

reduced the amount of disability insurance benefits (“DIB”) payable to the plaintiff under title II of the Social Security Act, 42 U.S.C.A. §§ 401-433 (West 1991 and Supp. 2001) (“Act”). Jurisdiction of this court exists pursuant to 42 U.S.C.A. § 405(g).

Barrett suffered an injury at his place of employment in Norton, Virginia, on July 25, 1994, and as a result underwent two surgeries on his neck. (R. at 12, 71.) He applied for DIB on June 6, 1995, alleging disability since August 15, 1994. In addition, Barrett entered into a lump sum settlement of his state workers’ compensation claim, approved by the Virginia Workers’ Compensation Commission on December 29, 1995. The settlement payment totaled \$45,000, of which \$30,000 was designated as “allocated to future medical expenses.” (R. at 71.) While Barrett was found disabled by the Social Security Administration and awarded DIB, his monthly social security payments were offset by the amount received in the workers’ compensation settlement, less the amount of attorney’s fee and expenses. The plaintiff objected on the ground that the \$30,000 allocated to future medical expenses should have been excluded from the offset.

Barrett received a hearing before an administrative law judge (“ALJ”) on his claim on March 10, 1999, at which he was represented by counsel. His attorney

automatic submission of parties in this case. See Fed. R. Civ. P. 25(d)(1).

explained the “high” amount of future medical expenses allocated in the workers’ compensation settlement as follows:

Attorney: [F]rankly, Your Honor - - and I talked to Mr. Barrett about that, and we talked about that when we settled this case, and the problem in his case was he’d already had two neck surgeries.

ALJ: Yes.

Attorney: They sent him to Blacksburg for another expert’s opinion on whether he would need another surgery. They, they determined that he did not at that time, but as always, these doctors say, you know, that may be something you’ll have to look at in the future, but we don’t know that.

....

[Barrett] states that his doctor’s [sic] told him there’s nothing they can do for him, but, because of his age, he still has some time to go with these problems, and, the doctors, frankly won’t write anything down saying that he needs future care, or that he’s going to need future surgery. That’s what they tell him in the office, but they won’t put that down on, on a piece of paper.

(R. at 21-22.)

The attorney declined to have his client testify at the hearing (R. at 22), but the ALJ held the record of the case open for a period of thirty days to allow the plaintiff to submit further proof of the reasonableness of the future medical expenses portion of the workers’ compensation settlement. In response, the plaintiff submitted a letter detailing his position that the workers’ compensation settlement was the sole evidence required

to show the reasonableness of the future medical expenses figure and consequently it was not necessary to submit any other evidence. (R. at 69-70.) By decision dated June 3, 1999, the ALJ found that the plaintiff's DIB payments were properly reduced. The Social Security Administration's Appeals Council denied review, and the ALJ's opinion constitutes the final decision of the Commissioner.

The parties have filed cross motions for summary judgment, and the plaintiff has briefed the issues.² The case is now ripe for decision.

II

The applicable statute, 42 U.S.C.A. § 424a (West Supp. 2001), in essence requires that social security disability awards be reduced, or "offset," by any periodic payments (including lump sum commutations or substitutes for periodic payments) of state workers' compensation benefits. *See Wilson v. Apfel*, 81 F. Supp. 2d 649, 652 (W.D. Va. 2000). The Social Security Administration has adopted regulations that carry out this legislative mandate. However, the regulations exclude certain benefits, such as future medical expenses, from the amount offset. Thus, the social security

² The Commissioner did not file a brief in support of his motion for summary judgment. Instead, the Commissioner filed a Statement of Intention Regarding Brief and Motion to Suspend Briefing Schedule, which stated, "This case involves no unusual factual or legal issues and the Administrative Law Judge decision contained in the Administrative Record filed herein stands as an explanation of the Commissioner's position."

award is not offset by such amounts and a claimant may receive full benefits from both social security and a workers' compensation settlement. The regulations provide that "[a]mounts paid or incurred, or to be incurred, by the individual for medical . . . or related expenses . . . are excluded in computing the reduction . . . to the extent they . . . reflect either the actual amount of expenses already incurred or a reasonable estimate . . . of future expenses." 20 C.F.R. § 404.408(d) (2001).

This exclusion for medical expenses paid or to be paid accurately follows the congressional purpose for the offset, which is to prevent double benefits for the same injury, reducing the incentive to return to work. *See Wilson*, 81 F. Supp. 2d at 652. Since state workers' compensation laws, such as in Virginia, normally provide for the payment of medical expenses for injured workers,³ as well as for compensation for lost income, there is no double payment when a social security benefit is not reduced for medical expenses, because the social security disability payment does not have any relation to the claimant's medical expenses.

On the other hand, to fail to offset "sham" future medical expenses, which are in reality simply substituted periodic workers' compensation payments, would be contrary to the congressional intent. *See id.* at 653.

³ *See Va. Code Ann.* § 65.2-603 (Michie Supp. 2001).

In regard to expenses not to be offset, whether past or future, the regulations provide that they “may be evidenced by the public disability award, compromise agreement, a court order, or by other evidence.” 20 C.F.R. § 404.408(d).

In the present case, the only evidence presented by the plaintiff is the fact that the Virginia Workers’ Compensation Commission approved an agreement between the plaintiff and his employer’s insurance company by which Barrett gave up his workers’ compensation claim in return for a lump sum payment of \$45,000, of which amount the sum of \$30,000 was allocated to future medical expenses. Relying on *Blankenship v. Heckler*, No. 83-0188-A, 1985 WL 71818 (W.D. Va. Oct. 28, 1985) (Williams, J.), the plaintiff contends that this workers’ compensation settlement is conclusive as to the amount of future medical expenses for purposes of the offset.

I disagree. In *Blankenship*, it was held that it had been error under the facts of that case to require the social security claimant to present more than the fact of an approved workers’ compensation settlement in order to show the amount of future medical expenses. *See* 1985 WL 71818, at *2. In the present case, the ALJ considered the settlement agreement, but found that it was not conclusive of the reasonableness of the amount of future medical expenses in light of the particular facts of this case, including the facts that the amount allocated in the settlement to future medical expenses was nearly eighty percent of the total cash settlement received by the

plaintiff;⁴ that shortly before the settlement, Barrett had been released by his physician to light work; that in the workers' compensation settlement the insurance company agreed in addition to the lump sum payment to pay all medical expenses incurred for one year; and that at the time of the hearing before the ALJ, more than three years after the settlement, Barrett had not incurred a substantial amount of medical expenses. (R. at 13.)

No similar facts appear in *Blankenship*. The only evidence there was the workers' compensation settlement allocation, and the court held that it was error for the ALJ to reject it. In the present case, to the contrary, there were additional facts upon which the ALJ could properly base a finding that the allocation was unreasonable.

This court must uphold the factual findings of the Commissioner if they are supported by substantial evidence and were reached through application of the correct legal standard. See 42 U.S.C.A. § 405(g) (West Supp. 2001); *Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal citation omitted). "It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Laws*

⁴ The total settlement was \$45,000, from which amount Barrett's attorney was paid \$6750 in fee and \$22.50 in expenses, leaving Barrett \$38,227.45.

v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966). Viewing the Commissioner's decision in the light of these principles, I find there was substantial evidence supporting the conclusion that the amount of future medical expenses claimed was unreasonable.

I reject the notion that the workers' compensation settlement is conclusive on this issue. The Commissioner of Social Security was not a party to that proceeding and the parties there had no incentive to eliminate the possibility of double recovery by social security claimants. In fact, since the allocation of future medical expenses may serve no purpose in a workers' compensation lump sum settlement agreement other than to attempt to defeat any later social security offset, it would be directly contrary to congressional intent to give the settlement a preclusive effect. *See Stockton v. Sec'y of Health & Human Serv.*, No. 87-5079, 1988 WL 24152, at *3 (W.D. Ark. Mar. 1, 1988) ("It cannot be that Congress intended that the . . . right to offset payment should be conclusively determined by private agreements between claimants and the employers' insurers."); *Thebeau v. Bowen*, No. 86-0037B, 1986 WL 98627, at *2 (D. Me. Dec. 9, 1986) ([T]he issue . . . now before this court was never fully and fairly litigated before the Workers' Compensation Commission by *any* party, much less by the [Commissioner of Social Security] who was not a party at all. Consequently, the

[workers' compensation] decree is entitled to no preclusive effect. . . .”) (emphasis in original).⁵

Moreover, the social security regulations do not require that the workers' compensation settlement be accepted as conclusive. The applicable regulation makes clear that the estimate of future medical expenses must be “reasonable.” 20 C.F.R. § 404.408(d). Even though the regulation provides that the Commissioner “may” consider a compromise agreement in determining the reasonableness of the amount of expense, he is not required to give it binding effect.

For these reasons, I find that the Commissioner's offset of the claimed future medical expenses was based on substantial evidence and thus proper.

An appropriate final judgment will be entered.

DATED: October 9, 2001

United States District Judge

⁵ The allocation of future medical expenses in workers' compensation settlements in order to minimize the social security setoff is apparently a fading practice, perhaps because of Social Security Administration resistance and because the claimant will now lose Medicare benefits until the amount of the “allocation” has been “used up.” See C.F.R. § 411.46 (2001); G. Patrick Murphy, *A Plaintiffs' Lawyer's Guide to Settlement Offers & Liens*, 86 Ill. B.J. 91, 92 (1998).