

N.D.A.G. Letter to Tracy (April 27, 1992)

April 27, 1992

Ms. Helen Tracy
Executive Director
Workers Compensation Bureau
Russell Building
4007 North State Street
Bismarck, ND 58501-0600

Dear Ms. Tracy:

Thank you for your March 11, 1992, letter inquiring whether N.D.C.C. § 65-05-09.1 requires any fees and costs paid to a lay person representative be deducted from the primary insurance amount before the amount of the Social Security offset is calculated.

N.D.C.C. § 65-05-09.1 provides in pertinent part:

When an injured employee, spouse or dependent of an injured employee, is eligible for and is receiving permanent total or temporary total disability benefits under section 65-05-09, and is also eligible for, is receiving, or will receive, benefits under Title II of the Social Security Act [42 U.S.C. 423], the aggregate benefits payable under section 65-05-09 must be reduced, but not below zero, by an amount equal as nearly as practical to one-half of such federal benefit. The federal benefit, or primary insurance amount, must be determined by the social security administration. The amount to be offset must equal the primary insurance amount less attorneys' fees and costs withheld from past due social security benefits or paid directly by the claimant for representation before the social security administration. The amount of the offset computed by the bureau initially must remain the same throughout the period of eligibility and may not be affected by any increase or decrease in federal benefits.

N.D.C.C. § 65-05-09.1 (emphasis supplied).

The above language specifically provides that only "attorneys'" fees and costs either withheld or paid directly by the claimant for representation before the Social Security Administration may be deducted from the primary insurance amount. The word "attorney" is normally used to mean an individual licensed to practice law. N.D.C.C. ch. 27-11; N.D.C.C. § 1-02-02 ("Words used in any statute are to be understood in their ordinary sense . . ."). Thus, fees and costs paid to a lay person representing a claimant before the Social Security Administration may not be deducted from the primary insurance amount before the amount of the Social Security offset is calculated. This is consistent with 20 C.F.R. § 404.1730(b) (iii)(2) (4-1-91 Edition), which provides that the Social Security

Administration will not deduct the fee charged by a non-attorney representative from the benefits payable to the claimant represented.

In conclusion, it is my opinion that when a claimant is represented by a lay person before the Social Security Administration, any fees and costs paid to the representative may not be deducted from the primary insurance amount before the amount of Social Security offset is calculated.

I trust this responds to your question.

Sincerely,

Nicholas J. Spaeth

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