

6. Applicants acknowledge that the Sales Charge will likely be insufficient to cover all costs relating to the distribution of the Contracts. To the extent distribution costs are not covered by the Sales Charge, CIGNA Life will recover its distribution costs from the assets of the general account. These assets may include that portion of the mortality and expense risk charge which is profit to CIGNA Life, and that portion of the optional death benefit charge that is profit. Applicants represent that CIGNA Life has concluded that there is a reasonable likelihood that the proposed distribution financing arrangement will benefit the Account, the Other Accounts and the owners of the Contracts. The basis for this conclusion is set forth in a memorandum which will be maintained by CIGNA Life at its home office and will be made available to the Commission.

7. CIGNA Life also represents that the Accounts will invest only in open-end management investment companies which undertake, in the event such company adopts a plan under Rule 12b-1 of the 1940 Act to finance distribution expenses, to have such plan formulated and approved by either the company's board of directors or the board of trustees, as applicable, a majority of whom are not interested persons of such company within the meaning of the 1940 Act.

8. Applicants also request an order under Section 6(c) granting exemptions from Sections 2(a)(32) and 27(c)(1) of the 1940 Act and Rule 22c-1 thereunder to the extent necessary to permit the deduction from Account values of the optional death benefit charges at the following times: upon surrender; upon annuitization; or upon payment of a death benefit.

9. Section 27(c)(1) requires that periodic payment plan certificates, such as the Contracts, be redeemable securities. Section 2(a)(32) defines a "redeemable security" as one which, upon presentation to the issuer, entitles the holder to receive "approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof." Rule 22c-1 under the 1940 Act prohibits redemptions "except at a price based on the current net asset value of such security which is next computed * * *." Applicants concede that where the optional death benefit charge is imposed upon annuitization, surrender or payment of the death benefit, the net dollar amount paid upon surrender or in the form of a death benefit, or applied to the purchase of annuity units under the Contract, will be less than the full accumulation unit value of the variable

portion of the Contract. Applicants state, however, that the gross proceeds will equal the full net asset value of the variable portion of the Contract. Applicants represent that the difference between the gross proceeds and the net dollar amount paid or applied will be equal to the unpaid aggregate charges for the optional death benefit that have accrued since the most recent Contract anniversary. Applicants state that if the cost for the optional death benefit were deducted from the value of the Contract upon accrual, there would be no difference between the gross proceeds and the net amount paid or applied. Applicants argue that payment of the accrued but unpaid charges out of the gross proceeds of redemption, annuitization or a death benefit should be viewed as a delayed deduction of otherwise permitted charges. Applicants assert that the prohibitions of Sections 2(a)(32) and 27(c)(1) and Rule 22c-1 are designed to prevent diminution or dilution of investment company assets and should not, therefore, be applied to a transaction that, but for its timing, would be otherwise permissible.

Conclusion

Applicants assert that for the reasons and upon the facts set forth above, the requested exemptions from Sections 2(a)(32), 26(a)(2)(C), 27(c)(1) and 27(c)(2) of the 1940 Act and Rule 22c-1 thereunder are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,
Secretary.

[FR Doc. 95-17051 Filed 7-11-95; 8:45 am]

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SOCIAL SECURITY ADMINISTRATION

[Social Security Acquiescence Ruling 95-2(9)]

Hodge v. Shalala; Workers' Compensation—Proration of a Lump-Sum Award for Permanent Disability Over the Remainder of an Individual's Working Life Under Oregon Workers' Compensation Law

AGENCY: Social Security Administration.

ACTION: Notice of Social Security Acquiescence Ruling.

SUMMARY: In accordance with 20 CFR 422.406(b)(2), the Commissioner of

Social Security gives notice of Social Security Acquiescence Ruling 95-2(9).

EFFECTIVE DATE: July 12, 1995.

FOR FURTHER INFORMATION CONTACT:

Gary Sargent, Litigation Staff, Social Security Administration, 6401 Security Blvd., Baltimore, MD 21235, (410) 965-1695.

SUPPLEMENTARY INFORMATION: Although not required to do so pursuant to 5 U.S.C. 552(a)(1) and (a)(2), we are publishing this Social Security Acquiescence Ruling in accordance with 20 CFR 422.406(b)(2).

A Social Security Acquiescence Ruling explains how we will apply a holding in a decision of a United States Court of Appeals that we determine conflicts with our interpretation of a provision of the Social Security Act (the Act) or regulations when the Government has decided not to seek further review of that decision or is unsuccessful on further review.

We will apply the holding of the Court of Appeals decision as explained in this Social Security Acquiescence Ruling to claims at all levels of administrative adjudication within the Ninth Circuit. This Social Security Acquiescence Ruling will apply to all determinations and decisions made on or after July 12, 1995. If we made a determination or decision on your application for benefits between June 21, 1994, the date of the Court of Appeals decision, and July 12, 1995, the effective date of this Social Security Acquiescence Ruling, you may request application of the Ruling to your claim if you first demonstrate, pursuant to 20 CFR 404.985(b), that application of the Ruling could change our prior determination or decision.

If this Social Security Acquiescence Ruling is later rescinded as obsolete, we will publish a notice in the **Federal Register** to that effect as provided for in 20 CFR 404.985(e). If we decide to relitigate the issue covered by this Social Security Acquiescence Ruling as provided for by 20 CFR 404.985(c), we will publish a notice in the **Federal Register** stating that we will apply our interpretation of the Act or regulations involved and explaining why we have decided to relitigate the issue.

(Catalog of Federal Domestic Assistance Programs Nos. 96.001 Social Security - Disability Insurance; 96.005 Special Benefits for Disabled Coal Miners.)

Dated: June 5, 1995.

Lawrence H. Thompson,

Principal Deputy Commissioner of Social Security.

Acquiescence Ruling 95-2(9)

Hodge v. Shalala, 27 F.3d 430 (9th Cir. 1994)—Workers' Compensation—Proration of a Lump-Sum Award for Permanent Disability Over the Remainder of an Individual's Working Life Under Oregon Workers' Compensation Law—Title II of the Social Security Act.

Issue: Whether, when offsetting workers' compensation benefits awarded for permanent disability under Oregon workers' compensation law against Social Security disability benefits, section 224(b) of the Social Security Act (the Act) requires the Social Security Administration (SSA)¹ to prorate a lump-sum award or settlement over the remainder of an individual's working life which the court concluded ends at age 65.

Statute/Regulation/Ruling Citation: Sections 224(a)(2) and (b) of the Social Security Act (42 U.S.C. 424a(a)(2) and (b)); 20 CFR 404.408; Social Security Rulings (SSRs) 76-34c, 81-33, 85-6c and 87-21c.

Circuit: Ninth (Alaska, Arizona, California, Guam, Hawaii (including American Samoa), Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington)

Hodge v. Shalala, 27 F.3d 430 (9th Cir. 1994).

Applicability of Ruling: This Ruling applies to determinations or decisions at all administrative levels (i.e., initial, reconsideration, Administrative Law Judge (ALJ) hearing and Appeals Council).

Description of Case: On October 23, 1986, the plaintiff, Gerald Hodge, injured his right wrist while working as a boilermaker. For a period of seven months, from October 24, 1986 through May 20, 1987, he received \$344.77 per week in temporary disability benefits under Oregon workers' compensation law. Eventually, it was determined that Mr. Hodge had lost the use of 40 percent of his right forearm and he was deemed permanently injured as of May 20, 1987. After payment of court costs, attorneys' fees and the recoupment of a prior

overpayment, Mr. Hodge received a net lump-sum award of \$4,068.75 under Oregon workers' compensation law.

Mr. Hodge also became entitled to Social Security disability benefits for a closed period between October 22, 1986 through February 29, 1988. In accordance with section 224(b) of the Act, SSA offset Mr. Hodge's lump-sum workers' compensation award against his disability benefits at the rate of \$344.77 per week, the same rate at which he had received temporary disability benefits under Oregon law. The plaintiff challenged the offset and the offset rate at a hearing, but an ALJ affirmed the prior determination and calculation of the offset. Regarding the offset rate issue, the plaintiff alleged that the offset amount should equal the lump-sum divided by the number of months remaining in his natural life. The ALJ found that because the lump-sum award did not specify an offset rate the proration should be based on the prior periodic rate, i.e., the temporary disability payments of \$344.77 per week. The Appeals Council denied Mr. Hodge's request for review of the ALJ's decision.

The plaintiff sought judicial review and the district court reversed SSA's decision to offset the plaintiff's Social Security disability benefits, holding that "scheduled" loss awards² were not substitutes for periodic benefits and thus were not offsettable. The district court accordingly did not address the offset rate issue. SSA appealed and the United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and found that an offset should be applied. However, the Ninth Circuit held that the proper offset rate, based on Oregon workers' compensation law, is calculated by prorating the lump-sum award over the working life of the plaintiff.

Holding: The Court of Appeals held that, under Oregon workers' compensation law, both "scheduled" and "unscheduled" awards substitute for periodic benefits and "represent a stream of lost future wages" intended to provide wage replacement for a worker's loss of earning capacity. Accordingly, both types of benefits, including Mr. Hodge's scheduled award, "must be offset to the extent that they overlap with federal benefits in a given month."

Regarding the calculation of the offset, the Ninth Circuit held that "the monthly offset amount should be equal to

Hodge's lump-sum award divided by the number of months between the date of the award and the date Hodge reaches the age of 65." The court presumed that under section 224(a) of the Act, age 65 marks the end of an individual's working life. Under section 224(b) of the Act, SSA must "approximate as nearly as practicable" the rate at which the lump-sum award would have been paid on a monthly basis. Because Oregon workers' compensation law provided for payment of Mr. Hodge's lump-sum award as "a substitute for a stream of payments for the remainder of his working life," the Court of Appeals found that the monthly offset rate could be determined from the application of State law without referring to SSA's policy guidelines for assistance in determining the offset.

The court noted that SSA has established policy guidelines for determining the monthly offset rates for various types of lump-sum awards.³ Because these guidelines must be consistent with the clear requirement of section 224(b) of the Act, the court interpreted the proration method most favored by SSA, the one that calculates the offset according to the rate specified in the lump-sum award, as referring not only to the rate expressly stated in the award, "but also to a rate specified by operation of [State] law." The court concluded that SSA should apply the prior periodic rate paid under a workers' compensation law only in cases where the monthly offset rate is not established by State law.

Statement As To How Hodge Differs From Social Security Policy

Under section 224(a) of the Act, a claimant's Social Security disability benefits are reduced because of the receipt of workers' compensation so that the total worker's compensation and Social Security disability benefits that a disabled worker receives will not exceed 80 percent of the worker's "average current earnings" at the onset of disability. In calculating this reduction when a claimant receives a workers' compensation lump-sum award or settlement, section 224(b) of the Act gives SSA authority to prorate the lump-sum in a way that "approximate[s] as nearly as practicable the reduction" that would have been made if the claimant had received benefits at a monthly periodic rate. According to SSA's regulation implementing section 224(b) of the Act (20 CFR 404.408(g)), the lump-sum is treated as a substitute for periodic

¹ Under the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, effective March 31, 1995, the Social Security Administration (SSA) became an independent Agency in the Executive Branch of the United States Government and was provided ultimate responsibility for administering the Social Security programs under title II of the Act. Prior to March 31, 1995, the Secretary of Health and Human Services had such responsibility.

² Under Oregon law, a permanently partially disabled worker receives either a scheduled or unscheduled award. Scheduled awards are fixed-sum awards for injuries to specified limbs or body parts. Unscheduled awards cover all other injuries (Or. Rev. Stat. § 656.214(2)-(5) (1993)).

³ SSR 87-21c and Program Operations Manual System (POMS) DI 52001.555 C.4.

payments and must be prorated. Under POMS DI 52001.555 C.4. the proration is accomplished using one of three methods in the following order of priority:

- (1) the rate specified in the award;
- (2) the periodic rate paid prior to the lump-sum award (if no rate was specified in the lump-sum award); or
- (3) the State workers' compensation maximum weekly rate in effect at the time of the workers' compensation injury (if no rate was specified in the lump-sum award and if no prior periodic payments were made).⁴

The *Hodge* court found that Oregon workers' compensation law establishes that a lump-sum award for a permanent disability is a substitute for a stream of payments for the remainder of an individual's working life which the

court presumed to end at age 65. Because the amount of the payment and the period of time covered are known, the court concluded that by the operation of Oregon law the monthly offset amount equals the lump-sum award divided by the number of months between the date of the award and the date the worker reaches age 65.

Explanation of How SSA Will Apply The Hodge Decision Within The Circuit

This Ruling applies only to cases in which the worker receives a lump-sum award or settlement under Oregon workers' compensation law for a permanent disability and the applicant resides in Alaska, Arizona, California, Guam, Hawaii (including American Samoa), Idaho, Montana, Nevada, Northern Mariana Islands, Oregon or Washington at the time of the determination or decision at any

administrative level, i.e., initial, reconsideration, ALJ hearing or Appeals Council.

When prorating a lump-sum award or settlement made under Oregon workers' compensation law for a permanent disability, SSA will treat the lump-sum as a substitute for periodic payments and will calculate the offset rate on a monthly basis by dividing the lump-sum by the number of months between the date of the award and the date the worker reaches age 65. However, if a workers' compensation award expressly establishes an offset rate under the Oregon statutory scheme (not merely a recital of the weekly or monthly benefit rate), SSA will prorate the lump-sum award according to that expressly stated offset rate.

[FR Doc. 95-17038 Filed 7-11-95; 8:45 am]

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⁴ See also SSR 87-21c