

SOCIAL SECURITY ADMINISTRATION  
OFFICE OF HEARINGS AND APPEALS  
TUCSON, ARIZONA

M.K. )  
 )  
 Claimant. ) Hearing Memorandum/  
 ) Closing Argument  
 )  
 SSN: \*\*\*-\*\*-\*\*\*\* ) Administrative Law Judge  
 ) XXXXXXXXXXXX  
 )  
 )  
 ) Hearing:  
 )  
 \_\_\_\_\_ )

STATEMENT OF CASE

M.K., Claimant, filed for Social Security Disability Insurance (SSDI) benefits on August 9, 1995. (Ex. 1) The SSDI application was subsequently approved on April 21, 1996. (Ex. 29) The Social Security Administration (SSA) determined that M.K. became disabled on June 16, 1993 and that she was eligible to receive SSDI payments of \$851.00 a month beginning August 1994. SSA also determined that M.K. was eligible for a SSDI lump sum payment of \$8516.00 for the period of December 1994 through March 1996. (Ex. 29)

On November 24, 1998, SSA notified MK that she had been overpaid \$32,303.00 in SSDI benefits for the period of June 1995 through September 1998 due to the receipt of worker's compensation payments.<sup>1</sup> (Ex. 3) On January 5, 1999, M.K. filed a request for waiver of repayment of the overpayment. (Ex. 21) At the request of SSA, M.K. filed a second waiver

---

<sup>1</sup> The SSA notice states two different overpayment amounts. On the first page, it states that the overpayment is \$32,303.00; on the second page, it states that the overpayment is \$33,474.10.

request form on April 6, 2000. (Ex. 5, 22) A third request for waiver was filed on June 25, 2001. (Ex. 25).

On September 11, 2000, M.K. met with Ms. Utter at the SSA office to discuss the waiver request. During that meeting, Ms. Utter assisted M.K. in writing a statement indicating that when she filed her first waiver request, she intended to request reconsideration of the overpayment amount because she did not agree with the method in which SSA determined the worker's compensation offset. (Ex. 24, 26/4) On September 19, 2000, SSA notified M.K. that her monthly SSDI benefits would be reduced to \$93.00 a month. In that notice, SSA also acknowledged that M.K. had requested a review SSA's previous decision. (Ex. 7)

On April 21, 2001, SSA sent M.K. a notice stating that her request for reconsideration was denied as untimely; however, based on the new information, SSA determined that she was eligible for full benefits starting November 1997. (Ex. 9) That notice also stated that M.K. would be notified by another staff member concerning the balance, if any, of an overpayment owed due to receipt of worker's compensation benefits from August 1994 to October 1997.<sup>2</sup> (Ex. 9)

On October 29, 2001, SSA notified M.K. that her request for waiver of repayment of a \$33,474.10 overpayment was denied. The notice stated that

---

<sup>2</sup> According to a SSA notice dated November 24, 1998, the original overpayment period was *June 1995 through September 1998*. In a SSA notice dated April 12, 2001, SSA re-determined that M.K. was eligible for full benefits starting November 1997 and referred to the potential overpayment period as *August 1994 through October 1997*. (Ex. 3, 9)

although they found that she did not have the ability to repay the overpayment, the waiver was denied because she had not timely reported receipt of worker's compensation benefits. (Ex. 13) M.K. filed a request for hearing on November 26, 2001 to dispute the denial. (Ex. 14) After the first hearing was postponed, a second hearing was held on September 24, 2002 before Administrative Law Judge (ALJ) XXXXXX. After M.K. testified, ALJ XXXXXX continued the hearing to allow M.K. an opportunity to present a witness and additional evidence at a final hearing. A final hearing is scheduled for December 3, 2002 at 10:00 a.m. before ALJ XXXXXXXX. (Hearing transcript; Notice of Hearing)

#### STATEMENT OF FACTS

M.K. is a 55 year old woman with multiple medical problems including fibromyalgia, bilateral carpal tunnel syndrome, TMJ and depression. Her symptoms include pain in her neck, mid-back, low-back and TMJ joint, numbness and tingling in her feet, muscle weakness, problems with balance and coordination, fatigue and difficulty sleeping. (Ex. 12, 15, 28; CE Report dated January 3, 2002 by \*\*\*, M.D.) On March 7, 2002, SSA found that M.K. has a continuing disability. (Ex. 15, 16)

M.K. received worker's compensation benefits of \$442.00 a week from July 8, 1993 to June 4, 1995 through the state of XXXXXX. (Ex. 18, 34) When she applied for SSDI benefits on August 9, 1995, M.K. informed SSA that she had received worker's compensation during this period. (Ex. 1) With M.K.'s signed authorization, SSA verified the receipt of these benefits with the worker's compensation insurance carrier in XXXXXXXXX on September 12, 1995. (Ex. 18)

On September 7, 1995, M.K. retained \*\*\*, an attorney in XXXXXXXX, to represent her in her worker's compensation case. (Ex. 34) On December 29, 1995, an order was entered reinstating M.K.'s worker's compensation benefits as of June 5, 1995; however, she did not receive any benefits until March 1996. (Ex. 34) On March 15, 1996, Mr. \*\*\* mailed a letter and a check for \$15,169.44 to M.K., which she received on March 23, 1996. (Ex. 32, Claimant's letter to SSA dated 3/28/96) This check represented worker's compensation benefits due to M.K., after attorney's fees and costs, for the period of June 5, 1995 to March 3, 1996. (Ex. 32) M.K. reported the receipt of this check and ongoing worker's compensation benefits to SSA by calling the SSA office and then by mailing a letter and a signed authorization form to the SSA office on or about March 28, 1996. The authorization form was signed and dated March 28, 1996 and addressed to the worker's compensation insurance carrier. M.K. included a copy of the \$15,169.44 worker's compensation check with her letter to SSA dated March 28, 1996. (Claimant's hearing testimony; Claimant's letter to SSA dated 3/28/96, Form SSA-1709 signed and dated on 3/28/96, and copy of worker's compensation check received 3/23/96.)<sup>3</sup>

---

<sup>3</sup> M.K. testified in the September 24, 2002 hearing that she had contacted the SSA office when she started receiving worker's compensation benefits again. She also testified that she had signed a form and sent it to SSA. After this hearing was continued, M.K. met with \*\*\*, a person who had been previously helping her with SSA matters and they discovered a copy of M.K.'s letter to SSA dated 3/28/96 as well as a copy of SSA form 1709 dated 3/28/96 in Mr. \*\*\* files. These documents have been provided to the SSA Hearings and Appeals office to be considered as exhibits in this case.

On April 21, 1996, SSA notified M.K. by letter that she was eligible for SSDI benefits. The SSA notice stated that her worker's compensation benefits had been considered in the calculation of the SSDI benefit amount. (Ex. 29)

From March 4, 1996 through October 31, 1997, M.K. received worker's compensation benefits of \$442.00 a week. (Ex. 34) The weekly benefits stopped when her worker's compensation claim was settled. On October 31, 1997, the XXXXXXXXXX Industrial Commission approved a settlement. (Ex. 19, 34)

According to the settlement agreement, the settlement payment of \$72,281.85 represented a compensation rate of \$47.44 per week for M.K.'s lifetime. (Ex. 19/7) M.K. reported the settlement agreement to SSA. (Ex. 31/2) On January 6, 1998, the worker's compensation insurance carrier verified the settlement to SSA. On SSA's form 1709, the carrier reported that the settlement was on November 17, 1997 for a gross amount of \$85,000.<sup>4</sup> This form was signed and dated by M.K. on September 17, 1997 at the request of SSA. (Ex. 20; SSA notice dated September 4, 1997)

On November 24, 1998, SSA sent M.K. a notice of overpayment stating that she had been overpaid \$32,303.00 from June 1995 to September 1998 because she received weekly worker's compensation benefits and a lump sum settlement payment. (Ex. 3) On December 8, 1999, M.K.'s SSDI benefits were reduced to \$74.00 a month. (Ex. 4) In September 2000, SSA changed M.K.'s SSDI payment to \$93.00 a month. (Ex.7) During the period of overpayment,

---

<sup>4</sup> The gross worker's compensation settlement amount was \$85,000; M.K. received \$72,281.85 after attorney's fees and costs were paid out of the settlement.

M.K. reported changes in her worker's compensation benefits to SSA. (Ex. 10, 18, 20, 25/2, 27, 31; letter and enclosures to SSA dated 3/28/96)

Between January 5, 1999 and June 9, 2001, M.K. filed three requests to waive repayment of the SSDI overpayment. She also asked SSA to reconsider the overpayment and the benefit amount as it related to the worker's compensation lump sum payment. (Ex. 21, 22, 24, 25)

On April 12, 2001, SSA notified M.K. that although her request for reconsideration had been dismissed as an untimely request, her eligibility for SSDI had been reconsidered and she was eligible for a full SSDI payment starting November 1997. The notice also stated that she would be notified of any changes to the overpayment. (Ex. 9) According to a statement by Karen Utter of SSA, the overpayment was recalculated by SSA and instead of paying M.K. the retroactive SSDI benefits owed to her based on the revised calculation, SSA kept \$32,030.00 in SSDI benefits to repay the overpayment. (Ex. 31/2)

On October 29, 2001, SSA denied M.K.'s request for waiver stating that she was at fault for causing the overpayment because the first indication that a change had occurred in her worker's compensation benefits was on January 6, 1998 when SSA verified that she had received an \$85,000 lump sum payment. SSA further stated that they did not know about the weekly worker's compensation benefits that were paid to M.K. from March 1996 through October 1997 until March 11, 1998 when a SSA representative spoke to a worker's compensation representative. (Ex. 13)

#### ISSUES AND ARGUMENT

*I. Whether M.K. was overpaid SSDI benefits?*

A. Worker's Compensation Offset.

Social Security Disability Insurance (SSDI) benefits may be reduced by the receipt of worker's compensation benefits. Offset occurs when the total benefits payable to a worker (and any auxiliaries) plus the worker's compensation exceeds the applicable limit. The applicable limit is the highest of 80% of the worker's average current earnings (called ACE) or the total family benefits payable to the worker and any auxiliaries in the first possible month of offset. 20 C.F.R. § 404.408(a)-(c); SSA POMS DI 52001-001. (Federal regulation and POMS policy attached as exhibit A.)

B. SSA Failed to Provide M.K. with Sufficient Information Regarding the Calculation of the Worker's Compensation Offset Which Prevented Her from Determining Whether the Offset Was Properly Calculated during the Period of Overpayment.

M.K.'s SSDI benefits were reduced because she received worker's compensation while she was receiving SSDI payments. According to SSA, this reduction resulted in a SSDI overpayment of \$32,030.00. (Ex. 3) Although M.K. requested an explanation of the offset calculation from SSA, she never received sufficient information to understand the calculation. (Ex. 32/1; Claimant's hearing testimony)

During the appeal process, SSA recalculated the offset based on "new information." (Ex. 9, 24) The recalculation caused the original overpayment period and the overpayment amount to change. This is because SSA previously stated that M.K. had been overpaid through September 1998 and SSA was now stating that she was eligible for a full SSDI payment as of November 1997. As such, there is no overpayment from November 1997 through September 1998.

In a notice dated April 12, 2001, SSA advised M.K. that she would be notified by another staff member regarding the overpayment balance. (Ex. 9) According to a fact sheet written by XXXXXXXX of the SSA District office in Tucson, the overpayment was recalculated and instead of paying retroactive benefits to M.K., SSA retained \$32,030.00 of these benefits to repay the overpayment. (Ex. 32/1) In her determination of whether a waiver should be granted, XXXXXX states that M.K. filed a Request for Reconsideration of the overpayment but it was denied as untimely. She further states that a recalculation of the lump sum settlement was done and it was determined that “SSA had used the full lump sum amount of \$85000 instead of the net amount of \$72281.85 after countable expenses and that the weekly rate was reduced to \$47.44.” Because of this, M.K. “was underpaid since October 1997”, however, the underpayment was applied to the overpayment and this eliminated the overpayment on the system. (Ex. 13/5)

SSA has not presented any proof that M.K. was notified in accordance with the law of a revised overpayment amount or of a revised overpayment period, or that past due SSDI benefits would be retained to repay the alleged overpayment. Further, the only notice that M.K. has received regarding a change in the overpayment was the April 12, 2001 notice, which stated “since your worker’s compensation was increased, your overpayment amount has decreased to \$159.00.” That notice also told her that someone from SSA would contact her regarding the overpayment balance. (Ex. 9) The information in this notice regarding the overpayment was confusing at best.

Also, on several occasions, M.K. asked SSA whether they had properly deducted all attorney fees and costs associated with the worker’s compensation



claim from the lump sum payments when the offset was calculated. (Ex. 26, 31, 32)

She provided SSA with numerous receipts and other documents verifying the fees and costs. (Ex. 31, 32) SSA never directly responded to this inquiry. (Claimant's testimony)

Because she has not received a sufficient explanation of the offset calculation, M.K. is unable to verify whether the SSDI overpayment was correctly calculated.

*II. Whether recovery of the overpayment should be waived?*

A. M.K. is Not at Fault for Causing the Overpayment Because She Reported Changes in Her Worker's Compensation Benefits to SSA and She Did Not Know or Could Not Have Known That She Was Being Paid The Incorrect Amount.

To qualify for a waiver of repayment of an overpayment, one of the factors that a person must show is that he is without fault in making the overpayment. To determine fault, SSA must consider all pertinent circumstances, including an individual's age and intelligence, and any physical, mental, educational or linguistic limitations. SSA will also consider whether the individual (1) made an incorrect statement to SSA which he knew or should have known was incorrect; or (2) failed to furnish information which he knew or should have known was material; or (3) in accepting the payment, knew or could have expected to know was an incorrect payment. 20 C.F.R. § 404.507.

At her initial disability application interview on August 9, 1995 at SSA in XXXXXXXXXX, M.K. reported that she had received worker's compensation benefits and that these benefits had stopped. (Ex. 1) M.K. signed a SSA Form 1709 dated August 10, 1995 authorizing SSA to contact the Worker's Compensation Board in

XXXXXX to verify her worker's compensation benefits. In September 1995, SSA received verification stating that M.K. had received temporary total worker's compensation benefits from July 8, 1993 to June 4, 1995. (Ex. 18)

M.K.'s worker's compensation benefits were eventually reinstated and she received a check for \$15,169.44 from her attorney in March 1996 representing benefits for the period of June 5, 1995 through March 3, 1996. (Ex. 32) M.K. promptly contacted SSA to report this change in her worker's compensation benefits by phone and by letter. Previously, she had been provided SSA authorization forms (SSA-Form 1709) and self-addressed envelopes to send to SSA in the event there was a change in her worker's compensation status. She signed this form and sent it with a letter and a copy of the check in a postage paid self-addressed envelope to SSA. (Claimant's hearing testimony; Claimant's letter to SSA dated 3/28/96, Form SSA-1709 signed and dated on 3/28/96, and copy of worker's compensation check received 3/23/96) When she reported this change, her application for SSDI benefits had not yet been approved. (Ex. 29) At this point, M.K. believed she had fulfilled her responsibility in reporting the change in her worker's compensation benefits to SSA. (Claimant's testimony)

The following month, SSA sent M.K. a letter dated April 21, 1996 stating that she was eligible for SSDI benefits. That letter explicitly stated that her worker's compensation benefits were considered in the calculation of the SSDI benefits. (Ex. 29) These statements lead M.K. to believe that her March 1996 report of continuing worker's compensation benefits had been considered in the calculation of the SSDI benefits. At that point, she had no reason to believe that there had been a benefit miscalculation. (Claimant's testimony)

On September 4, 1997, XXXXXXXX of SSA sent M.K. a letter asking her to sign and return a form because SSA needed current information about her worker's compensation claim to determine the correct monthly SSDI benefit. (Notice dated September 4, 1997) The form was not specified in the letter; however, M.K. signed a SSA Form 1709 dated September 17, 1997 and this form was eventually sent to the NC School Board by SSA to verify the status of her worker's compensation payments. The form was completed sometime after November 17, 1997 because that date is referenced in the form as the date of settlement. The form was signed by a worker's compensation adjuster and dated January 6, 1998. (Ex. 20)

On October 31, 1997, M.K. 's worker's compensation claim was settled. (Ex. 19) M.K. notified SSA of the settlement and that her benefits would stop. (Ex. 19, 20, 23, 31/2; Claimant's testimony) SSA obtained verification of the settlement on January 8, 1998. (Ex. 20) However, it was not until ten months later that SSA notified M.K. that her SSDI monthly benefit was being substantially reduced and that she had been overpaid SSDI benefits from June 1995 to September 1998 due to the changes in her worker's compensation benefits. (Ex. 3)

In her decision to deny M.K. 's waiver, XXXXXX stated that she could not be found without fault because she had not "timely" report changes in her worker's compensation payments. XXXXXXXX further stated that "it was not until 1/16/98 that SSA was aware that a lump sum settlement had been received from Worker's Comp and it was not until 3/11/98 that SSA was aware that M.K. 's Worker's Comp payments had continued until October 1997. (Ex. 13/5) This is simply incorrect. SSA had knowledge of these changes because M.K. reported them to SSA as they

occurred either by phone or by mail. (Ex. 10, 18, 20, 25/2, 27, 31; letter and enclosures to SSA dated 3/28/96)

Further, the Program Operations Manual (POMS) policy applicable in M.K.'s circumstances instructs the SSA Representative to **assume** that there will be further worker's compensation payments when these payments stop, unless the representative has verified that the case is closed and no further payments or awards are expected. It also states that full SSDI payments may be paid pending further worker's compensation payments but that an overpayment may occur, and that to pay full benefits under these circumstances; SSA must obtain a request for full benefits in writing from the worker (M.K.). The policy also instructs SSA to prepare a six-month stand-alone diary to follow up on the worker's compensation claim status unless the claim is closed and final. (SSA POMS DI 52-001.120 attached to this memorandum as Exhibit B)

It is not clear from the record whether the procedures outlined in the POMS manual were followed by SSA but it appears they were not. Had SSA been following up with the insurance carrier or with M.K. every six months, they may have known more than they claimed they knew during the period of overpayment. Further, according to XXXXXXXXX, the burden was solely on M.K. to report changes in the worker's compensation (which she did). This is despite the fact that SSA had direct knowledge of the worker's compensation claim from the onset of the application and SSA had contacted the insurance carrier within a month of the application. The evidence, or lack thereof, demonstrates that SSA took no responsibility in following up on the worker's compensation claim to determine whether the "case was closed and final" as required by its own operations manual.

The record also demonstrates that SSA did not make a timely re-determination of benefits when M.K. reported the changes. Clearly, M.K. should not bear sole responsibility in a case where she has done what she was required to do and SSA has failed to act timely and in accordance with its own policy.

Also, as illustrated by the attached federal regulations and the facts in this case, the offset calculation can be complex and confusing. (See Attachment A) To determine whether there is an offset, SSA looks at a person's average current earnings (ACE). The ACE is not the same amount that is paid to the worker as a monthly benefit. The ACE is calculated by SSA considering a person's work history based on the earnings reported to the SSA system. Under certain circumstances, only 80% of the ACE is compared to the worker's compensation benefits.

After she was notified of the overpayment, M.K. asked SSA for the offset calculation because she did not understand how it was figured. Prior to this, M.K. relied on SSA to pay the correct amount of benefits based on the changes she had reported in her worker's compensation benefits. (Claimant's testimony) Because this calculation is not simply or commonly understood, M.K. did not know, nor could she have known that SSA was not considering her worker's compensation payments when SSA paid SSDI during the overpayment period.

For the reasons stated above, M.K. is without fault in causing the overpayment of SSDI benefits.

B. Recovery of the Overpayment Would Defeat the Purpose of Title II of the Social Security Act.

To defeat the purpose of Title II of the Security Act means to deprive a person of income required for ordinary and necessary living expenses including

fixed living expenses such as rent or mortgage payments, food, clothing utilities, maintenance, insurance, taxes and installment payments. Also considered are medical expenses and other miscellaneous expenses which may be reasonably considered as part of a person's standard of living.

20 C.F.R. § 404.508.

As in this case, a waiver is usually requested when the overpayment has not been fully recovered. Unless a person specifies that he wants the entire overpayment amount to be considered for the waiver, SSA will only consider the amount still owed. However, if a waiver is requested after the overpayment has been completely recovered; the entire overpayment amount must be considered. If the overpayment has been fully recovered, the person must show that he went into debt to repay the overpayment to show that recovery would defeat the purpose of Title II. POMS Manual, GN 02250.310.

M.K. first requested a waiver of the overpayment on January 5, 1999 before any of the overpayment had been recovered. (Ex. 21) She requested waiver of the entire overpayment amount. (Ex. 22, 25) However, before the waiver was decided, SSA recovered the entire amount of the overpayment from retroactive benefits. (Ex. 13)

In her requests for waiver, M.K. provided substantial information about her ordinary, necessary and medical expenses and she provided documentation to support this information. The evidence showed that M.K. needs all of her Social Security benefits to meet ordinary and necessary living expenses, including medical expenses. (Ex. 21, 22, 25, 31, 32) These expenses have not substantially changed. (Claimant's testimony)

Currently, M.K. 's income is approximately \$930.00 a month in SSDI benefits. She has no other income. For many years, she has had multiple medical problems for which treatment is not totally paid for by insurance. From November 1998 when her SSDI check was substantially reduced until April 2001 when SSA re-determined that she was eligible for a full SSDI payment again, M.K. spent her worker's compensation settlement payment to live on and to pay for medical expenses not covered by Medicare. (Claimant's testimony) During this period, M.K. also borrowed approximately \$30,000.00 from her elderly parents to meet her expenses. Her parents expect her to repay this money. (Ex. 31) M.K. has also used credit cards to meet expenses which still have outstanding balances. (Ex. 32/3) Substantially reducing M.K. 's monthly SSDI benefits based on an incorrect offset calculation for several months and then recovering the entire overpayment from the SSDI benefits owed to her because of this mistake has created a severe financial hardship on her, and it continues to do so.

#### CONCLUSION

If this court determines there is an overpayment, M.K. should be granted a waiver because she is not at fault for causing the overpayment as she reported changes in worker's compensation to SSA on a timely and consistent basis, she cooperated with SSA to the best of her ability and understanding, she did not know and she could not have known that she was being paid incorrect amounts during the period of overpayment, and she can not afford to repay the overpayment.

Respectfully Submitted By:

---

XXXXXXXXXXXX, Attorney for Claimant