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T/SH/1/MD

Commissioner's File: CM/121/1985

C A O File: AO 6127/MOB/85

Region: North Fylde Central Office

**SOCIAL SECURITY ACTS 1975 TO 1985
CLAIM FOR MOBILITY ALLOWANCE
DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS**

Name:

Appeal Tribunal:

Case No: 17/01

[ORAL HEARING]

1. Our decision is that the claimant is not entitled to a mobility allowance because on 24 May 1984 when his claim was received he was over the age of 66 and had not been entitled to an allowance in respect of a period ending immediately before he attained the age of 65 and therefore does not satisfy the conditions of section 37A(5)(aa)(ii) or section 37A(5)(aa)(i) of the Social Security Act 1975 as amended.
2. This appeal relates to a claim for mobility allowance which was received on 24 May 1984 from the claimant who gave his date of birth as 13 March 1918. On 18 September 1984 the adjudication officer issued a decision disallowing the claim but on the claimant's appeal the social security appeal tribunal ("the tribunal") on 8 May 1985 unanimously reversed the decision of the adjudication officer's decision. The terms of the decisions of the adjudication officer and the tribunal are set out later in this decision. The adjudication officer was given leave to appeal to the Commissioner by the chairman of the tribunal and in the grounds of appeal attention was drawn to the conflict between on the one hand the decision in Commissioner's file CM 147/1984 and on the other hand the decisions in Commissioner's files CWM 10/1984, CMW 7/1984, CM 118/1984 and CM 50/1984. On 30 July 1985 the Chief Commissioner directed an oral hearing of the appeal by a Tribunal of Commissioners. The claimant died on 18 August 1985 and his widow (hereinafter called "the appointee") was appointed to proceed with the claim on the terms of a letter dated 10 September 1985.
3. The claimant had made an earlier claim for mobility allowance on 17 June 1981 which was disallowed by the adjudication officer on the ground that the claimant did not satisfy the medical conditions for an award.
4. We held an oral hearing of the appeal at which the adjudication officer was represented by Mr. Peter Milledge of the Solicitor's Office, Department of Health and Social Security and the appointee, who was not present, was represented by Mr. Richard Drabble of Counsel, instructed by Mr Roger Smith, solicitor, of the Child Poverty Action Group. We are indebted to both representatives for their helpful submissions.
5. Mobility allowance is provided for by section 37A of the Social Security Act 1975 which was inserted into that Act by section 22(1) of the Social Security Pensions Act 1975 and was subsequently amended by section 3 of the Social Security Act 1979. As in force at

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the date of the claim now under consideration section 37A, so far as relevant for the present purpose, provided as follows:-

- "37A - (1) Subject to the provisions of this section, a person who satisfies prescribed conditions as to residence or presence in Great Britain shall be entitled to a mobility allowance for any period throughout which he is suffering from physical disablement and that he is either unable to walk or virtually unable to do so.
- (2)
- (3)
- (4)
- (5) No person shall be entitled to a mobility allowance -
 - (a) in respect of a period in which he is under the age of 5 or over the age of 75;
 - (aa) in respect of a period in which he is over the age of 65 but under the age of 75 unless either -
 - (i) he had been entitled to a mobility allowance in respect of a period ending immediately before the date on which he attained the age of 65; or
 - (ii) he would have been so entitled but for paragraph (b) below and a claim for the allowance by or in respect of him is made before the date on which he attained the age of 66;
 - (b) except in prescribed cases, for any week before that in which a claim for the allowance by or in respect of him is received by the Secretary of State.
- (6)
- (6A)
- (6B)
- (7) Except so far as may be provided by regulations, the question of a person's entitlement to a mobility allowance shall be determined as at the date when a claim for the allowance is received by the Secretary of State.
- (8)"

As originally inserted section 37A(5)(a) read:-

"in respect of a period in which he is under the age of 5 or over pensionable age;" and sub-paragraph (aa) was not included.

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6. The decision of the adjudication officer first concerned was as follows:-

"The claimant is not entitled to mobility allowance because he is over the age of 65 and had not been entitled to a mobility allowance in respect of a period ending immediately before the date on which he attained the age of 65. (Social Security Act 1975, section 37A(5)(aa)(i)."

In his initial written submission to the tribunal the adjudication officer submitted in effect that the claimant did not satisfy either condition (i) or condition (ii) of section 37A(5)(aa).

7. The tribunal adjourned its first hearing to give the claimant an opportunity to bring evidence that he would have been entitled to mobility allowance before the age of 65, had he claimed, and to allow the adjudication officer an opportunity to consider the proposition that, in such a case, a disallowed claim made by the claimant would be enough to bring him within section 37A(5). The adjudication officer then made a further submission in which he did not dispute that the claimant satisfied the prescribed conditions as to residence and presence in Great Britain and that he might, at the date of the claim under appeal, have satisfied the medical conditions. However, he submitted that the claim under appeal had not been received before the claimant reached the age of 66 and that the further condition in subsection (5)(aa)(ii) that a claim must be received before the claimant reached that age was not satisfied. He also submitted that the case was not the same as a recent case in the House of Lords - the McCaffrey case referred to later - that entitlement to mobility allowance was dependent on a claim being made at the appropriate time and that a claim received after age 66 cannot be founded upon an unsuccessful claim before the age of 66.

8. At the resumed hearing the tribunal recorded their decision as follows:-

"The appellant is not disqualified for mobility allowance by reason only of the circumstances set out in the AO's decision of 18.9.84.

The AO is directed to refer medical questions to a medical board for decision."

and recorded the reasons for their decision as follows:-

"The decision of the Adjudication Officer was direct to only one element of the appellant's circumstances. The Regulations provide, inter alia, that a claimant may receive mobility allowance if, being over 65 he would have been entitled thereto if he had made a claim at the appropriate time, and he makes a claim before he is 66. Although it is attractive to interpret the last clause as referring to the claim in question it must be supposed that the Minister and Parliament considered the Regulations when they were framed and chose not to use words such as "makes the claim..." or "makes the claim in question..." or "makes a claim after the age of 65 but before he is 66". The regulations are carefully framed, and it must be supposed that the intention was to ensure that those who made early but unsuccessful claims were to be given a later chance of this benefit after the age of 65 as their condition deteriorated [what follows is not relevant to the present appeal]."

9. As we are in substantial agreement with Mr Milledge's submission in support of the adjudication officer's appeal we think it appropriate to consider first the two alternative submissions made by Mr Drabble on behalf of the appointee. His first submission was that the claimant's case was dealt with not by paragraph (aa)(ii) of regulation 37A(5) but by paragraph (aa)(i). Alternatively he submitted that the approach adopted by the tribunal was correct.

10. It appears to us that Mr Drabble's first submission, and our view of it, will be better understood if before we consider it we refer to the decision of the House of Lords in Insurance Officer (Appellant) v McCaffrey (A.P.) (Respondent) Northern Ireland (1984

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1 WLR 1353). That case concerned a claim for non-contributory invalidity pension under section 36 of the Social Security (Northern Ireland) Act, which reproduces the terms of section 36 of the Social Security Act 1975 as originally enacted. So far as relevant for the present purpose section 36 provided:-

- "36. - (1) Subject to the provisions of this section, a person shall be entitled to a non-contributory invalidity pension for any day on which he is incapable of work; if he has been so incapable for a period of not less than 196 consecutive days ending immediately before that day.
.....
.....
- (4) Subject to subsection (5) below, [which is not relevant for the present purpose] a person who has attained pensionable age shall not be entitled to a pension under this section unless he was so entitled (or is treated by regulations as having been so entitled) immediately before attaining that age."

The question in issue was whether the claimant, who was over pensionable age when she made her claim but had met the conditions set by section 36 immediately before she attained that age, could be said to have been entitled to a pension at that time so as to escape being disentitled by regulation 36(4). It was submitted by the appellant that she could not show that she had been so entitled because she had not made a claim, as required by section 79(1) of the Act which provides:-

- "79. - (1) Subject to the following provisions of this chapter, and, in the case of retirement pensions, to section 27(6), it shall be a condition of a person's right to any benefit that he makes a claim for it in the prescribed manner and within the prescribed time."

11. In the leading speech, with which the other four Lords of Appeal expressed their agreement, Lord Scarman said:-

".....First, entitlement is governed by section 36. The section does not define entitlement by reference to the making of a claim or require a claim as a condition precedent to entitlement. Secondly, section 79(1) has to be construed so as to be consistent with the entitlement which is treated by section 36, and not 'vice versa'. Any other approach makes nonsense of section 36. A government department, faced with the complexities of administering social security, may perhaps be forgiven for putting the cart before the horse. But a judge can have no excuse. The logic of entitlement and claim is clear: claim is based on the existence of entitlement. Thirdly, section 79(1) does not speak of 'entitlement'. It merely declares it to be 'a condition of a person's right to any benefit that he makes a claim'. These words do not have to be construed as a reference to entitlement. They can equally well, as a matter of ordinary English, be a reference to the right to be paid. And this is the meaning appropriate to a section dealing with the administration of benefit. Accordingly, I read the section as having this effect: a claimant not only has to show the existence of an entitlement but has also to make a claim in the prescribed manner and within the prescribed time in order that he may be paid. This construction avoids introducing a restriction upon entitlement not to be found in section 36 and makes sense of section 79(1) as a provision dealing with the administration of benefit.
....."

12. In support of his first submission Mr Drabble argued that in paragraph (b) of regulation 37A(5), as in paragraph (aa)(ii), the reference is to "a" claim, that the making of any claim before a claimant reaches the age of 65 suffices to remove the bar to entitlement constituted by paragraph (b) and that once the bar is removed it becomes open to a claimant

to show that "he had been entitled in respect of a period ending immediately before the date on which he attained the age of 65" by showing that he had satisfied the medical and residential conditions of entitlement in respect of such a period. He observed that it was only by adopting his proposed construction that account could be taken of the McCaffrey decision. We certainly agree that if the bar constituted by paragraph (b) were removed consideration of the case could proceed in the same way as it proceeded in the McCaffrey case but we cannot accept that that affords a sound reason for adopting a construction of paragraph (b) which would not otherwise be justifiable. We consider that paragraph (b) should be construed on its own but, of course, paying due regard to the reasoning behind the McCaffrey decision so far as applicable.

13. Paragraph (b) is framed in terms appropriate to a prohibition against retrospective claiming, which suggests that that may have been its purpose. However, although it does not in terms provide that the making of a claim is to be a condition of entitlement to an allowance, it quite clearly has that effect as is confirmed by the words "would have been entitled but for paragraph (b) below" in paragraph (aa)(ii). The result is that a claimant who shows that he satisfied the residential and medical conditions during a period immediately preceding his 65th birthday cannot be said to have been entitled in respect of that period unless the first week of the period was the week, or was later than the week, in which a claim was received by the Secretary of State.

14. Mr Drabble's contention was in effect that any claim received earlier than the beginning of the period of entitlement sought to be relied upon by the claimant, even if such claim was disallowed, suffices to remove the obstacle created by paragraph (b). We cannot find any support for that view elsewhere in the section and we consider it highly improbable that such a result can have been intended. The normal result of disallowance of a claim is that the claim ceases to have any effect whatsoever and the suggestion that a disallowed claim, although it clearly could never lead to an award of an allowance based on it, could nevertheless continue to have an effect, is one that we could not accept unless driven to do so. We consider that there is a much more readily acceptable interpretation of paragraph (aa)(i) read in the light of paragraph (b), namely, that there must have been a claim which was actually allowed and led to the claimant being held entitled to an allowance in respect of the period. That conclusion comes to much the same as saying that paragraph (aa)(i) applies only in a case in which an allowance was actually awarded for a period ending immediately before a claimant's 65th birthday and it ties in with paragraph (aa)(ii) to which we now turn.

15. We turn now to Mr. Drabble's alternative submission that the tribunal were correct in supposing "that the intention [of paragraph (aa)(ii)] was to ensure that those who made early but unsuccessful claims were to be given a later chance of this benefit after the age of 65 as their condition deteriorated". In our view the only reasonable interpretation of paragraph (aa)(ii) is that it was intended to give a later chance of benefit not to "those who had made early but unsuccessful claims" but - and to a limited extent only - to those who had not made earlier claims which they could have made successfully. We regard the suggestion that the words "a claim" in paragraph (aa)(ii) are intended to refer to any claim, including any unsuccessful claim made by a claimant before he reached the age of 66 for the same reason as that for which we rejected the similar suggestion made by Mr. Drabble in his first submission. We also reject the possibility that paragraph (aa)(ii) in effect allows the back dating of a claim to a date earlier than the 65th birthday so as to put the claimant in the same position as if he satisfied paragraph (aa)(ii) because any such backdating is prohibited by paragraph (b) to which no exceptions are provided for. The only other possibility is that "a claim" refers to the claim currently under consideration and we have no doubt that it is to that claim that it does refer. The true effect of paragraph (aa)(ii) is thus that a claimant who cannot succeed under paragraph (aa)(i) because he did not claim and was not awarded an allowance in respect of a period ending immediately before his 65th birthday, can be awarded an allowance after he is 65 only if (a) he claims it on or after his 65th and before his 66th birthday and (b) could have had an allowance for such a period if he had claimed it.

16. Before reaching our conclusion we considered the decisions referred to in paragraph 2 above. All of them except that on reasoning as our decision and we need say no more about them. The decision on file CM 147/1984 dealt with a case very similar to the present case. It differed only in that the unsuccessful claim made by the claimant before he was 65 failed because it was made at a time when section 37A had not come into force in relation to persons of the claimant's age at the time and not because he failed to satisfy the medical conditions. Paragraphs 6 and 7 of the decision were as follows:-

"6. Leaving aside for the moment the adjudication officer's second submission, he submits that paragraph (aa)(ii) cannot assist the claimant because the claim received on 20 August 1984 [that is that claim the subject of the decision] was not made before the date on which the claimant attained the age of 66.

True, that claim was not made before the claimant reached the age of 66 but the claim made in 1978 was so made. Paragraph (aa)(ii) does not depend upon a claim having been received by the Secretary of State because paragraph (b) is excluded; a claim for the allowance was made in 1978 although it was refused. 1. the adjudication officer's submission is correct, a person making a claim after the age of 66 would not be entitled to a mobility allowance even if he had made an earlier claim before attaining that age. It seems to me that the exclusion of paragraph (b) from paragraph (aa)(ii) is to enable a person to have title to an allowance if he has made a claim at any time before the age of 66. If that is not so, a claim made after the age of 66, whether or not a claim had been made before the age of 66, would rule out a person under the age of 65 as provided in paragraph (aa).

7. Turning to the adjudication officer's second submission, when the claimant made his claim in 1978, he had no entitlement to an allowance because the statutory provisions had not been brought into force. When, however, they were brought into force for his age group from 5 September 1979, from that date he could have claimed an allowance subject to all the provisions of section 37A. For the purposes of that section, his earlier claim, although premature, came to life, as it were, in so far as it might affect any further claim. This is not applying the provisions of the section retrospectively but reviving the earlier claim, not to the extent that he would qualify for an allowance at the earlier date, but that the earlier claim could be cashed in did in respect of section 37A once it came into force in respect of him."

17. In our view it is not correct that paragraph (b) is excluded from paragraph (aa)(ii). Indeed paragraph (aa)(ii) comes into play only in cases where paragraph (b) has taken effect and prevented a claimant from taking advantage of paragraph (aa)(i). It follows that we cannot agree with the reasoning in the above quoted paragraphs which seems to us to be wholly dependent on the exclusion of paragraph (b). Moreover, as indicated earlier, we cannot accept that a claim once dismissed can continue to have an effect. Our conclusion is therefore that the decision on file CM 147/1984 was wrongly decided and should not be followed.

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18. For the foregoing reasons the adjudication officer's appeal succeeds and that our decision must be as set forth in paragraph 1 above.

(Signed) D Reith
Commissioner

(Signed) J N B Penny
Commissioner

(Signed) J B Morcom
Commissioner

Date: 16th May 1986