CASE NO. 6485 CRB-4-22-9 : COMPENSATION REVIEW BOARD
CLAIM NO. 400029637

GERALD R. ROWE, EXECUTOR OF THE ESTATE OF PATRICIA A. ROWE, DECEASED : WORKERS' COMPENSATION COMMISSION
CLAIMANT-APPELLEE

v. : SEPTEMBER 15, 2023

BRIDGEPORT HOSPITAL
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Jon A. August, Esq., Miller, Rosnick, D'Amico, August & Butler, P.C., 1087 Broad Street, Bridgeport, CT 06604.

Respondent Bridgeport Hospital was represented by Melissa B. Convertito, Esq., Letizia, Ambrose & Falls, 667-669 State Street, Second Floor, New Haven, CT 06511.

Respondent Second Injury Fund was represented by Trevor S. White, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106. Attorney White was excused from attending oral argument.

This Petition for Review from the September 13, 2022 Ruling on Respondent's Form 36 of December 10, 2019, and Ruling on Respondent's October 5, 2021 Motion to Approve Its December 10, 2019 Form 36 of Michelle D. Truglia, Administrative Law Judge acting for the Fourth District, was heard on February 24, 2023 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Toni M. Fatone and Soline M. Oslena.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The respondent employer has petitioned for review from the September 13, 2022 Ruling on Respondent's Form 36 of December 10, 2019, and Ruling on Respondent's October 5, 2021 Motion to Approve Its December 10, 2019 Form 36 of Michelle D. Truglia, Administrative Law Judge acting for the Fourth District (ruling).[1] We find no error and accordingly affirm the decision.[2]

The administrative law judge noted that the parties stipulated to the following facts. The decedent was born on October 2, 1948. On October 31, 1996, while employed as a registered nurse for the respondent, the decedent contracted hepatitis C following an accidental needle stick. She subsequently developed a significant respiratory/lung condition due to the medications she was taking for the hepatitis C. The respondent accepted compensability for the respiratory/lung condition and commenced paying temporary total disability benefits on November 16, 1996, along with timely cost-of-living adjustments (COLAs) thereafter. The respondent issued a voluntary agreement which was approved by the Workers' Compensation Commission (commission) on January 16, 1998. The decedent's condition continued to deteriorate; a lung transplant was recommended, which she declined.

[1] Counsel for the Second Injury Fund filed a notification of appearance on November 25, 2022; however, he subsequently requested that he be excused from oral argument, which request was granted.

[2] At an informal hearing held on August 24, 2022, the parties waived the 120-day rule for issuing decisions pursuant to General Statutes § 31-300, which requires that "[a]s soon as may be after the conclusion of any hearing, but no later than one hundred twenty days after such conclusion, the administrative law judge shall send to each party a written copy of the administrative law judge's findings and award." See also September 7, 2022 Joint Motion to Extend Time to Issue Formal Hearing Decision. The extension was requested in order to accommodate delays associated with probate proceedings following the decedent's death on April 17, 2022.

On October 2, 2014, the decedent reached her full retirement age of sixty-six pursuant to the Social Security Act and became eligible for social security retirement benefits. On October 2, 2016, she reached her maximum retirement age of seventy pursuant to the Social Security Act. As of the date for the filing of briefs in this matter, the decedent had never received or applied for social security retirement benefits despite being eligible to do so. According to a letter from the Social Security Administration dated July 22, 2019, the decedent would have received $2,169 per month had she applied for benefits at age seventy. See Joint Exhibit 1, ¶ 9.

On December 10, 2019, the respondent filed a form 36 indicating that in accordance with General Statutes § 31-307 (e)[3], the hospital was entitled to a credit for temporary total disability benefits paid since the date the decedent reached her full retirement age of sixty-six. The form 36 also stated that the decedent's "entitlement to ongoing temporary total disability benefits going forward at her full base compensation rate should be terminated."[4] (Emphasis in the original.) On December 11, 2019, the decedent objected to the form 36.

At the commencement of formal proceedings on February 8, 2022, the parties stipulated that the issue for determination was whether the form 36 should be granted or, more specifically, whether the respondent was entitled to an offset and, if so, as of what date. In addition, the decedent sought a ruling as to whether the offset, if applicable,

[3] While in effect, General Statutes § 31-307 (e) provided: "Notwithstanding any provision of the general statutes to the contrary, compensation paid to an employee for an employee's total incapacity shall be reduced while the employee is entitled to receive old age insurance benefits pursuant to the federal Social Security Act. The amount of each reduced workers' compensation payment shall equal the excess, if any, of the workers' compensation payment over the old age insurance benefits." It should be noted that Number 06-84 of the 2006 Public Acts repealed § 31-307 (e) effective as of May 30, 2006.
[4] The form 36 was dated December 6, 2019, but was filed on December 10, 2019.

would apply to dependents' benefits paid pursuant to General Statutes § 31-306.[5] The respondent argued that the issue of the applicability of the offset to dependents' benefits was not ripe for adjudication as the decedent was still alive.[6]

The administrative law judge noted that in addition to the respondent's request for an order granting the December 10, 2019 form 36 and the October 5, 2021 motion to approve the form 36, the respondent also sought to terminate its obligation to pay the decedent any additional temporary total disability benefits. The trier indicated that since the date of filing the form 36, the respondent had limited its requested reimbursement commencement dates to either October 2, 2014, when the decedent reached her full retirement age of sixty-six, or October 2, 2018, when she reached her maximum retirement age of seventy.

The decedent died on April 17, 2022, shortly after the formal proceedings of February 8, 2022, and before the closing of the record on May 9, 2022. The cause of death on the April 18, 2022 death certificate was listed as interstitial lung disease. See May 5, 2022 Supplemental Memorandum of Law Regarding Applicability of Former § 31-307 (e) and Dependent's Claim to Benefits Pursuant to § 31-306 [Affirmation of Jon A. August, Exhibit A]. At the respondent's request, the trier took administrative notice of the parties' briefs filed prior to formal proceedings and the voluntary agreement

[5] General Statutes § 31-306 (a) provides in relevant part that "[c]ompensation shall be paid to dependents on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease …."

[6] The administrative law judge declined to address the applicability of the offset to dependents' benefits, and the respondent has not appealed that issue. We note that in Hummel v. Marten Transport, Ltd., 114 Conn. App. 822, *cert. denied*, 293 Conn. 907 (2009), our Appellant Court stated that "[t]he plain meaning of § 31-307 (e) shows it to be inapplicable to the plaintiff's simultaneous collection of § 31-306 widow's benefits and social security widow's benefits." Id., 851-52.

approved by the commission on January 16, 1998. The trier also noted that neither the decedent nor her husband ever testified at a deposition or at trial.

On the basis of the foregoing, the administrative law judge, having found that the parties were subject to the provisions of the Workers' Compensation Act, concluded that because § 31-307 (e) was in effect on the decedent's date of injury, the statutory offset was applicable to the claim pursuant to the "date of injury" rule.[7] Conclusion, ¶ H. The trier determined that although the statute was repealed in 2006, the legislative history associated with the repeal contains no language suggesting that the repeal was intended to be retroactive in effect. As such, given that the statute "involves or affects the substantive rights of the parties, it is properly applied only prospectively, regardless of the fact that the [respondent] made [its] claim for the offset after the repeal of the statute." Conclusion, ¶ I.

The trier found that the form 36 was not filed until December 10, 2019, when the decedent was seventy-one years old and had surpassed her maximum retirement age. Citing Smith v. Federal Express Corp., 5405 CRB-7-08-12 (December 1, 2009), for the proposition that retroactive relief cannot be granted on a form 36, the trier concluded that any relief in the present matter could be granted only on or after the date the form 36 was filed.[8] The trier expressly rejected the respondent's contention "that relief should be

[7] "The date of injury rule is a rule of statutory construction that establishes a presumption that new workers' compensation legislation affecting rights and obligations as between the parties, and not specifying otherwise, applie[s] only to those persons who received injuries after the legislation became effective, and not to those injured previously." (Internal quotation marks omitted.) Esposito v. Waldbaum's, Inc., 78 Conn. App. 472, 474 n.3 (2003), *quoting* Badolato v. New Britain, 250 Conn. 753, 756 n.5 (1999).

[8] In Smith v. Federal Express Corp., 5405 CRB-7-08-12 (December 1, 2009), this board stated that "[o]ur cases require that a respondent notify the commissioner and employee of a proposed discontinuance of benefits before the date of the proposed discontinuance…. The earliest date that a termination of benefits may become effective is the date on which the Form 36 is filed." (Internal citation omitted.) Id., *quoting* Torres v. Southern Connecticut Truck & Tire Center, 3144 CRB-3-95-8 (February 5, 1997).

granted by 'operation of law.' If this were true, then the filing of the form 36 was superfluous." Conclusion, ¶ K.

Noting that "social security retirement benefits are not automatically sent out by the federal government," Conclusion, ¶ L, the trier, in reliance upon this board's analysis in Villani v. New Milford, 4990 CRB-7-05-8 (May 18, 2006), *appeal dismissed*, A.C. 27710 (July 18, 2007), determined that a prospective eligible recipient must file an application to establish an entitlement to the benefits. The trier found that the decedent never applied for social security retirement benefits in her lifetime, and the evidentiary record is devoid of any testimony or documentary evidence indicating that a claim for social security retirement benefits after attaining either full or maximum retirement age is mandatory. Moreover, the respondent presented no case law in support of its claim for an offset against social security retirement benefits that were never actually paid to or received by the decedent. Having concluded that the respondent was not entitled to the offset, the administrative law judge denied, with prejudice, both the December 10, 2019 form 36 and the October 5, 2021 motion to approve the December 10, 2019 form 36.

The respondent has appealed the ruling, contending that the administrative law judge erred as matter of law in concluding that although § 31-307 (e) was applicable to the claim, the respondent was not entitled to the offset under the factual circumstances of the matter. The respondent also claims as error the trier's conclusion that, even if the offset were applicable, the commencement date for the application of the offset would have been the date of the filing of the form 36. As we are not persuaded by the respondent's first claim of error, we decline to reach the second claim.

The standard of appellate review we are obliged to apply to a trier's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). Thus, "it is … immaterial that the facts permit the drawing of diverse inferences. The [trier] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair, supra, 540, *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We note at the outset that the respondent does not dispute the trier's findings that § 31-307 (e) is applicable to the present matter and the repeal in 2006 was not retrospective in application given the substantive nature of the statute.[9] As such, we begin our analysis with the respondent's argument that it was entitled to the social security offset as of either the date the decedent reached her full retirement age of sixty-six or the date she reached the maximum retirement age of seventy. As the respondent accurately points out, the Connecticut higher courts do not appear to have addressed the issue of whether the social security offset "applies when a claimant has

[9] In Turner v. Turner, 219 Conn. 703 (1991), our Supreme Court stated that when interpreting a workers' compensation statute, it is an "accepted principle that a statute affecting substantive rights is to be applied only prospectively unless the legislature clearly and unequivocally expresses its intent that the legislation shall apply retrospectively." Id., 712.

elected not to apply for full or maximum social security retirement benefits, despite being 'eligible' to do so." (Emphasis omitted.) Appellant's Brief, p. 5. However, the respondent argues that "[b]ased on the legislative intent behind the statute and the case law interpreting the statute … it is clear that the offset should apply in the present case." Id. We disagree.

Section 31-307 (e) was originally enacted as part of the extensive workers' compensation legislation passed by the Connecticut legislature in 1993.[10] In Rayhall v. Akim Co., 263 Conn. 328 (2003), our Supreme Court, in reviewing the constitutionality of § 31-307 (e), observed that the statute "was enacted as part of a comprehensive scheme to reform the Workers' Compensation Act…. We have noted previously that the principal thrust of these reforms was to cut costs in order to address the spiraling expenses required to maintain the system."[11] (Internal citation omitted.) Id., 346.

Having concluded that it would "analyze the plaintiff's constitutional challenge under the rational basis test," id. 345, the court remarked that it was "rational for the legislature, by applying the offset only to total incapacity benefits, to target the benefit of unlimited duration, as opposed to the one of limited duration, when determining where to cut costs." Id., 351. Moreover, given that "the legislature rationally could have determined that receipt of old age social security benefits establishes a presumption of

[10] The bill analysis for § 16 of No. 93-228 of the 1993 Public Acts states: "Benefit Offsets. Requires total disability benefits to be reduced by any amount the claimant is entitled to receive in Social Security Benefits."

[11] In Rayhall v. Akim Co., Inc., 263 Conn. 328 (2003), our Supreme Court summarized the claimant's constitutional claims as follows: "The plaintiff claims that the offset under § 31–307 (e) for social security old age retirement benefits against total disability benefits violates his right to equal protection under the federal and state constitutions. The plaintiff contends that § 31–307 (e) unconstitutionally discriminates on the basis of disability, because the offset applies to total disability benefits, but does not apply to partial disability benefits. The plaintiff further contends that § 31–307 (e) unconstitutionally discriminates on the basis of age, because the offset applies only to an age-based retirement benefit, and not other benefits that are nonage-based." Id., 341.

retirement," id., 351-52, the legislature also "rationally could decide to reduce wage replacement benefits for workers who have retired from the workforce." Id., 351. As such, the court held that "because the legislature's goal of cost saving was legitimate and the offset is a rational means to achieve that goal, we conclude that § 31–307 (e) is not unconstitutional." Id., 353.

In examining the statute's legislative history, the court noted that Senator Michael P. Meotti had remarked that the provision "requires that total disability benefits be reduced by any Social Security retirement benefits received. This also is very common throughout the nation and it's present in the New Jersey, New York and Massachusetts systems currently." Id., 347 n.17, *quoting* 36 S. Proc., Pt. 11, 1993 Sess., p. 3934. The court pointed out that:

> The only legislative history that expressly addresses the offset merely reflects that the legislature was aware of similar offset provisions in other jurisdictions …; and that it considered applying the offset more broadly, but settled on limiting its reach to old age social security benefits applied against total disability benefits. (Footnote omitted; internal citations omitted.)

Id., 347.

The Rayhall court made two additional observations relative to § 31-307 (e) which are pertinent to the issue at bar. The court stated:

> We recognize that the offset does not provide a precise fit so that it applies *only* to those workers who, irrespective of their injury, would have retired upon eligibility for social security retirement benefits. Under rational basis review of a facial challenge to the constitutionality of a statute, however, we need not find such a precise fit. (Emphasis in the original.)

Id., 352.

In making this observation, the court seemed to acknowledge that the offset would potentially, and perhaps unfairly, apply to workers who might not have retired but for their injury. However, the court also remarked that the claimant:

> contends that the offset lacks a rational basis because it applies upon mere *eligibility,* not actual receipt of old age social security benefits. In the present case, the plaintiff is not merely eligible for, but has received, old age social security benefits and, therefore, is not aggrieved by this distinction. Moreover, even if we were inclined to consider the merits of this claim in the context of eligibility, we are unaware of any instance in which a claimant has been aggrieved by application of the offset upon mere eligibility. (Emphasis in the original.)

Id., 346 n.16.

In making this assertion, the Rayhall court appeared to decline to reach the issue of a claimant's potential aggrievement on the basis of eligibility for, rather than actual receipt of, social security retirement benefits.

Four months later, in Esposito v. Waldbaum's, Inc., 78 Conn. App. 472 (2003), our Appellate Court reviewed an appeal of this board's affirmance of a decision by the workers' compensation commissioner granting temporary total disability benefits to a claimant who had sustained his injury prior to the enactment of § 31-307 (e).[12] The respondent, in reliance on Mulligan v. F. S. Electric, 231 Conn. 529 (1994), argued that the date of the claimant's disability, rather than the date of injury, should have governed the applicability of the offset.[13] The court, recognizing the statute's prospective

[12] Effective October 21, 2021, the Connecticut legislature directed that the phrase "administrative law judge" be substituted when referencing a workers' compensation commissioner. See Public Acts 2021, No. 18, § 1.

[13] In rejecting the respondent's argument, the Esposito court noted that in Mulligan v. F. S. Electric, 231 Conn. 529 (1994), our Supreme Court had "simply utilized the date of total disability as a mere component in the calculation of the workers' compensation benefit rate …" Esposito v. Waldbaum's, Inc., 78 Conn. App. 472, 476 (2003).

application consistent with our Supreme Court's analysis in Rayhall, supra, rejected the respondent's argument, concluding:

> The statutory subsection at issue clearly affects an employer's substantive right to reduce the compensation benefits of a disabled worker once the employee becomes eligible for social security retirement benefits. Hence, absent a clear expression of legislative intent to the contrary, the defendant's right to reduce the plaintiff's compensation must have vested on the date of injury.

Esposito, supra, 478.

For purposes of the issue at bar, it should be noted that the workers' compensation commissioner in Esposito determined that the claimant "became eligible for social security retirement benefits when he attained the requisite age of sixty-five on June 17, 1998 …." Our Appellate Court did not address the merits of this finding in its review.

In 2006, pursuant to Number 06-84 of the 2006 Public Acts, the legislature repealed § 31-307 (e). The respondent argues that legislative history associated with this repeal provides support for its contention that the legislature intended that the offset would become applicable once a claimant reached either full or maximum social security age. As an illustration, the respondent points to the following remarks made by Senator Edith G. Prague in opening the discussion of the repeal bill:

> Currently, in our workers' comp system, there is a very unfair situation that no other New England state has. And as a matter of fact, there are only ten states in the whole country, and one by one they're dropping this provision, Louisiana being the most recent.
>
> And that provision is that when somebody is either eligible for Social Security or collecting Social Security, if they are working and get injured, and have a total disability, collecting workers comp, 100% of their Social Security is deducted off of their workers' comp payment.

> If somebody is just eligible for workers' comp and not for Social Security and not collecting it, whatever they're eligible for is deducted off of their workers' comp.

49 S. Proc., Pt. 9, 2006 Sess., p. 2617.

Our review of this history reflects that Senator Edwin A. Gomes also spoke in favor of repeal, stating:

> For somebody to have 100% of their Social Security to be discounted because they're injured on the job is completely ridiculous.
>
> And I say that anytime that, they even have a provision in here if you're entitled to the Social Security at the age of 62, and you're not collecting it, it still will be discounted from your workers' compensation. That is, that is way off the mark.

Id., 2619.

Senator Andrew W. Roraback agreed with Senator Prague that a social security retirement recipient who sustained an injury after returning to the workforce should not be subject to the offset. As such, he proposed an amendment to the repeal bill seeking to limit the scope of the repeal to individuals who were already collecting social security when they sustained the injury rendering them temporarily totally disabled. Senator Prague spoke against the negative impact of the amendment on workers between the ages of sixty-two and sixty-five and eight months, pointing out that:

> most people at age 62 don't collect Social Security because it's a reduced rate. They don't get full Social Security until they're about 65 and 8 months.
>
> But simply because they're eligible, they could be 63 years old and injured on the job, and whatever they're eligible for under Social Security is deducted off of their workers' comp….
>
> It is very unfair. It's almost unconscionable ….

Id., 2627.

Ultimately, the amendment was defeated and the repeal bill passed. However, as the respondent correctly points out, there is some ambiguity as to whether the repeal was intended to apply to workers who were younger than sixty-five. In remarks before the Labor and Public Employees Committee at a hearing held on February 14, 2006, Kyra P. Nesteriak, Government Affairs Manager for the Connecticut Business & Industry Association, stated that:

> The language that's before you in Senate Bill 25 is slightly broader than the language that was discussed in meetings that were held with Senator Prague.
>
> And what this language does is it allows as long as you are eligible to receive the Social Security retirement benefits for there to be no offset as opposed to, when the discussions took place with Senator Prague and yourself and others, it was supposed to be that you were already collecting Social Security retirement benefits and then were injured.
>
> This opens the door up wider, so as long as someone is eligible, they don't have to actually be receiving the benefits.[14]

Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 1, 2006 Sess., pp. 108-109.

However, Howard B. Schiller, Esq., speaking on behalf of the Workers' Compensation Section of the Connecticut Trial Lawyers Association, remarked that it was his understanding that the bill limited the repeal of the offset to individuals aged sixty-two and older, thereby "[eliminating] a problem with regard to mere technical eligibility rather than actual receipt of benefits." Id., 110. However, Schiller also pointed out that the bill failed to "address the circumstances of workers who are totally disabled

[14] In her written statement, Nesteriak indicated that "[a]llowing individuals to collect more than their weekly wage replacement levels creates a significant disincentive for people to return to work. Instead it creates an incentive to stay on workers' compensation as that … individual's income would be greater than if the person was working." Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 1, 2006 Sess., p. 273.

who, perhaps injured before age 62, find themselves at the point of retirement when they should normally be expecting to have, if you will, the benefit of years of work and saving contributing to Social Security and elsewhere." Id. Schiller urged the legislature to repeal § 31-307 (e) in its entirety.[15]

Lori Pelletier, Secretary Treasurer of the Connecticut AFL-CIO, and a representative from AARP Connecticut also offered testimony in support of repeal of the offset in its entirety.[16] However, a written statement from a representative of the Connecticut Conference of Municipalities reflected that individual's understanding that the repeal "would allow persons to receive full workers' compensation benefits after such members have begun receiving social security benefits." Id., 278.

At a subsequent public hearing held before the Labor & Public Employees Committee on February 28, 2006, John Del Vecchio, a workers' compensation organizer for District 1199 of the New England Health Care Employees Union, remarked that:

> Public Act 93-228 required that benefits for total incapacity be reduced dollar for dollar by eligibility for social security retirement benefits. As a result, people eligible for social security retirement who are injured on the job receive significantly less workers' comp disability benefits, or in many cases, no benefits at all…. Senate Bill 25 would rectify this miscarriage of justice and restore

[15] In his written statement, Schiller pointed out that General Statutes § 31-307 (e) "applies when a worker is *eligible* for benefits (which can be age 62). When a worker continues to work without electing social security benefits (which can be deferred until age 70), if there is a period of total disability before a return to work, benefits are totally offset even though the worker has never actually retired and no money has been paid by social security." (Emphasis in the original.) Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 1, 2006 Sess., p. 276.

[16] The AARP representative stated: "We feel that workers who suffer an occupational injury or illness should be eligible for unreduced workers' compensation regardless of age or eligibility for retired worker benefits under Social Security. The majority of people who remain in the workforce after age 65 do so because they have to – because their Social Security benefits are inadequate to live on." Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 1, 2006 Sess., p. 274.

> reasonable partial wage replacement to senior citizens injured on their jobs.

Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 3, 2006 Sess., p. 798.

In proceedings before the Connecticut House of Representatives held on May 1, 2006, Representative Kevin Ryan remarked that "if a senior is injured at work and becomes totally disabled, the law allows the workers' comp insurance company to completely offset the amount of the injured senior's federal social security retirement benefits against the state workers' comp benefits." 49 H.R. Proc., Pt. 16, 2006 Sess., p. 5139. Noting that the repeal bill "simply eliminates the provision for folks with total disability to allow state workers' compensation benefits to be reduced by federal social security retirement benefits, Representative Ryan stated:

> The workers who suffer an occupational injury and illness should be eligible for unreduced workers' compensation, regardless of their age or eligibility for retired workers benefits under social security.

Id., 5140.

Representative John W. Hetherington also spoke in favor of repeal, remarking, "I believe that there is no logical connection between workers' compensation and otherwise earned social security benefits, and therefore I would urge adoption of the Bill." Id., 5141.

As the respondent in the present matter points out, the legislative history associated with the repeal of § 31-307 (e) does reflect that the offset, at least in some cases, was being applied to the social security retirement benefits of temporarily totally disabled individuals upon reaching the age of sixty-two. This appears to have been the case regardless of whether the injury was sustained before or after the injured worker had

begun collecting social security retirement benefits or was merely eligible for such benefits having attained the age of sixty-two. However, we disagree with the respondent's contention that the offset was necessarily "being correctly applied …," Appellant's Brief, p. 7, given that, as discussed previously herein, the legislative history for the enactment of the offset contains Senator Meotti's remark that it was to be applied to social security retirements "received." 36 S. Proc., Pt. 11, 1993 Sess., p. 3934.

Moreover, the legislative history relied upon by the respondent was associated with proceedings for what ultimately became the offset's complete repeal. In light of the legislative history's ambiguity relative to the contemplated scope of the repeal, we are not persuaded that this history provides an adequate basis for the inference that the legislature intended that § 31-307 (e) be applied to individuals who were eligible for, rather than actually receiving, social security retirement benefits.

Following the repeal of § 31-307 (e) in May 2006, our Supreme Court again addressed the applicability of the offset in Pasquariello v. Stop & Shop Cos., 281 Conn. 656 (2007).[17] In that matter, the claimant, who had been collecting social security retirement benefits when he sustained the injury which rendered him totally disabled, appealed this board's reversal of the commissioner's award of temporary total disability benefits.[18] The claimant alleged that the application of the statute "to persons who have returned to the workforce after retiring and drawing social security benefits [violated] his constitutional right to equal protection." Id., 670.

[17] See Public Acts 2006, No. 06-84, § 1.

[18] The Supreme Court transferred the appeal from the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. See Pasquariello v. Stop & Shop Cos., 281 Conn. 656, 660 n.6 (2007).

In reviewing the language of Public Acts 1993, No. 93-228, § 16, the court determined that it was bound by the "plain meaning rule" as contemplated by General Statutes § 1-2z[19] and noted that "[t]he dispositive phrase appears to be '*while* the employee is entitled to received [social security] benefits ….'" (Emphasis in the original.) Id., 665.

> In the absence of any statutory definition, we construe the term "while" in accordance with "the commonly approved usage of the language...." General Statutes § 1–1(a). "While" is defined to mean "during the time that...." Webster's Third New International Dictionary. Thus, the statute prescribes that social security benefits shall be deducted from total disability payments during the time that the employee is entitled to receive social security benefits. This phrase is broad and without limitation. Accordingly, the offset appears to apply whenever an employee concurrently is entitled to total disability and social security benefits.

Id., 665.

The court concluded that the application of the statute "whenever the two benefits exist concurrently does not appear on its face to be irrational or yield absurd results." Id. However, the court also acknowledged "that, despite its equal *application*, the offset may have a different *effect* on some workers;" specifically, workers similarly situated to the claimant who were already receiving social security retirement benefits prior to sustaining an injury. (Emphasis in the original.) Id., 666. The Pasquariello court

[19] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Alternatively, "[w]hen a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter...." (Citations omitted; internal quotation marks omitted.) Doe v. Norwich Roman Catholic Diocesan Corp., 279 Conn. 207, 212 (2006). Section 1-2z became effective on October 1, 2003, following the issuance of both Rayhall v. Akim Co., 263 Conn. 328 (2003), and Esposito v. Waldbaum's, Inc., 78 Conn. App. 472 (2003).

referenced its previous analysis in Rayhall, supra, relative to its observation that the offset "does not provide a precise fit so that it applies *only* to those workers who, irrespective of their injury, would have retired upon eligibility for social security retirement benefits." (Emphasis in the original.) Id., 668, *quoting* Rayhall, supra, 352.

The court stated:

> In other words, although a given worker may not have planned to retire at the precise point in time when his social security eligibility and disability coincide, at some point thereafter, that worker likely would retire. Although it is unfortunate that application of the offset cannot coincide with the point in time when each worker subjectively intended to retire, we cannot envision a practical method whereby the legislature could have achieved that outcome in every case.

Id., 675.

The court further noted "that the legislature repealed § 31–307 (e) because it recognized the limited financial resources available to older workers and the inequities affecting *all* older workers as a result of application of the offset." Id., 669. Nevertheless, the court deemed the claimant's constitutional challenges to be without merit, remarking that "[t]he offset applies to all persons who are totally disabled and concurrently eligible for social security." Id., 672.

> The legislature has established a reasonable ground for applying the offset to all persons concurrently receiving social security benefits and total incapacity benefits. Although we may question the fairness of the result in the present case given the overall intent of the Workers' Compensation Act, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."

Id., 676, *quoting* Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096 (1993).

In the present matter, the respondent accurately points out that the Pasquariello court stated that the "receipt of social security benefits gives rise to the presumption of retirement and, hence, a lesser need for the replacement of wages under the workers' compensation scheme." Id., 674, *citing* Rayhall, supra, 351-352. The respondent asserts that this statement reflected the court's acknowledgement that most employees will eventually retire, and "it is completely reasonable to assume that the Claimant would have retired from the Hospital at some point had she not been totally disabled from her work-related injury." Appellant's Brief, pp. 6-7. The respondent avers that this assumption is fully consistent with both the Social Security Act, which contemplates different age thresholds for the commencement of benefit payments, and § 31-307 (e) "which, by its very nature, assumes that many employees will reach the point where they find themselves both totally disabled and eligible for Social Security retirement benefits."[20] Id., 7.

We concede that it is certainly possible that, in the absence of the injury sustained by the claimant, she would have retired from paid employment at some point. However, we are not persuaded that the Pasquariello court, in making such a general observation, was suggesting that the offset should automatically be applied to claimants upon reaching a specific retirement threshold. This is particularly so given that the court appeared to contemplate that the offset was intended to apply to individuals who were already "concurrently *receiving* social security benefits and total incapacity benefits." (Emphasis added.) Id., 676.

[20] See 42 U.S.C. § 416 (l) (1).

We recognize that the Pasquariello court noted that the statutory language of 42 U.S.C. § 402 (a)[21] states that "[e]ntitlement to social security commences at age sixty-two or older." Id., 672, *citing* 42 U.S.C. § 402 (a) (2). However, our examination of the full text of this provision reflects that entitlement to social security retirement benefits also requires that an applicant be "a fully insured individual," 42 U.S.C. § 402 (a) (1), who "has filed an application for old-age insurance benefits …." 42 U.S.C. § 402 (a) (3).

In Villani v. New Milford, 4990 CRB-7-05-8 (May 18, 2006), *appeal dismissed*, A.C. 27710 (July 18, 2007), this board examined the meaning of the word "entitlement" in its review of an appeal brought by respondents seeking "reversal of the trier's ruling that a claimant between the ages of 62 and 65 who has not yet elected to receive Social Security benefits is entitled to full compensation for temporary total disability, despite the offset provision of § 31-307 (e) C.G.S." Id. The respondents argued that the language of the statute was "unambiguous, thereby preventing [this board] from delving into the legislative history or any other evidence supporting a different interpretation." Id. However, we disagreed, holding that the use of the word "entitled" in the phrase "while the employee is entitled to receive old age insurance benefits," id., was potentially subject to more than one interpretation in light of the process for obtaining social security

[21] Section 402 (a) of title 42 of the United States Code provides: "**Old-age insurance benefits**
Every individual who --
(1) is a fully insured individual (as defined in section 414(a) of this title),
(2) has attained age 62, and
(3) has filed application for old-age insurance benefits …
shall be entitled to an old-age insurance benefit …." (Emphasis in the original.)

benefits for an individual between the age of sixty-two and full retirement age. We pointed out that:

> The Black's Law Dictionary definition of "entitle" is "to give a right or legal title to," or "to qualify for; to furnish with proper grounds for seeking or claiming." An "entitlement" is further defined as "right to benefits, income or property which may not be abridged without due process; *e.g.* social security benefits." See Black's Law Dictionary, Abridged Sixth Edition. The logic implied by this definition becomes circular in the context of § 31-307 (e). To wit: one is furnished with proper grounds for seeking Social Security benefits when one reaches the age of 62, and that right cannot be abridged without due process. Yet, the right to collect Social Security is not invoked until the beneficiary elects to begin receiving those benefits, and there is no obligation on the part of the Social Security Administration to begin paying such benefits beforehand. Though a prospective beneficiary may be eligible to claim benefits, she or he does not establish legal title to such payments until an application is filed. Only at that point would the federal government be unable to deny payment without due process. Both arguments regarding the meaning of "entitled" appear tenable…. Thus, we must look beyond the statutory language itself.

Id.

In addition, we noted our Supreme Court's reference in Rayhall, supra, to the comment in the legislative history made by Senator Meotti to the effect that the offset provision "requires that total disability benefits be reduced by any Social Security retirement benefits received."[22] Rayhall, supra, 347 n.17, *quoting* 36 S. Proc., Pt. 11, 1993 Sess., p. 3934.

[22] Our review of the legislative history for Public Act 93-228 indicates that in addition to the comments by Senator Meotti referenced previously herein, Representative Michael P. Lawlor stated that "[t]here are offsets in the amendment for the amount that is *received* on a social security pension." (Emphasis added.) 36 H.R. Proc., Pt. 18, 1993 Sess., p. 6211. Lawlor remarked that the "[s]ocial security offset … means that if people are collecting social security, that vast sum … will be offset from what they're getting from workers' compensation." Id., 6232. In proceedings before the Labor and Public Employees Committee held on March 11, 1993, a representative for the Professional Insurance Agents of Connecticut, Inc., stated that "[i]n particular we support the provision of the bill which allows workers' compensation benefits to be reduced by the amount of retirement income or other income already being *received* by the worker." (Emphasis added.) Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 4,

In assessing the practical effects of the offset on the claimant's social security retirement benefits, we reasoned that the claimant, in order to preserve the full dollar amount of her temporary total disability benefits were the offset to be applied, would essentially be forced into early retirement. This termination of employment would permanently limit her social security retirement benefit to $587 per month, as opposed to the $786 per month she would collect upon reaching her full retirement age. As such, we concluded that such a result would be inconsistent with both our Supreme Court's analysis in Rayhall, supra, as well as the remedial nature of the Workers' Compensation Act, which seeks "to encourage and even facilitate the return of the employee to the work force once the person is capable of doing so." Villani, supra. We also pointed out that the federal government began increasing the full retirement age in 1983 and, as such, "[e]ncouraging workers' compensation claimants to claim social security benefits prior to their full retirement age would frustrate the purpose of these changes, which are intended to persuade workers to remain in the work force for a longer period of time." Id.

We agree with the respondent that Villani can be distinguished from the present matter on the basis that the claimant in the present matter elected not to apply for either full or maximum social security retirement benefits, whereas the claimant in Villani chose not to apply for early retirement benefits. It may therefore be argued that the public policy concerns referenced by this board in Villani are not pertinent to the present matter. However, in Villani, we stated that although "a prospective beneficiary may be eligible to claim benefits, she or he does not establish legal title to such payments until an

---

1993 Sess., p. 1474. Similarly, Ken Delacruz, president of the Metal Trades Council bargaining unit for the Electric Boat shipyard, commented that "[o]ne of the proposals that would have a devastating impact on many workers is the proposal to reduce workers' compensation by any retirement benefits *received*." (Emphasis added.) Id., 1709.

application is filed." Id. We further noted that, "[c]onsistent with the testimony of a specialist in Social Security law, the trial commissioner found that the claimant was not automatically entitled to receive benefits at the age of 62. Rather, she would have had to elect to receive them by applying for them at some point prior to her full retirement age."[23] Id.

We believe this finding by the commissioner was fully consistent with the statutory requirements for social security retirement benefits as set forth in 42 U.S.C.A. § 402 (a). Moreover, although the Connecticut state courts do not appear to have addressed the application requirement, the issue has been litigated in the federal forum. For instance, in Clark v. Celebrezze, 344 F.2d, 479 (1965), *cert. denied*, Clark v. United States, 385 U.S. 817, 87 S.Ct. 38 (1966), the U.S. Court of Appeals for the First Circuit reviewed an appeal from a decision by the Secretary of Health, Education and Welfare brought by a plaintiff seeking widower's social security insurance benefits. At that time, in order for a widower to collect such benefits, the Social Security Act required that the widower be receiving "at least one-half of his support" from the decedent spouse on either the spouse's date of death or the date the spouse had become entitled to the benefits in her own right.[24] The court noted that:

> The only serious issue is that presented by the examiner's determination that the time when plaintiff's wife "became entitled to old-age … benefits", within the meaning of Section 202 (f) (1) (D) (ii) … was when she successfully applied therefor in

[23] In his finding, the Villani commissioner stated that "until the Claimant reaches the age of 65 years and eight months, the Respondents are not allowed to take a credit, set-off, or to reduce the Claimant's temporary total disability benefits on a weekly basis." August 23, 2005 Finding & Order, Conclusion. The construction of this conclusion relative to the applicability of § 31-307 (e) was not explicitly challenged and, hence, was not subject to review by this board on appeal. However, in light of the fact that the issue of the applicability of the offset to the claimant's temporary total disability benefits upon the attainment of her full retirement age was not before the commissioner, we believe the reference to that eventuality went beyond the scope of the proceedings.

[24] See § 202 (f) (1) of the Social Security Act, 42 U.S.C.A. § 402 (f) (1) (D) (i).

> October 1960, rather than when she first would have qualified for benefits had she then applied, which was March 1960.

Id., 480.

The appeals court referenced the entitlement requirements set forth in 42 U.S.C.A. § 402 (a), and commented that:

> This statutory language prescribes three prerequisites to entitlement to benefits— that the applicant is a fully insured individual, that the applicant has attained retirement age, and that the applicant has filed an application for benefits. *It plainly fixes the time when an applicant becomes entitled to benefits as the first month in which all three conditions, including the filing of an application, are met.* (Emphasis added.)

Id., 481.

The appeals court concluded that although the decedent:

> could have qualified for benefits in March 1960 by filing an application at that time, this does not change the fact that it was not until October 1960, when she actually did file, that the statutory requirements for entitlement were satisfied. As put somewhat differently in Bender v. Celebrezze, 332 F.2d 113, 115-116 (7th Cir. 1964), "[t]he Social Security Act … makes the filing of an application a substantive condition precedent to entitlement to benefits."

Id.

Similarly, in Berner v. Finch, 335 F. Supp. 318 (E.D. Mo. 1971), *aff'd*, Berner v. Richardson, 465 F.2d. 1407 (1972), the U.S. District Court for Eastern District of Missouri, Eastern Division, reviewed an appeal brought by the administrator of his brother's estate seeking social security retirement and disability benefits which he contended were still due and owing to his deceased brother. The court noted that the decedent, after filing an application on his own behalf on November 21, 1967, had received social security retirement benefits until his death. An application filed in 1963

by the brother on the decedent's behalf was denied by the Social Security Administration on October 4, 1963; however, the administrator contended that the application was still pending given that "the Administration made no determination of 'entitlement' under the 1963 application …."[25] Id., 321. The court disagreed, remarking that "until a proper application has been filed no determination of 'entitlement' thereunder could be made." Id. As such, "[t]he October 4, 1963 decision constituted a final disposition of the application which effectively removed it from the category of pending proceedings." Id.

The administrator also sought federal disability benefits predicated on the statutory language in 42 U.S.C. § 402 (a) (3), which recognizes an entitlement to social security retirement benefits on the basis of an applicant's entitlement "to disability insurance benefits for the month preceding the month in which he attained the age of 65." Id., 322. However, the court held that because the decedent had never filed an application for federal disability benefits in his own right, he failed to establish an entitlement to such benefits, given that an application is "a sine qua non of entitlement to benefits." Id. "The making of an application by an insured during his lifetime, or by someone on his behalf, is a necessary condition precedent to the creation of an obligation on the part of the United States under the statute." Id., *quoting* Coy v. Folsom, 228 F.2d 276, 278 (3d Cir. 1955).

In addition, in Johnson v. United States, 572 F.2d 697 (9th Cir. 1978), the U.S. Court of Appeals for the Ninth Circuit stated that "filing is a substantive condition to receiving benefits under the Social Security Act when the applicant is a minor seeking retroactive benefits." Id., 698. Finally, in Cheers v. Secretary of Health, Education, and

[25] The 1963 application filed by the brother was predicated on the decedent's alleged incompetency.

Welfare, 610 F.2d 463, 469 (7th Cir.1979), *cert. denied,* 449 U.S. 898, 101 S.Ct. 266 (1980), the U.S. Court of Appeals for the Seventh Circuit affirmed a decision by the Secretary of Health, Education and Welfare denying the appellant benefits for disabled children. Remarking that "[i]n this case, we are asked to review one of those unfortunate occurrences where well-founded law imposes harsh consequences upon the individual," id., 464, the appeals court affirmed the denial, stating that "[t]he Secretary readily admits appellant was eligible for these benefits at the time, but refuses to grant the benefits because the appellant failed to file a written application as required by the administration's regulations."[26] Id.

The foregoing federal precedent clearly reflects that the requirements set forth in 42 U.S.C. § 402 (a) contemplate that entitlement for retirement benefits hinges inter alia upon the applicant having applied for those benefits. Given that the statutory language of § 31-307 (e) specifically references "entitlement," rather than "eligibility," we

[26] However, in Slorby v. Slorby, 760 N.W.2d 89 (2009), the Supreme Court of North Dakota reversed the district court's denial of a husband's motion to abate spousal support predicated on an amended judgment which stated that the support obligation would terminate when the wife became "eligible to receive social security benefits." Id., 91. The district judge concluded that "the intent appears to be clear that the spousal support would continue until January, 2011, when [the wife] turns sixty five (65) years old." Id. The judge further noted that "the second amendment lists several options which may activate the termination of the spousal support and the court concludes the exact date was inserted to identify the date on which [the wife] would become eligible to receive benefits under this agreement." Id., 91-92. The Supreme Court disagreed, holding that the phrase "'eligible to receive Social Security benefits' [was] not ambiguous in the context of this case," id., 93, given that the wife's social security statement indicated she would be eligible to receive benefits as of her sixty-second birthday. The court determined that "[t]he only requirement of the second amended judgment is that [the wife] be eligible to receive any social security benefits." Id. In light of the fact that the provisions of the amended judgment required only that the wife be eligible to receive social security benefits, the court held that "[w]hether [the wife] has applied for social security benefits is irrelevant because the second amended judgment does not require her to apply for or to actually receive the benefits." Id., 93-94. One justice dissented on grounds that the "plain meaning of 'eligible' is 'entitled' in this context" and, given that the Social Security Act requires that an applicant file an application to establish entitlement, the majority opinion "completely ignores the third criterion of the law." Id., 96. Another justice also dissented, partly in concurrence with the first dissent, and also on the basis that the inclusion of the January 2011 date (when the wife would turn sixty-five) in the amended judgment suggested that "it is logical to interpret the judgment to mean spousal support would end when [the wife] reached the age of sixty-five and was 'eligible' to receive a Social Security benefit somewhat more comparable to the amount of spousal support." Id., 97.

therefore agree with the administrative law judge that "[a]n application must be made by the prospective, 'eligible' recipient to the federal government in order to be 'entitled' to receive benefits." Conclusion, ¶ L. As such, we affirm the trier's conclusion that, under the circumstances of this matter, the social security retirement offset formerly codified at § 31-307 (e) is not applicable to the decedent's temporary total disability benefits. In light of our affirmance, we therefore decline to embark on an inquiry into the appropriate applicable commencement date for the offset or an examination of whether a form 36 is required in order to trigger the offset.[27]

There is no error; the September 13, 2022 Ruling on Respondent's Form 36 of December 10, 2019, and Ruling on Respondent's October 5, 2021 Motion to Approve Its December 10, 2019 Form 36 of Michelle D. Truglia, Administrative Law Judge acting for the Fourth District, is accordingly affirmed.

Administrative Law Judges Toni M. Fatone and Soline M. Oslena concur in this Opinion.

[27] In light of our affirmance, we also decline to reach the issue of whether the respondent should be estopped from claiming the offset on the grounds that it delayed filing its form 36.