

SICKNESS BENEFIT - Good Cause for not claiming
in time - see enclosed letter with reasoning

[RECEIVED 10 JAN 1992]

BEFORE THAT HE WAS
NOT ENTITLED

JMH/SH/2

Sent by David Williams, Compliance Unit

Commissioner's File: CS/275/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Michael David Edwards

Appeal Tribunal: Truro

Case No: 333/06763

1. My decision is that in respect of that part which is appealed the decision of the social security appeal tribunal is erroneous in law and I set it aside.

2. The claimant first made his claim on 30 September 1991. The tribunal held:-

(1) The claimant was not entitled to sickness benefit between 31.03.90 and 29.09.90 since under section 165A(2)(b) Social Security Act 1975 there is an absolute ban on claims in relation to a period more than 12 months before the claim was made. This is indubitably the case and although the point was in front of the tribunal it was not disputed by the claimant or on his behalf.

(2) That in respect of the period 01.10.90 to 31.08.91 the claim was not within the prescribed time limit and under regulation 19(2) of the Social Security (Claims and Payments) Regulations 1987/1968 the claimant had not shown that there was good cause throughout that period for his failure to make the claim.

3. The facts are sufficiently set out in Box 2 of Form AT3, at pages T22/23. The claimant was and is ill. He suffers from disc degeneration and has had two operations for fusing of the vertebrae which involved the initial operation plus further admissions to complete the procedure. He now has to see a neurosurgeon. He is in continuous pain and takes three types of painkillers one of which is pethidine and he has to rest in bed

for two or three hours per day. The tribunal found as a fact that the situation has got worse since 31 March 1990. The Tribunal found that the claimant's reason for not making a claim was that he was under the impression that being self-employed he was not entitled to benefit.

In box 4 - Reasons for the decision - the tribunal found as follows:-

"The plain fact is that the claimant was under a misapprehension that he was not entitled to benefit and being under this misapprehension, the fact that he had to bed rest 2 or 3 hours per day is irrelevant since it did not prevent him from going to visit the social security office as he had no intention to do so because in his mind he had no reason to do so. It was only when a form from the Citizens Advice Bureau made him realise that he was entitled to claim benefit that he promptly made his claim."

4. In other words the tribunal found not merely that he was unaware of his rights but that he positively thought that he had no rights.

5. The tribunal in my decision adopted the wrong test. They relied heavily on R(S) 8/81 where the Commissioner said:-

"I am prepared to assume, as probable, the purposes of this decision that there is a large number of self-employed persons who are totally unaware of the fact that they are entitled to claim sickness benefit should they fall sick. When such a person does fall sick, he can reasonably be expected to make, or institute, an enquiry as to his rights at the local or other convenient, social security office. If he fails to do so, and there are no special circumstances justifying that failure (eg. that the claimant was too ill to make, or institute, any enquiry) it cannot be held that the claimant could not reasonably have been expected to be aware of his rights."

It is true that in this case the tribunal did find that the claimant was not impeded by his illness from making enquiries. However, in my decision, the passage I have cited from R(S) 8/81 is directed to the case where the claimant is merely unaware of his rights - and not to the case where the claimant believes positively that he had no rights. Since R(S) 8/81 was decided there have been two decisions not, so far as I am aware as yet reported but which are directly in point on this issue. I would add that it is no criticism whatsoever of the adjudication officer or anyone concerned that these cases were not cited to the tribunal. However, the distinction is well made in CS/224/90 at p2 by the Commissioner. Having cited the passage from R(S) 8/81 which I have cited above and having noted the failure of the tribunal to determine whether the claimant was in fact too ill to make or institute an enquiry the commissioner said, referring to that passage from R(S) 8/81, as follows:-

"And even that seems to me to be an overstrict approach. It is one thing to be unaware of the entitlement to sickness benefit; it seems to me to be another to believe positively, as seems to be the case in this case, that there was no entitlement because of the matters to which I have referred. I dealt with that in CS/124/89 where I said -

"I think I can safely say that it is a common misconception that a person who is self-employed or perhaps retired is not entitled to sickness benefit, and I would in general be inclined to take the view that where a claimant has misconceived his entitlement in that way his ignorance of his rights has to be regarded as reasonable; as it seems to me, such a claimant is not to be penalised for not having made enquiries - it would not occur to him to do so because he would think he had nothing to make enquiries about."

In this case it seems to me that the tribunal found as a fact that the claimant thought he had no rights and accordingly within the principles laid in CS/124/1989 and CS/224/90 the claimant had in this case shown good cause throughout the relevant period for failing to make a claim.

6. Accordingly in my view the tribunal adopted too strict an approach. The facts have been exhaustively enquired into by the tribunal and I see no reason to send this case back to another tribunal. In accordance with s.23(7)(a)(i) of the 1992 Act for the reasons to which I have referred, it is my decision that the claimant did have good cause and accordingly he is entitled to sickness benefit for the period in question.

(Signed) J.M. Henty
Deputy Commissioner

(Date) 13 December 1993