

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FRANCIS G. SCOTT,)	
)	
Plaintiff)	
)	
v.)	Civil No. 91-172 B
)	
LOUIS SULLIVAN,)	
Secretary of Health and)	
Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION¹

¹ This action is properly brought under 42 U.S.C. ' 405(g). The Secretary 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 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 February 26, 1992 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.

This Social Security Disability appeal challenges the application of a congressional scheme for determining the amount of disability benefits to be offset by a claimant's simultaneous receipt of state workers' compensation benefits. The plaintiff contends that it is fundamentally unfair for the government to determine the offset applicable to him by comparing his disability benefits, which are calculated based on his wages earned prior to his disability in 1971, with his state workers' compensation benefits, which in comparison are inflated because they are based on his wages earned in 1983 when he was injured during a trial work period.² In applying this offset mechanism, the plaintiff asserts that the Secretary deprived him of a property entitlement to disability benefits.

² The plaintiff also asserts that the Secretary improperly induced him to return to work in 1983 by not warning him that he could suffer adverse financial consequences if he was injured on the job. The Secretary notified Scott that he would be permitted to test his ability to return to work during a trial work period during which time he would receive both his disability benefits and his earned income. *See* Record p. 49. Nothing in the record indicates that the Secretary misled Scott. The one-page notice explaining the trial work period informs the claimant to "Promptly Report Events Which May Affect Your Benefits . . . [such as if] [y]ou apply for workers' compensation . . ." *Id.* While it is true that the letter does not explain how returning to work might jeopardize his benefits, it should have alerted Scott to the fact that if he became injured and received workers' compensation it might affect his benefits.

In any event, it would be unreasonable to require the Secretary to make an individualized determination and warn every claimant of the possible consequences that a decision to participate in a

trial work period could have on him. *Cf. Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 449 U.S. 268, 275-76 (1980) (Congress may dispense benefits without first making individualized determinations). On this record, it cannot be found that the Secretary improperly induced the plaintiff to return to work.

The plaintiff began receiving disability benefits in 1971 due to an injury to his back that year. Record p. 16. In January 1983 he returned to work in a different capacity while still receiving benefits pursuant to a trial period of work authorized by the Secretary. *Id.*; *see also id.* pp. 48-51. In April of that year he was forced to stop working because of a reinjury or a second injury to his back. *Id.* p. 16. At that point the plaintiff became entitled to workers' compensation as a result of his second injury. *Id.* The Social Security Administration ("Administration") subsequently determined that, pursuant to 42 U.S.C. § 424a, as of December 1987 the plaintiff was no longer entitled to disability benefits, which he received under 42 U.S.C. §§ 402 and 423, because of the level of his workers' compensation.³ Record pp. 16-17. Nevertheless, he was paid disability benefits for December 1987 and January 1988. *See id.* pp. 52-53. Thereafter, he was informed that he must repay those benefits. *Id.* Scott then challenged the termination of his entitlement to disability benefits and his duty to repay the benefits already received. The Administrative Law Judge affirmed the Administration's determination of the proper offset for his receipt of workers' compensation. Findings 1-2, Record p. 24. However, finding Scott without fault the Administrative Law Judge waived the repayment he owed as "against equity and good conscience." Findings 3-4, 6, Record p. 24.

³ As of December 1987 Scott was receiving monthly totals of \$1,379.60 under sections 423 and 402 and \$1,474.33 in workers' compensation. Record pp. 17, 91. It should be noted that the weekly workers' compensation figure was initially listed as \$398.03 but was later corrected to \$340.25, which was the amount paid to the plaintiff in December 1987 and January 1988. *Id.* p. 17, 19. The so-called "monthly amount" of workers' compensation received is calculated by multiplying the weekly amount by thirteen and then dividing that amount by three. *See id.* pp. 19, 91.

The plaintiff argues that, as applied by the Secretary, section 424a unfairly deprives him of his disability benefits because Congress did not address his circumstances when it wrote the statute. Specifically, he asserts that in enacting this scheme Congress only contemplated applying an offset where a claimant seeks disability benefits and workers' compensation benefits simultaneously for a single injury. The Social Security Act, he argues, does not reflect a congressional intent to offset disability benefits where a claimant seeks workers' compensation for a separate injury incurred years after the injury for which he receives disability benefits. Scott does not contend that the Secretary inaccurately calculated the offset to be applied to his benefits according to the Secretary's regulation, which merely implements the detailed scheme set forth in section 424a.⁴ *See* 20 C.F.R. ' 404.408. He simply argues that the regulation should not apply to him.

In evaluating the Secretary's application of the section 424a offset, the court must look first to the plain language of the statute. *Sprandel v. Secretary of Health & Human Servs.*, 838 F.2d 23, 25 (1st Cir. 1988). If the language is silent or ambiguous, the court must then determine whether the Secretary's interpretation is "a sufficiently rational [choice] to preclude a court from substituting its judgment for that of the [agency]." *Id.* (quoting *Young v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986)).

Section 424a states, in relevant part, that an offset shall be applied as follows:

- If for any month prior to the month in which an individual attains the age of 65 --
- (1) such individual is entitled to benefits under section 423 of this title, and
 - (2) such individual is entitled for such month to --

⁴ The Secretary's regulation "will be upheld as long as it is reasonably related to the language or purpose of the Act." *Sprandel v. Secretary of Health & Human Servs.*, 838 F.2d 23, 25 (1st Cir. 1988). The plaintiff does not claim that the regulation itself is invalid on the ground that the Secretary acted beyond the scope of his authority.

(A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State . . . the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title . . . shall be reduced (but not below zero) by the amount by which the sum of --
(3) such total of benefits under sections 423 and 402 of this title for such month . . . ,

. . . .
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 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.

. . . .
For purposes of clause (5), an individual's average current earnings means the largest of (A) the average monthly wage . . . used for purposes of computing his benefits under section 423 of this title, (B) one-sixtieth of the total of his wages and self-employment income . . . for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest, or (C) one-twelfth of the total of his wages and self-employment income . . . for the calendar year in which he had the highest such wages and income during the period consisting of the calendar year in which he became disabled . . . and the five years preceding that year.

42 U.S.C. ' 424a(a).

The formula used for calculating the reduction of Scott's benefits can be simply stated as follows: Any portion of a claimant's section 423 and section 402 disability benefits -- which together are referred to as the total family benefit ("TFB") -- plus his workers' compensation benefits, that exceeds 80 percent of his average current earnings ("ACE") is to be offset against the TFB. *See* Record p. 19.

In the case at bar the plaintiff's ACE was calculated according to the second listed method

under section 424a(a) (i.e., according to one-sixtieth of his total wages for the relevant five-year period).⁵ Record p. 19. The plaintiff does not suggest, and rightly so, that the result would be any different if his ACE were evaluated under one of the alternative methods. The plaintiff stopped working and became eligible for disability benefits in 1971 and thus the Administrative Law Judge properly based his ACE on the five consecutive years preceding 1971 in which his earnings were the highest. *Id.* The Administrative Law Judge then correctly found that the entire amount of the plaintiff's disability benefits must be offset.⁶ *Id.* Only if his ACE were high enough so that 80 percent of it exceeded the total of his TFB and his workers' compensation, would Scott be entitled to receive both workers' compensation and disability benefits (in whole or in part).

The plaintiff asserts that it is unfair to calculate his ACE based on his earnings prior to 1971 because his workers' compensation is based on his much higher income for work performed in 1983. He argues that section 424a does not specify a method for determining the offset in his circumstances and that the court should find that his ACE is to be calculated according to his 1983 wages, which would make him eligible to receive disability benefits. *Id.* pp. 147-49.

⁵ The plaintiff's total income during the years 1966 through 1970, his five highest income years, was \$34,851.13. His ACE, one-sixtieth of that sum, was \$580.00. Record p. 19.

⁶ The Secretary found that 80 percent of the plaintiff's ACE was \$464.00. Record pp. 19, 91. Upon applying the offset formula, it is evident that Scott's TFB (\$1,379.60) plus his workers' compensation (\$1,474.33) exceed 80 percent of his ACE (\$464.00) by more than the total amount of his disability benefits (i.e., his TFB).

There is no legal justification for the plaintiff's request. The plain language of section 424a leaves no ambiguity which might permit the Secretary to calculate Scott's ACE according to his 1983 wages. Nor is there any evidence to suggest that in enacting section 424a Congress intended to exempt claimants such as Scott from the detailed method of reduction set forth therein. Indeed, there is a complete absence of evidence indicating that Congress did not mean what it stated explicitly and without reference to such an exception. "The legislative history of the [Social Security] Act is entirely consistent with the conclusion that it was intended to mean what it says" and the "weight of judicial authority also supports a literal reading of the Act." *Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 449 U.S. 268, 275-76 (1980).

In fact, even the legislative history lends no support for Scott's position. The congressional purpose underlying section 424a was simply to avoid a duplication in benefits under two systems of workers' compensation which might lead to an erosion of state workers' compensation programs. *Richardson v. Belcher*, 404 U.S. 78, 83 (1971); *see also Kananen v. Matthews*, 555 F.2d 667, 670 (8th Cir.) (citing S. Rep. No. 404, 89th Cong., 1st Sess. 2040 (1965)) ("[T]he purpose of ' 424a is to prevent the payment of excessive combined benefits."), *cert. denied*, 434 U.S. 939 (1977). The Supreme Court found this purpose legitimate and the mechanism for furthering it, as set forth in section 424a, rationally related to the purpose. *Belcher*, 404 U.S. at 83-84; *see also Kananen*, 555 F.2d at 670-71 (citing numerous examples, court rejected claimant's arguments that offset provisions of section 424a violate due process and equal protection, commenting that "[s]imilar arguments have been consistently found to be without merit").

A court cannot fashion its own remedy to address unfair results when those results are the product of clear and unambiguous statutory language. Rejecting a claim similar to Scott's here, the Supreme Court remarked that, even if the plain language of a statute "produces incongruities, the federal courts may not avoid them by rewriting or ignoring that language." *Potomac Elec. Power Co.*, 449 U.S. at 283. "Such compelling statutory language is present in this case. . . . The fact that it leads

to seemingly unjust results in particular cases does not give judges a license to disregard it."⁷ *Id.* at 284. However sympathetic the plaintiff's circumstances, I conclude that there is no basis for granting him relief. See *Schweiker v. Gray Panthers*, 453 U.S. 34, 48-49 (1981) (quoting *id.*) ("` `[S]ympathy is an insufficient basis for approving a recovery' based on a theory inconsistent with law.").

For the foregoing reasons, I recommend 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 22nd day of May, 1992.

⁷ It is clear that the validity of a formula for dispensing government benefits does not depend on its fairness to everyone:

The administration of public assistance based on the use of a formula is not inherently arbitrary. There are limited resources to spend on welfare. To require individual determinations of need would mandate costly factfinding procedures that would dissipate resources that could have been spent on the needy.

Schweiker v. Gray Panthers, 453 U.S. 34, 48 (1981) (citations omitted).

David M. Cohen
United States Magistrate Judge