

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DONALD G. RIOUX,)
)
 Plaintiff)
)
 v.) **Civil No. 92-306-P-H**
)
 DONNA E. SHALALA,)
 Secretary, United States Department)
 of Health & Human Services,)
)
 Defendant)

ROBERT C. SMITH,)
)
 Plaintiff)
)
 v.) **Civil No. 92-184-B**
)
 DONNA E. SHALALA,)
 Secretary, United States Department)
 of Health & Human Services,)
)
 Defendant)

REPORT AND RECOMMENDED DECISION ¹

These Social Security Disability appeals both raise the question whether the Secretary erred in deciding that the plaintiffs' disability payments should be subject to offset as a result

¹ These actions are properly brought under 42 U.S.C. 405(g). The Secretary has admitted that the plaintiffs have exhausted their administrative remedies. The cases are presented as requests for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 1, 1993 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record. In these cases, post-oral argument briefing was ordered.

of lump sum workers' compensation settlements each has received. The plaintiffs assert that a regional supplement to the Social Security Administration's ("SSA") Program Operations Manual System ("POMS")² entitled "Boston No. 4-30 (8/86) Offsets, Deductions and Nonpayment R11501.055" ("Boston No. 4-30") obligates the Secretary to determine the portion of the lump sum settlements allocable to permanent impairment even though neither the settlements themselves nor the Workers' Compensation Commission ("Commission") approval of them reflect such an allocation.³ The significance of this is that recoveries for permanent impairment are exempt from Social Security offset.

The Administrative Law Judges' findings are similar in both cases. Following hearings, the Administrative Law Judges determined that the claimants had applied for and had been awarded disability insurance benefits, Finding 1, Rioux Record p. 19; Smith Record p. 23; that they were awarded and had received lump sum workers' compensation settlements which were approved by the Commission, Finding 2, Rioux Record p. 19; Smith Record p. 23; that the lump sum settlement awards were in their entirety commutations of and substitutes for future periodic workers' compensation benefits and payments, were conditioned on the claimants' relinquishment of their right to periodic workers' compensation benefits and were therefore countable for the purpose of applying the offset prescribed by 42 U.S.C. 424a, Findings 3-4, Rioux Record p. 19; Smith Record p. 23; and that the disability insurance benefits payable should be offset, Finding 5, Rioux Record p. 19; Smith Record p. 23. The Appeals Council declined to review the decisions, Rioux Record pp. 4-5; Smith Record pp. 3-4, making each of them the final determination of the

² The POMS is the policy and procedure manual used by employees of the Department of Health and Human Services in evaluating claims. It replaced the "Claims Manual" previously used. *See Evelyn v. Schweiker*, 685 F.2d 351, 352 n.5 (9th Cir. 1982).

³ In the Smith case, no mark whatever appears in the "permanent impairment" column of the settlement form. Smith Record p. 66. In the Rioux case, the designation "-0-" appears in the "permanent impairment" column. Rioux Record p. 49. Even in the absence of a designation on the Smith form, it is apparent that no portion of the settlement was allocated to permanent impairment since the dollar amounts that appear in the other columns add up to the designated total.

Secretary. 20 C.F.R. 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

42 U.S.C. 424a(a) provides in relevant part that if, in any month, an individual eligible for Social Security Disability benefits is also eligible for "periodic benefits on account of his or her total or partial disability (whether or not permanent) under a [workers'] compensation law or plan of . . . a State," then that individual's Social Security benefits are reduced by the amount by which the sum of such benefits and the workers' compensation periodic benefits exceeds the higher of 80% of his "average current earnings" or the total of the disability insurance benefits entitlement prior to application of the reduction. The statute also charges the Secretary with responsibility for calculating the mandated reductions for periodic benefits payable other than on 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." 42 U.S.C. 424a(b). Congress enacted section 424a in response to criticism that injured workers eligible for both federal disability insurance benefits and state workers' compensation benefits were receiving benefit compensation in excess of pre-disability take-home pay. *Richardson v. Belcher*, 404 U.S. 78, 82-83 (1971).

SSA regulations specify that certain medical and legal expenses are not counted for this reduction. 20 C.F.R. 404.408(d). The regulations also direct the SSA to calculate the reduction for lump sum payments that constitute a "commutation of or a substitute for periodic benefits, such as a compromise and release settlement." 20 C.F.R. 404.408(g).

The permanent impairment compensation to which the plaintiffs are entitled depends upon the workers' compensation law in effect on the date of injury. 39 M.R.S.A. 56-B applies to injuries occurring after November 19, 1987 and therefore to Rioux's injury of March 9, 1989.⁴ 39 M.R.S.A. 56-B (1989). Its predecessor, section 56, applies to injuries occurring before November

⁴ Rioux Record p. 19. Rioux suffers bilateral carpal tunnel syndrome. *Id.* p. 49.

20, 1987 and therefore to Smith's injury of December 23, 1983.⁵ Both sections provide schedules of compensation for permanent impairment based on the particular injury sustained. Section 71-A, as does its predecessor, section 71, allows for lump sum settlements in discharge of liability in which rights to future benefits are extinguished. 39 M.R.S.A. 71-A (1989).

The Secretary argues that there is no basis for concluding that the settlements at issue were made pursuant to sections 56 or 56-B, and asserts that they are instead lump sum settlements, or commutations, under section 71-A. Secretary's Memorandum pp. 4-5. Section 71-A provides that an employer and employee may by agreement discharge any liability for compensation, in whole or in part, by the employer's payment of an amount to be approved by the Commission and that either of them may petition the Commission for an order commuting all future benefits to a lump sum.

Section 71-A does not preclude an award for permanent impairment. Nevertheless, the Law Court appears to place the burden on the claimant to show, by means of a stipulation in an agreed-upon statement of facts or by some other evidence of record, that the lump sum represents something other than wage replacement. *Soper v. St. Regis Paper Co.*, 411 A.2d 1004, 1008 (Me. 1980). In these Social Security Disability appeals, the claimants have presented evidence of partial permanent impairment developed long after the workers' compensation settlements were approved.⁶

In Rioux's case, an independent medical examination was conducted on February 4, 1992. Rioux Record, p. 72. On the basis of that examination, Dr. Christopher Brigham concluded that Rioux has a 17.5% permanent impairment to his right upper extremity and a 10% permanent impairment to his left upper extremity.⁷ *Id.* p. 78. In Smith's case, an independent medical examination was performed on December 10, 1991. Smith Record p. 87. Dr. Donald Hankinson determined

⁵ Smith Record p. 11. Smith suffered an injury to his back and right elbow. *Id.* p. 66.

⁶ Rioux's settlement was approved on October 31, 1990 and Smith's on October 25, 1989.

⁷ Rioux suggests that this translates to 110 weeks of workers' compensation benefits not subject to offset. *See* Rioux Itemized Statement of Specific Errors at 2.

therefrom that Smith has a 14% permanent impairment of the back.⁸ *Id.* at 92. Despite these after-the-fact evaluations, I will consider the appeals within the framework of sections 56 and 56-B.

The Maine workers' compensation laws in effect at the time of the plaintiffs' injuries provided that an employee with certain specified permanent injuries could receive a lump sum payment for those injuries in addition to weekly benefits based on an incapacity for work. 39 M.R.S.A. 56, 56-A (both sections repealed 1987, replaced by 56-B); 39 M.R.S.A. 56-B. The Secretary suggests that the payment for a permanent impairment is in reality compensation for loss of income as well and therefore is subject to offset. However, Maine law is clear that a lump sum settlement under section 56 (and so presumably under its successor, section 56-B, also) may represent not only a substitute for a periodic benefit on account of partial or total incapacity for work but also an additional award for loss of bodily function. *Bean v. H.E. Sargent, Inc.*, 541 A.2d 944, 946 (Me. 1988). In *Bean*, the Maine court explained:

Since 1965 when the Legislature changed the Workers' Compensation Act to provide that permanent impairment benefits be paid to an injured employee in a lump sum in addition to any weekly compensation for a work incapacity, a permanent impairment benefit has not been related in any way to wage replacement. . . . An injured employee may be entitled to weekly compensation for either total or partial incapacity for work over the period of the weeks of the incapacity as well as a one-time, lump sum payment of compensation for a permanent impairment to the employee's body. The payment of compensation for a permanent impairment pursuant to sections 56 and 56-A is not dependent on loss or diminution of wages and is paid without regard to whether the permanent impairment has, in fact, adversely affected the employee's capacity to work. The payment of a permanent impairment benefit, pursuant to sections 56 and 56-A, is not compensation for any actual period that the employee is totally incapacitated and unable to work, but for the loss of function of an injured part of the body. The period of presumed incapacity referred to in sections 56 and 56-A is simply an

⁸ Smith represents that this translates to 28 weeks of workers' compensation benefits not subject to offset. *See* Smith Itemized Statement of Specific Errors at 2.

arbitrarily designated multiplier used in mathematically calculating the amount of the permanent impairment award.

Id. (citations and footnote omitted).

The fact remains, however, that the degree of permanent impairment that appears in the record derives from evidence that has been submitted to the Administrative Law Judge by each plaintiff and not from a Commission-approved agreement between the plaintiff and his employer. Section 56-B(4) states that "[a] petition for determination of the percentage of impairment must be filed with the commission no later than the date of maximum medical improvement" 39 M.R.S.A. 56-B(4). The record is devoid of any indication that the plaintiffs ever petitioned the Commission for an award of permanent impairment or that there was any agreement approved by the Commission as to permanent impairment.⁹ As previously noted, the Commission simply approved lump sum settlements lacking any positive designation of a portion for permanent impairment.¹⁰ Rioux, Record p. 49; Smith, Record p. 66.

At oral argument the plaintiffs took the position that, pursuant to Boston No. 4-30, the Secretary has an affirmative obligation to determine whether part of the lump sum workers' compensation settlements is attributable to permanent impairment, even in the absence of any such designation by the Commission. The Secretary asserts that Boston No. 4-30 is an informal guide

⁹ At oral argument, the plaintiffs' attorney stated that one does not have to petition for permanent impairment, but that one could either petition or enter into an agreement approved by the Commission or the Commission could do a "memorandum of payment." There is nothing in the record to indicate that any of these procedures have been followed to determine what portion of the settlement, if any, is attributable to permanent impairment. In Smith's case, an entry for "permanent impairment" in the "Summary of Proposed Commutation" has been crossed out. Smith Record p. 66. In Rioux's case, no entry was ever made. Rioux Record p. 49.

¹⁰ In their decisions, the Administrative Law Judges noted that "The claimant does not take the position that the Maine Workers' Compensation Commission actually awarded him a lump sum payment for 'permanent impairment.' Nor does he take the position that he ever petitioned for such an award." Rioux Record p. 18; *see also* Smith Record p. 23. The Administrative Law Judges then concluded that the plaintiffs' argument that the Secretary should find that they were entitled to awards for permanent impairment, with that amount excluded from the offset mandated by 42 U.S.C. 424a, was without merit. *Id.*

only and is not binding on an administrative law judge. The Secretary's position, expressed at oral argument, is that if a Commission-approved settlement does not reveal what portion is attributable to permanent impairment, the Secretary will make no exclusion from offset.

Boston No. 4-30, which was drafted to address specific situations under the Maine Workers' Compensation Act, provides:

Lump sum payments made under either Section 56 or 56A [sic] of Maine's Workers' Compensation (WC) Act are excluded from offset considerations.

Based on an Office of General Counsel determination, because payments made under Section 56 or 56A [sic] of the Maine WC Act are expressly payable "in addition to" periodic payments and are not "a commutation of, or substitute for periodic payments" within the meaning of Section 224(b) of the Social Security Act, they are not to be considered for offset purposes.

Although such cases will not be common, ask the beneficiary if he/she is (or will be) receiving a lump sum WC payment *in addition to* periodic WC benefits. If yes, *and* you determine that the lump sum payment is pursuant to 56 or 56A [sic] of the Maine WC Act, do not consider the additional lump sum in computing offset.

Boston No. 4-30 (8/86) Offsets, Deductions and Nonpayment R11505.055 (emphasis in original).

Boston No. 4-30 is a regional supplement to the POMS. In enacting the Social Security Benefits Reform Act of 1984, P.L. No. 98-460, 98 Stat. 1794 (codified in scattered sections of 42 U.S.C.), Congress discussed the distinction between regulations, rulings and the POMS. H.R. Rep. No. 1039, 98th Cong., 2d Sess. 35, *reprinted in* 1984 U.S.C.C.A.N. 3093. Regulations, or substantive rules, have the effect of law and are binding on all levels of adjudication including state agencies, administrative law judges, the SSA's Appeals Council and the federal courts. *Id.* Rulings are interpretative policy statements issued by the Secretary and other interpretations of law including selected federal court decisions, and are binding on all levels of administrative

adjudication. *Id.* The POMS, in contrast, is "a compilation of detailed policy instructions and step-by-step procedures for the use of State agency and SSA personnel in developing and adjudicating claims. The POMS is not binding on the Administrative Law Judges, Appeals Council or Courts." *Id.*

The Supreme Court has said of the SSA's Claims Manual (predecessor to the POMS) that: "[It] is not a regulation. It has no legal force, and it does not bind the SSA. Rather it is a 13-volume handbook for internal use by thousands of SSA employees, including the hundreds of employees who receive untold numbers of oral inquiries . . . each year." *Schweiker v. Hansen*, 450 U.S. 785, 789 (per curiam), *reh'g denied*, 451 U.S. 1032 (1981). The Ninth Circuit, citing various Supreme Court cases, including *Hansen*, neatly summarized the effect of the POMS when it stated that, "while the guidelines [in POMS] do not have the force and effect of law, they are not of absolutely no effect or persuasive force." *Evelyn v. Schweiker*, 685 F.2d 351, 352 n.5 (9th Cir. 1982) (citations omitted).

The First Circuit has not spoken directly on the effect or value of the POMS, but appears to have made a distinction between the "ordinary effect of POMS" and instructions by way of POMS that "have been presented to [the court] unequivocally as the Secretary's policy and interpretation." *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 23 (1st Cir. 1986). In *Avery*, the court stated that "We cannot believe that such a deliberate effort to 'clarify' SSR 82-58 and [one of its examples] would be intended to guide only the deciders of first instance" and characterized POMS DI T00401.570 as "the latest word on departmental pain policy, committing the Secretary and superseding any inconsistent discussion and examples." *Id.* at 24. The court noted that the Secretary's brief on appeal contained a statement that during the interim before new policies were developed pursuant to the Pain Commission's report and actions of Congress (*i.e.*, the Social Security Disability Reform Act), the Secretary's regulations as explained in SSR 82-58 "and as further articulated in the new POMS instruction is the national policy on pain." *Id.* at 23 n.5.

Such a sweeping statement can hardly be found to apply to Boston No. 4-30. While it serves as a guide in the initial stages of assessment of claims for social security benefits, I conclude that the Secretary is not bound to follow Boston No. 4-30 either by simply accepting what the plaintiffs have proposed as the portion of the lump sum settlements that reflects permanent impairment or by designating some figure of her own in the absence of one agreed upon by employer and employee and approved by the Commission.

I note that even if Boston No. 4-30 were applied, the Secretary would not be required to exclude any portion of the settlements from offset. The plaintiffs are asking the Secretary to fashion and retrofit permanent impairment findings to previously agreed-upon and approved lump sum settlements. Although the plaintiffs have presented evidence that the injuries sustained have resulted in permanent impairment, the settlements themselves do not reflect any allocations for permanent impairment, even though each plaintiff had ample opportunity to request a figure representing one. The Secretary would be justified in concluding that no part of the lump sum settlements is attributable to permanent impairment and that, as the lump sums had not been awarded pursuant to section 56 or 56-B, they were not eligible for exclusion from offset.

I therefore recommend, in both appeals, that the Secretary's decision be *AFFIRMED*.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 27th day of May, 1993.

David M. Cohen
United States Magistrate Judge