

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

PETER McCOLLETT,)	
)	
Plaintiff)	
)	
v.)	Docket No. 04-81-B-W
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION¹

The plaintiff in this Social Security Disability (“SSD”) appeal presents the same issue addressed by this court over three years ago in the case of *Rioux v. Massanari*, 2001 WL 574615 (D. Me. May 25, 2001), *aff’d* Docket No. 00-302-P-H (D. Me. July 2, 2001). For reasons which counsel for the defendant was unable to explain satisfactorily at oral argument, the plaintiff’s appeal from the decision of the administrative law judge, which was issued in this case on October 13, 2000, Record at 23, languished before the Appeals Council until April 28, 2004, *id.* at [ii], 5. I recommend that the decision of the commissioner be vacated and the cause remanded for recalculation of the offset from the plaintiff’s weekly benefits of his workers’ compensation settlement payments under 42 U.S.C. § 424a.

¹ This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on November 19, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to *(continued on next page)*

As was the case in *Rioux*, the question presented here concerns the application of section 424a to cases in which an applicant for SSD benefits who had received a lump sum settlement on a workers' compensation disability claim returned to the Maine Workers' Compensation Board after receiving that approved settlement and obtained a statement allocating the lump sum over his remaining life expectancy for purposes of minimizing the offset against social security benefits required by the statute. The commissioner declined to use the allocated weekly rate so determined in calculating the amount of benefits which the plaintiff was to receive, despite the fact that the agency had accepted such amendments or addenda to Maine workers' compensation lump sum settlement decrees as a basis for calculating offsets under section 424a at least from some time in 1994 through early 1997.

The administrative law judge in this case found that the plaintiff had been entitled to SSD benefits since December 1987, Finding 1, Record at 22; that he sustained work-related injuries on May 5, 1991 and October 4, 1994 for which he was subsequently awarded workers' compensation benefits, Finding 2, *id.*; that lump sum settlements of his workers' compensation claims arising out of these injuries were approved by a Maine workers' compensation commissioner on June 25, 1992 and June 4, 1993, without any allocation of any portion of the settlements to future indemnity projected over the plaintiff's life expectancy, Finding 3, *id.*; that the settlements were amended on July 17, 1996 to allocate \$20,000 from the first lump sum settlement and \$10,000 from the second lump sum settlement to future indemnities projected over a life expectancy of 31 years, Finding 4, *id.*; and that the allocations made in the amended settlements were not excludable from the computation of offset under the statute and 20 C.F.R. § 404.408(d) because there was no showing that the allocations reflected a reasonable estimate of future

the administrative record.

expenses and because the amendments specifically altered the terms of the original settlements, Findings 5-6, *id.* at 22-23. The Appeals Council eventually declined to review the decision, *id.* at 5-7, making it the final determination of the commissioner, 20 C.F.R. § 404.981.

The administrative law judge based his decision on Social Security Ruling 97-3 (“SSR 97-3”).² Record at 18-20. As noted in *Rioux*, 2001 WL 574615 at *3, that Ruling was issued on October 3, 1997, some three months after the plaintiff obtained the amended workers’ compensation settlements at issue here. This court held in *Rioux* that SSR 97-3 could not be applied retroactively to workers’ compensation settlements that had been amended prior to the effective date of the Ruling. 2001 WL 574615 at *7, *8. That is precisely what the commissioner did in this case, and the same result is required.

At oral argument, counsel for the commissioner contended that the administrative law judge did not base his decision on a retroactive application of SSR 97-3, but rather on a lack of evidence to support the post-award allocation of worker’s compensation benefits to medical expenses. While the administrative law judge did make a finding to that effect, Record at 22, his opinion cannot reasonably be read to allow the conclusion that he did so in any context other than the application of SSR 97-3, which he quotes extensively, *id.* at 18-20.

Accordingly, I recommend that the commissioner’s decision be **VACATED** and the case remanded for recalculation of the statutory offset based on the terms of the plaintiff’s amended workers’ compensation settlements.

NOTICE

² Social Security Ruling 97-3, reprinted in *West’s Social Security Reporting Service Rulings* 1983-119 (Supp. 2004) at 173-77.

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 this 23rd day of November, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

PETER MCCOLLETT

represented by **HARRY N. STARBRANCH**
HOWARD & BOWIE
P. O. BOX 460
DAMARISCOTTA, ME 4543
563-3112
Email: hblaw@lincoln.midcoast.com

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **THOMAS D. RAMSEY**
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002
617/565-4277
Email: thomas.ramsey@ssa.gov