

CS 550/1981

RFMH/JW

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

~~CS 550/1980~~

1. My decision is as follows:-

- (a) The claimant is in law the stepfather, ie the "parent" of the illegitimate child, Gareth, whose natural mother married the claimant during the lifetime of the natural father; section 24(3) of the Child Benefit Act 1975 and regulation 6(2) of the Social Security Benefit (Dependency) Regulations 1977, [S.I. 1977 No.343]. ("The Regulations").
- (b) The original decisions by the insurance officer awarding increase of invalidity benefit for the inclusive period from 11 January 1980 to 10 April 1980 shall be reviewed because there has been a relevant change of circumstances since those decisions were given; section 104(1)(b) of the Social Security Act 1975 ("The Act").
- (c) The said decisions shall be revised so that increase of invalidity benefit is not payable in respect of Ian and Gareth for the inclusive period from 11 January 1980 to 10 April 1980 because the children were not ordinarily living with the claimant and he was not contributing to the cost of maintaining them at the weekly rate of at least £14.20; sections 41 and 43 of the Act and regulation 6(2) of the Regulations.
- (d) As a result an overpayment of invalidity benefit was made to the claimant amounting to £179.86, and,
- (e) The claimant is required to repay to the Secretary of State benefit overpaid for that period of £179.86 as I am not satisfied that in the obtaining and receipt of that benefit he has throughout used due care and diligence to avoid overpayment; section 119(1) and (2) of the Act.

2. This is an appeal by the claimant from the decision of the local tribunal on 17 October 1980. The claimant requested an oral hearing of the appeal, a request to which I acceded. At the oral hearing before me on 24 January 1983, the claimant attended and gave oral evidence. The insurance officer was represented by Mr E Stocker of the Solicitor's Office of the Department of Health and Social Security.

3. The claimant's child Ian was born on 23 October 1963. The claimant and his wife were divorced on 17 February 1970. On 19 July 1975 the claimant's wife had an illegitimate child, Gareth, whose natural father died in 1981. The claimant and his wife re-married on 26 July 1976.

4. The claimant had claimed invalidity benefit from 25 October 1973. He also claimed an increase of that benefit in respect of Ian and subsequently in respect of Gareth, who was living with the claimant and his wife.

5. On 29 January 1980, the claimant called at the local office of the Department and reported that he had changed his address but failed to notify the interviewing officer that there had been a change in the family circumstances and that he had ceased to maintain the children. Accordingly increase of benefit continued in payment until 10 April 1980, when the claimant's wife informed the Department that he was not living with her and that divorce proceedings were pending.

6. The claimant failed to reply to a letter on 21 April 1980 but called at the local office on 12 May 1980. He confirmed that Ian and Gareth were not living with him and stated

"... I am not actually maintaining them, but I have on several occasions offered money to my wife which she would not accept. I wish to state that I will sign any undertakings that money paid to me on behalf of my 2 children will be paid over to my wife"

7. In a letter dated 2 July 1980 the claimant's wife stated that he had last resided with her on 11 January 1980 and that he had made no contribution since that date.

8. In the light of that evidence the insurance officer reviewed his decisions awarding increase of invalidity benefit in respect of Ian and Gareth for the inclusive period from 11 January 1980 to 10 April 1980 because there had been a relevant change of circumstances since the decisions were given. His revised decision was to the effect that increase of invalidity benefit was not payable during that period because the claimant would not be treated for the purposes of the Child Benefit Act as having the children living with him and he was not contributing to the cost of providing for the children at the weekly rate of at least £14.20. He further required repayment of the sum of £179.86 representing the amount of benefit overpaid in respect of the inclusive period from 11 January 1980 to 10 April 1980, as he was not satisfied that the claimant had throughout that period used due care and diligence to avoid overpayment in obtaining and receipt of that benefit.

9. The claimant appealed to the local tribunal against the revised decision of the insurance officer. In the event the local tribunal

unanimously dismissed the appeal and the claimant **now appeals** to the Commissioner and relies substantially on the same grounds as those considered and rejected by the local tribunal. Those grounds have been taken into account in this decision.

10. Section 104(1)(b) of the Act provides that a decision of an insurance officer may be reviewed at any time if he is satisfied that there has been any relevant change of circumstances since the decision was given. On the evidence before me, the awards of increase of invalidity benefit for the inclusive period from 11 January 1980 to 10 April 1980 were rightly reviewed because of the relevant change of circumstances, namely that the claimant had ceased to reside with his children and did not maintain them.

11. Section 41(1) and (2) of the Act provides that entitlement to an increase of invalidity benefit in respect of a child is dependent on entitlement to child benefit. In addition, in certain circumstances, there is entitlement to an increase of invalidity benefit where there is no actual entitlement to child benefit. One such possible case occurs here.

12. Regulation 6(2) of the Regulations provides:-

"(2) For the purposes of section 41 ... where a beneficiary is a man, he shall be treated as if he were entitled to child benefit in respect of any child ordinarily not living with him of whom he is a parent if -

(a) the person who is entitled to child benefit in respect of that child is that man's wife or former wife and is also a parent of that child; and

(b) he is contributing to the cost of providing for that child at a rate which is at least equal to the lowest amount at which any benefit specified in the second column of Part IV of Schedule 4 to the Act is payable".

Regulation 6 is replaced as from 2 June 1980 by regulation 4A in substantially the same terms.

13. The first qualification for entitlement to an increase of invalidity benefit in respect of the child Gareth depends upon whether or not the claimant falls to be treated as the parent of the child for the purposes of regulation 6(2) of the Regulations. Gareth is the illegitimate child born to the claimant's wife by another father prior to her re-marriage to the claimant on 26 July 1976.

14. Regulation 1(2) of the Regulations provides that "parent" has the meaning assigned to it by section 24(3) of the Child Benefit Act" and section 24(3) of the Child Benefit Act 1975 provides as follows:-

"(3) References in this Act to a parent, father or mother of a child shall be construed -

- (a) as including references to the natural parent, father or mother of an illegitimate child;
- (b) as including references to a step-parent, step-father or step-mother."

The expression "step-parent" or "step-mother" is not further defined. It is Mr Stocker's submission that as the claimant is not Gareth's natural father and as Gareth was born illegitimate, the claimant's eventual re-marriage to Gareth's mother does not make the claimant Gareth's step-father.

15. In Decision R(F) 1/79 one of the questions for determination was whether a man on his marriage became the step-father of his wife's child by a previous marriage that terminated on divorce. On that question the then Chief Commissioner said:- (paragraphs 6 and 10)

"6 ... I have no doubt that he did. It is not necessary to refer to the various dictionary definitions of stepdaughter and stepfather, and as to the continued survival of the natural father, after his marriage was dissolved, it is clear that the re-marriage of the parent, and not the death of one or other of the parents, is the qualification for falling into the category of stepchild. See per the Lord President in *Inland Revenue v Russell*. 1955 S.C. 237 at p.240.

10. In my view the claimant's status as a step-parent is primarily to be regarded as a status relationship towards his stepdaughter, and as such independent of his status relationship towards his wife as spouse But however empty of rights and obligations the status itself may be, it operates in the sphere of family relationships, and its continued preservation after the marriage which created it is at an end is desirable, if only for family social reasons. Relationships by affinity, no less than by consanguinity, tend to support the unity of a family"

That matter was further considered by the Commissioner in Decision R(S) 4/81 where he held that the status of step-father continues beyond the termination by divorce of the marriage with the mother of the child and would continue even if the mother or the claimant in that case had re-married.

16. For the purposes of the present claim, I am satisfied that the relationship of the step-parent under 24(3) of the Child Benefit Act 1975 is one which arises on the marriage to the parent of the child and which does not depend in any way upon whether the child was the legitimate child of a previous marriage or was illegitimate.

17. While it does not arise for decision in the present case, it must be borne in mind that the purpose of the legislation is to make adequate provision for dependent children and that it must not be

construed too restrictively without having regard to the prevailing social conditions. While dictionary references have previously referred to a step-relationship as arising from the re-marriage of a parent, the revised edition of Chambers 20th Century Dictionary defines "step" as "a prefix indicating affinity by another marriage or mating."

18. In my judgement, the claimant is the parent of both the children Ian and Gareth for the purposes of regulation 6(2) of the Regulations. The conditions referred to in regulation 6(2)(a) are satisfied but the claimant must also show that he has contributed to the cost of maintaining Ian and Gareth as specified in regulation 6(2)(b) and section 43 of the Act. In his evidence before the local tribunal, the claimant confirmed that he had made no payments because he had found it impossible to communicate directly with his wife. In his evidence before me, he qualified this by telling me that he had on several occasions visited his wife's house in her absence and put money through the letter box for the maintenance of the children. However he was unable to supply precise dates or the amounts paid and this evidence does not conform with any of his former statements. I have no doubt that the claimant has deep affection for Gareth and Ian, but this does not assist him to prove that he was contributing to their maintenance in the amounts specified. Accordingly increase of invalidity benefit is not payable in respect of Ian and Gareth for the inclusive period from 11 January 1980 to 10 April 1980. I note that Ian was excluded from the award from 7 April 1980 because he ceased to be considered a "child" within the meaning of section 2(1)(b) of the Child Benefit Act 1975, but although this is disputed by the claimant, the matter is not an issue on the present appeal, and I do not propose to determine this question.

19. The final question for determination on this appeal is whether or not the claimant should be required to repay the sum of £179.86, being the amount of benefit overpaid to him in respect of the inclusive period from 11 January 1980 to 10 April 1980, to which he was not entitled.

20. The decisions to pay increase of invalidity benefit to the claimant in respect of Ian and Gareth were made by the insurance officer and were varied on review. Under section 119(1) and (2) of the Act, repayment must be required unless the claimant can show to the satisfaction of the person or tribunal determining the appeal or review that in obtaining and receipt of the benefit the claimant has throughout used due care and diligence to avoid overpayment. In Decision R(G) 1/79 the Commissioner stated in this connection:-

"The statutory language does not necessarily import considerations of honesty or good faith but a standard of care and diligence which it is expected will be exercised. It involves not merely refraining from carelessness, neglect, inattention or indolence in regard to the conditions and circumstances of entitlement to benefit. It signifies also positive action, such as

furnishing full information to enable entitlement to benefits to be correctly ascertained and finding out by enquiry the conditions and circumstances of such entitlement."

21. The claimant does not dispute that when he visited the local office on 29 January 1980 he failed to report the change in the family circumstances. He told me that at that time he hoped for a reconciliation and that accordingly there were mitigating circumstances for his omission. However, on 18 March 1980 the claimant signed a further doctor's statement and declared that the circumstances of his dependents remained unchanged. Despite this reminder, the claimant took no steps to alert the local office of the true position. On the evidence before me, I am not satisfied that in obtaining and receipt of the increase of invalidity benefit for the inclusive period from 11 January 1980 to 10 April 1980 the claimant has throughout used due care and diligence to avoid overpayment in respect of the sum of £179.86 and he is accordingly required to repay the sum to the Secretary of State.

22. Finally, I should mention that in its decision the local tribunal required the claimant to repay the sum "at the rate of £4 per week." The rate at which repayment is required is an administrative matter for determination by the Secretary of State and is entirely outside the jurisdiction of the statutory authorities, ie the insurance officer, tribunal and Commissioner. Accordingly the local tribunal had no power to specify the rate at which repayment should be required.

23. The claimant's appeal is dismissed.

(Signed) R F H Heggs
Commissioner

Date: 16 March 1983

Commissioner's file: C.S. 550/1981
C I O File: I.O. 8046/V/81
Region: West Midlands