A Large C&R and the Feds – What Can Go Wrong and How to Fix It
By: Hon. Robert G. Rassp[1]

What does an Applicant's attorney do when the feds come calling and say the Applicant has been overpaid social security disability benefits (SSDI) because of a large Compromise and Release? This article addresses this issue along with attorney best practices in these cases and how judges who approve lump sum settlements can protect against an Applicant's reduction of monthly social security disability benefits due to a large settlement of his or her workers' compensation case.

Louis was a physical therapy assistant at a local hospital employed from 1985 until February 13, 2002 when he slipped and fell injuring his lumbar spine. At the time of his injuries he was 45 years old. Louis had multiple unsuccessful back surgeries and developed drop foot, severe weight gain resulting in bariatric surgery, narcotic addiction and dependency, and severe depression - all of which were accepted by his employer's workers' compensation claims administrator. He received TTD payments from February 18, 2002 through December 28, 2013 at $575.47 per week, based on his average weekly wage of $863.21 per week. Once he was permanent and stationary in December 2013, he was paid permanent disability advances of $170.00 per week. An agreed medical examiner deemed Louis 100% totally disabled but there was a dispute over apportionment due to prior industrial and non-industrial injuries. In fact the AME apportioned 50% of the permanent disability to a childhood lumbar spinal fusion.

Louis was originally awarded monthly social security disability benefits at $1,423.70 per month beginning in 2004. He became eligible for Medicare thirty months after he became disabled.

All of these facts are extremely important to understand how a case like this can settle with potentially severe consequences when social security disability and Medicare issues are looming. Louis's workers' compensation case settled on June 26, 2014 by way of a Compromise and Release in the sum of $550,000.00 new money, less attorney's fees of $82,500.00. There was a Medicare Set-Aside Arrangement (WCMSA) of a lump sum seed money payment of $97,269.00 plus annual payments to the Applicant of $18,027.59 per year commencing on July 1, 2015 and every year thereafter for life (a predicted 23.3-year life expectancy) to cover the structured WCMSA. CMS approved a WCMSA in the sum of $403,758.00 which the seed money plus the structured WCMSA parts of the settlement covered. The cost of the structured part of the WCMSA was $261,548.00. So the Applicant netted $108,683.00 new money after deduction of attorney's fees, the WCMSA lump sum seed money, and the cost of the structured part of the WCMSA.

Here is a graphic of the settlement:

Gross C&R:	$550,000.00 new money
Less Attys Fees:	$ 82,500.00

[1] The opinions expressed in this article are the opinions of the author and are not the opinions of the State of California Department of Industrial Relations, the DWC, or the WCAB. The readers are further notified that this article does not involve legal advice and if there are any questions arising from the issues raised in this article, parties should consult with a qualified attorney on these issues.

Less WCMSA Seed Money payable to the Applicant:	$ 97,269.00
Less WCMSA Structure for annual payments:	$261,548.00
Net unencumbered to Applicant:	$108,683.00

Attached to the C&R was a Social Security Addendum that added $28,000.00 as medical treatment costs that are not covered by Medicare but that are covered by workers' compensation medical treatment such as co-payments, deductibles, mileage reimbursement, over the counter medications, and off-label prescription medications. This was calculated at $100.00 per month for life.

Practice Point: Counsel should always use the Centers for Disease Control and Prevention life expectancy charts to calculate an accurate life expectancy in these cases. Do not rely on "rated age" life expectancy predictions by insurance industry "experts" because those numbers are speculative and not recognized in the official life charts from the CDC. Counsel should only use actual chronological life charts and not insurance company or WCMSA vendor generated "related age" ones.

In any event, the Applicant's net proceeds in the settlement was calculated based on the unencumbered money he would receive to be equal to $288.57 per month for life based on the calculations set forth in the social security addendum. The social security addendum stated as follows:

Gross C&R:	$550,000.00
Less Attys Fees:	$ 82,500.00
Less WCMSA Seed Money payable to the Applicant:	$ 97,269.00
Less WCMSA Structure for annual payments:	$261,548.00
Less medical treatment not covered by Medicare:	$ 28,000.00
Net unencumbered to Applicant:	$ 80,683.00

The $288.57 per month was calculated by taking $80,683.00 and dividing it by the Applicant's life expectancy at the time of the settlement in months (23.3 years is 279.6 months). This addendum avoided the dreaded "80% Rule" found at Section 224 [42 U.S.C. Section 424a; 20 C.F.R. Sections 404.317, 404.408(a), and 404.408(c)(1)(i)[2]. What the 80% Rule says is that you cannot receive social security disability monthly benefits that together with publicly mandated benefits such as SDI, workers' compensation temporary disability, or permanent disability indemnity exceed 80% of the highest calendar year's earnings in the five-year period prior to the onset date of disability resulting in entitlement to SSDI benefits.

Let's say Louis earned $48,000.00 in 2001, $44,403.00 in 2002, and somewhat less money in each previous year - 2000, 1999, and 1998. You take his highest annual earnings of $48,000.00, divide it by 12 months and you get $4,000.00 per month. The 80% Rule says he cannot receive more than $3,200.00 per month combined between his weekly workers' compensation (WC) benefits and his monthly social security disability (SSDI) benefits. If he does, then the monthly social security disability benefits are reduced so that both WC benefits and SSDI benefits are less

[2] Counsel can read the actual U.S. Code and Code of Federal Regulations sections cited in this article by simply "googling" them on line.

than $3,200.00 per month. However, if you amortize his net recovery of money in a C&R over his life expectancy, you avoid the 80% Rule. This is because the social security administration considers workers' compensation benefits to demonstrate loss of future earning capacity and you can amortize disability benefits over a remaining life time. This is the beginning of the problem that developed in this case. This is no longer formally called the "Hartman" formula because SSA internal regulations called the "Procedure Operations Manual System[3]" or "POMS" adopted the Hartman[4] decision and mandates each SSA Regional Office and its Payment Service Centers to use one of three formulas that is the most favorable to each Claimant for SSDI benefits who settles a workers' compensation case for a lump sum. This is because there are 50 "flavors" of workers' compensation cases where federal law must apply to all 50 separate workers' compensation systems in the USA.

Before we get to the problem in the case, the important take-away here is that if you do not have a social security addendum at all when the Applicant is receiving Title II social security disability benefits, the federal government will consider the entire amount of the C&R as earnings and will apply the 80% Rule accordingly, which would result in reducing or completely eliminating a person's entitlement to monthly social security disability benefits on account of a large C&R. The federal government would use the TTD rate to calculate the "earnings" as a result of a C&R that should have a social security addendum but doesn't.

Recently, an Applicant's attorney tried to walk through for WCJ approval a C&R for $83,000.00 for a social security disability recipient and there was no social security addendum. There was a small WCMSA that had been approved by CMS in the sum of around $12,000.00. The Applicant's pre-injury earnings were $10.00 per hour or $400.00 per week which is $20,800.00 per year and $1,733.33 per month. The Social Security Administration converts weekly workers' compensation benefits into monthly benefits and then adds the monthly SSD payments to apply the 80% Rule. Her SSDI monthly benefits are roughly $1,200.00 per month. The 80% Rule threshold for her would be $1,386.66 per month combined WC and SSDI benefits. Without the social security addendum to the C&R, the social security administration would consider the Applicant's net proceeds of $58,550.00 ($83,000.00 less attorney's fees of $12,450.00, less the WCMSA of $12,000.00) from the C&R as earnings which would end her SSDI benefits for at least 42 months. This is because the social security administration would use the weekly TD rate as earnings until the entire amount of the C&R is "paid out." Permanent disability advances are considered unencumbered earnings and have to be added to the "net recovery" in a social security addendum even though they were paid prior to a settlement.

Practice Point: Counsel should always advise the injured worker to submit a copy of a C&R and all of its attachments to the Social Security Administration (SSA) if and when the SSA or CMS inquires about the status of a workers' compensation case. Remember, Section 111 of the SCHIP Act and MMSEA Act of 2007 requires all claims administrators to report individuals who have become or will become eligible for Medicare and who have pending a personal injury or workers' compensation claim.

[3] See https://policy.ssa.gov

[4] *Sciarotta v. Bowen* (1988) 837 F.2d 135.

Now to the problem with Louis' case. On June 26, 2014, the C&R for $550,000.00 was approved by a workers' compensation judge. On August 25, 2014, the Applicant sent a copy of the C&R to CMS and to the Social Security Administration (SSA). On September 13, 2014, Louis received a notice from SSA that his monthly SSDI benefits were being reduced. On October 21, 2014 he received a notice from SSA that he was overpaid $22,972.00 from November 1, 2004 through September 30, 2014 - almost ten years of overpayment, all due to his lump sum settlement in the C&R!

SSA sent a notice to Louis dated February 7, 2015 that outlined the reason for the overpayment. SSA took the $550,000.00 C&R, subtracted the attorney's fees of $82,500.00 and the Medicare Set Aside seed money of $97,269.00 and calculated his bi-weekly PD payments of $370.00. The total exceeded the 80% Rule and SSA claimed the over payment. The problem is that SSA failed to include the cost of the Medicare Set Aside Annuity (which pays $18,027.59 per year beginning July 1, 2015 and annually thereafter for life). The purchase of the annuity part of the WCMSA cost $261,548.00 and was part of the $550,000.00 gross C&R. It was clear to Louis' legal counsel that SSA miscalculated the application of the 80% Rule.

When an Applicant calls his attorney that the client has received a notice of overpayment of social security disability due to a C&R, the first thing counsel needs to do is to advise the Applicant to complete a federal form called "Request for Waiver of Overpayment Recovery." The form (Form 632) can be obtained at the following website, via Google search, or at any social security administration regional office: www.socialsecurity.gov.

Practice Point: Always have the Applicant complete the Request for Waiver of Overpayment form (SSA form 632) and hand carry it to the SSA regional office nearest the Applicant's residence. Make sure he or she has previously sent a copy of the C&R, F&A, or Stipulated Award to the SSA office, and if not to do so when filing the Request for Waiver of Overpayment.

For SSA to waive collection of an overpayment, the Applicant has to prove two things:

1. It was not the fault of the Applicant that there was an overpayment of SSDI benefits, and;
2. Paying SSA back would create a severe economic hardship in that the Applicant could not be able to pay for food, clothing, housing, or other essential expenses; or it would be unfair for some other reason.

See Section 204(b) of the Social Security Act and 42 CFR 404.506 through 404.512. Many times, a representative from SSA will call the Applicant and ask to schedule a face to face meeting to discuss the overpayment. In Louis' case, it was no surprise that he failed to appear at the face to face meeting. Previous clients have attended these meetings and the purpose is simply for the SSA representative to verify the information that was written on the Request for Waiver and to determine if an overpayment of SSDI benefits are the SSDI recipient's fault. The discussion is not recorded, the Applicant is not placed under oath and usually the matter can be resolved informally at that point.

In determining whether or not the overpayment was the fault of the SSDI beneficiary, the SSA looks at three factors:

A. The Applicant made an incorrect statement or a statement that the Applicant knew or should have known was incorrect concerning his or her receipt of incorrect benefits or rate;

B. Whether the Applicant failed to give timely information to SSA which the Applicant knew or should have known was important (e.g. sending a copy of the workers' compensation benefits notices, benefits print outs, or copies of the settlement documents with all of the attached addendum).
C. Whether the Applicant accepted payments where the Applicant knew or should have known were incorrect.

If the matter is not resolved then Uncle Sam sends another letter that states "Based on the facts we have, you so not meet both of these rules [#1 and #2 above] and we deny your Request for Waiver of Overpayment." On November 26, 2014 Louis and his attorney (this author) filed a Request for Reconsideration of the notice of overpayment that was dated October 21, 2014. Louis received the SSA notice dated September 21, 2015 that the waiver of overpayment was denied because he failed to appear at the face to face conference. This notice gave the Applicant 60 days to request a hearing before a federal administrative law judge. A request for hearing was filed on November 10, 2015 and a hearing before an administrative law judge was set on August 7, 2017. Yes, this whole thing started in 2014 and it took until August 17, 2017 to get a hearing. You will find out in a minute that the final decision of the judge did not issue until September 7, 2018, four years after Louis appealed his reduction in monthly SSDI benefits from $1,423.70 per month to $906.00 per month due to the alleged overpayment from 2004 through 2014.

At the hearing on August 7, 2017, the federal administrative law judge (ALJ) was very uncertain about the 80% Rule, the Medicare Secondary Payer Act, and the Patel Memo of July 23, 2001 (that created the practice – not a regulation – using Medicare Set-Aside Arrangements in lump sum settlements of workers' compensation cases). In fact he was so uncertain he ordered Louis' attorney to submit a brief to him regarding all of the above. Louis' attorney submitted a brief outlining what is written in this article and included a full copy of the C&R, Order Approving C&R, all of the addendum, copies of 42 CFR 404.317, 404.408, and a copy of the Patel memo[5].

The judge ordered a manager of a local SSA Regional Office to testify by telephone (which is common in SSDI hearings) who tried to explain how the 80% Rule works. It was obvious to us that because of many factors, including the testimony of essentially the judge's co-worker, this trial did not result in resolution of the issues.

A new judge was re-assigned the case due to the trial judge being "unavailable" but suffice it to say that the new judge listened to the audio tape of the hearing and read Applicant's trial brief. In the first part of her decision dated September 7, 2018, the ALJ explained the current law regarding alleged overpayment of social security benefits. Counsel's understanding of federal

[5] See www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Set-Aside-Arrangements/WCMSA-Memorandums/Downloads

law will assist anyone in defending an Applicant who is accused of being overpaid social security disability benefits due to settlement of his or her workers' compensation case. Here are excerpts of the judge's decision:

> "The issue is whether there has been an overpayment in disability insurance benefits, and if so, whether the claimant qualifies for waiver of the overpayment as defined under Section 204(b) of the Social Security Act. Adjustment or recovery of the overpayment shall be waived if the claimant is without fault, and adjustment or recovery would defeat the purpose of the Act, or would be against equity and good conscience."
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> "An overpayment is the difference between the amount paid to the overpaid individual and the amount of payment to which the individual was actually entitled (20 CFR 404.504). The undersigned must consider all available evidence related to the overpayment (20 CFR 404.522(a)."
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> "Section 204(b) of the Act provides that adjustment or recovery of the overpayment shall be waived, the effect of which relinquishes the obligation of the claimant to repay the amount of the overpayment, covered by waiver, if the claimant is without fault and adjustment or recovery would either defeat the purpose of Title II of the Act, or be against equity and good conscience (20 CFR 404.506(a))."
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> "Fault, as used in *without fault* applies only to the individual. Although SSA may have been at fault in making the overpayment, that fact does not relieve the claimant or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment, if the claimant is not without fault. In determining whether the individual is at fault, the undersigned will consider all pertinent circumstances, including the claimant's age and intelligence, and any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) he has (20 CFR 404.507)."
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> "If the claimant is considered to be without fault, the undersigned will consider whether recovery of the overpayment would defeat the purpose of Title II of the Act. Adjustment or recovery will defeat the purpose of the Act where the claimant needs substantially all of his *current* income (including social security monthly benefits) to meet *current* ordinary and necessary living expense. Ordinary and necessary living expenses include: fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g. life, accident, health insurance including premiums for supplementary insurance benefits), taxes, installment payments, etc.; medical, hospitalization and other similar expenses; expenses for the support of others for whom the claimant is legally responsible; and other miscellaneous expenses which reasonably be considered as part of the claimant's standard of living (20 CFR 404.508(a) and (b)."
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> "If the Claimant is found to be without fault, the undersigned will also consider whether recovery of an overpayment is against equity and good conscience under Title II of the Act. Recovery of the overpayment is against equity and good conscience if the claimant changed his position for the worse or relinquished a valuable right because of reliance upon a notice that a payment would be made or because of the overpayment itself; or,

was living in a separate household from the overpaid person at the time of the overpayment and did not receive the overpayment. The claimant's financial circumstances are not material to a finding of against equity and good conscience (20 CFR 404.509)."

"20 CFR 416.110 provides that an individual is eligible for Supplemental Security Income Benefits (SSI are under Title XVI of the Act whereas SSDI benefits are under Title II of the Act) if he does not have more income than is permitted under the SSI program. 20 CFR.1104 provides that both earned and unearned income are considered in determining an individual's eligibility for SSI. 20 CFR 416.1121 indicates that unearned income includes Social Security Disability benefits."

"The Commissioner of Social Security has the burden of proving the existence of an overpayment of social security disability benefits (and of any other benefit under the Act). *McCarthy v. Apfel* 221 F. 3d 1119 (9th Cir. 2000); *Cannuni ex rel. Cannuni v. Schweiker*, 740 F. 2d 260, 263 (3d Cir. 1984); *United States v. Smith* 482 F. 2d 1120, 1124 (8th Cir. 1973). The Commissioner has the burden of proving the fact and amount of the overpayment. The Commissioner must establish:

1. That the claimant received the disability benefits for the period of the overpayment in question;
2. That these benefits were in excess of the amount to which the claimant was entitled; and
3. That the overpayment was in the amount claimed by SSA.

The ALJ acknowledged in her decision Louis's attorney's trial brief in which the 80% Rule, the Medicare Secondary Payer Act (42 USC 1395y), and the Patel Memo were described. The ALJ stated in her opinion that the SSA could not meet its burden of proving the existence of an overpayment in the first place. After unilaterally contacting the Applicant's SSA Regional Office and being referred by that office to the SSA Payment Service Center in Richmond, CA, the ALJ discovered that no one from the SSA office could explain how and why an overpayment was alleged in the first place. The ALJ's four or five emails and inquiries of the SSA offices were not responded to over a two-month period.

In her Notice of Decision, the ALJ stated:

"[This Court} sent another email a week later requesting an update, noting it had been over two months since [this Court's] initial inquiry. The manager of the payment processing office responded two weeks later stating that the processing office had decided there was a $4.00 overpayment to be added to a prior overpayment… There is no clear explanation as to this recalculation. It provides no clarification and, in fact, further muddles the uneasy history of the claimant's alleged overpayment…The SSA then declared the claimant had been overpaid $22,972.00 simply because 'we treat a lump sum award as if it were paid on a weekly basis after deducting legal expenses and medical expenses.' There was no detailed breakdown, discussion of relevant SSA rules and regulations, or an application of said rules."

> "Moreover, the SSA initially found the claimant to not be at fault since the settlement occurred in 2014. It was only after the claimant refused to provide financial information or attend the personal conference did the SSA find the claimant to be at fault such that recovery of the overpayment was not waived. When pressed by [this Court] about the overpayment calculation, the SSA regional office and payment center delayed for months before responding with an even more puzzling calculation unaccompanied by any clear reasoning. Because the original offset amount was erroneously calculated, the SSA has failed to provide a coherent explanation as to how it performed its recalculation, the undersigned finds the SSA has failed to prove the fact and amount of the overpayment. Therefore, the undersigned finds no overpayment occurred, there is no need to discuss the issue of waiver. The SSA has failed to establish that the claimant was overpaid in the amount of $22,972.00 for the period November 2004 through September 2014. Any and all amounts already withheld from the claimant due to the alleged overpayment shall be paid back to the claimant."

When you read the ALJ's decision, you learn a great deal about the inner workings of the SSA at the local level. There are only a few SSA Payment Service Centers (formerly called Office of Disability Operations) in the country – the one in Richmond, CA, one in Chicago, one in New York, and at the SSA headquarters in Bethesda, Maryland. This case involved a complete breakdown of the agency applying its own regulations, statutes, and case law.

The postscript: Louis has had a rough last few years. Despite the large C&R settlement in 2014, protection for his future medical treatment by almost $100,000 in seed money, annual annuity payments, and social security disability, at age 62 his quality of life and health have deteriorated. This author has stayed in touch with Louis through the attorney who referred Louis for his workers' compensation case. Since suffering from a severe reduction in his monthly SSDI benefits, Louis has to live check to check, had to borrow money from family members, and at times has been on the verge of homelessness. With SSA withholding $22,972.00 in SSDI benefits, getting that money back is a life saver.

This case is a demonstration of how counsel in a workers' compensation case should protect a client who is receiving SSDI benefits and who settles his or her workers' compensation case by way of a Compromise and Release. Despite providing best practices of having a bullet-proof social security addendum, attaching the structured settlement agreement that outlined the initial unencumbered money payments, the WCMSA seed money, and the cost of the WCMSA annuity, and attaching CMS approval of the WCMSA, through SSA's own ineptitude the sky fell anyway. One take away here is for Applicant's attorneys to never give up on a client. Set up the settlement documents with best practices as outlined in this article, and be prepared to defend the settlement's terms in federal court before an administrative law judge in order to protect an Applicant's SSDI benefits.

The main take away is prevention: Make sure the Applicant is protected in the first place by having a detailed social security addendum and attaching the WCMSA to the C&R. Make sure the Workers' Compensation Judge approves the C&R with the following language either pre-printed in the Order Approving C&R or handwritten in by counsel:

> "The Court has reviewed the allocation of proceeds in the Social Security Addendum. It is found that the net proceeds of this settlement are equivalent to $_____ per month for life due to the loss of future earning capacity caused by loss of function under the AMA Guides.[6]"
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> "The Court has reviewed the WCMSA attached to the C&R and hereby finds that the WCMSA adequately considers the interests of Medicare under the Medicare Secondary Payer Act (42 U.S.C 1395y) concerning Applicant's potential future medical treatment for the accepted parts of body injured resolved in this settlement."

The language in the Order Approving C&R should be written on the face of the one-page Order and not as a "Supplemental Order Approving C&R" which will not be recognized by CMS or SSA. In cases where a proposed WCMSA has been submitted to and approved by CMS, counsel just needs to attach the CMS notice accepting the WCMSA along with a copy of the WCMSA and the language on the Order Approving C&R regarding the WCMSA is not necessary. For any non-submittal WCMSA to CMS, the language indicated above regarding an WCMSA should be on the Order Approving C&R.

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[6] SSA uses the Second Edition of the AMA *Guides* for eligibility under the listings pursuant to Subpart P of the SSA regulations.