



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Medicare Set Aside

- ▶ Can an injured worker be held liable for medical costs that CMS finds over and above the MSA?
- ▶ If CMS approves the WCMSA and the account is later exhausted, Medicare will pay regardless of the amount of care required.



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So What are the Thresholds?

- ▶ The claimant is a **Medicare beneficiary** and the total settlement amount is **greater than \$25,000.00**; or
- ▶ The claimant has a **reasonable expectation of Medicare enrollment within 30 months of the settlement date** and the anticipated total settlement amount for future medical expenses and disability/lost wages over the life or duration of the settlement agreement is expected to be **greater than \$250,000.00**.



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So What are the Thresholds?

- ▶ A claimant has a reasonable expectation of Medicare enrollment within 30 months if any of the following apply:
 - The claimant has applied for Social Security Disability Benefits (Medicare coverage begins 24 months after entitlement to SSD)
 - The claimant has been denied Social Security Disability Benefits but anticipates appealing that decision



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So What are the Thresholds?

- ▶ The claimant is in the process of appealing and/or re-filing for Social Security Disability benefits
 - The claimant is 62 years and 6 months old
 - The claimant has an End Stage Renal Disease (ESRD) condition but does not yet qualify for Medicare based upon ESRD



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