

JGM/GJH

SOCIAL SECURITY ACTS 1975 TO 1981
CLAIM FOR NON-CONTRIBUTORY INVALIDITY BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision CS 2/82

1. My decision is that:-

- (i) non-contributory invalidity pension (the pension) is not payable to the claimant for any period before 5 March 1977 because any such period is more than 12 months before the claim therefor.
- (ii) that the pension is payable to the claimant for the inclusive period from 7 March 1977 to 30 December 1980. I leave the question of payment for any period thereafter for decision on the further claim dated 31 December 1980.

2. The claimant has spent most of his working life abroad and thus has not paid contributions in the United Kingdom. He experienced a major breakdown in mental health in 1971, since when apart from a few visits abroad he has been in this country and it is not in doubt that from that time he has been resident here and in time has satisfied the purely medical conditions for an award of non-contributory invalidity pension. The problems that have arisen in this case have to a marked extent arisen out of the conditions as to residence in the United Kingdom laid down in regulation 3 of the Social Security (Non-Contributory Invalidity Pension) Regulations 1975 [SI 1975 No 1058] (the NCIP regulations), and out of the requirement in section 36(1) of the Social Security Act 1975 that the incapacity has to have continued for 196 consecutive days before the date for which the allowance is claimed, a requirement which cannot, under regulation 4(2) of the same regulations as in force at the time of the claim be satisfied by days on which the claimant (though incapable of work) is absent from Great Britain.

3. As to the residence conditions the insurance officer now concerned after reviewing a body of new evidence on the point has

submitted that by 19 November 1975 the claimant satisfied the requirement of residence in Great Britain for 10 out of the preceding 20 years. He has in my judgment, despite short spells abroad resided here ever since then and, accepting as I do the submission above mentioned, I hold that the claimant has satisfied the residence conditions for the pension for any day for which he can establish title to the pension since it was first introduced (in November 1975). The insurance officer and on appeal the local tribunal rejected the claimant's claim dated 5 March 1978 on the ground that the residence conditions were not satisfied. On the claimant's appeal to the Commissioner a variety of other points have come up for decisions and I held an oral hearing at which the claimant was represented by Mr G L Hill of Messrs Le Brasseur and Oakley solicitors and the insurance officer was represented by Mr R Aitken of the Solicitors' Office of the Department of Health and Social Security. I heard submissions on a wide variety of points but not on the residence point.

4. The first point debated arose out of the above mentioned provision of section 36(1) of the Social Security Act 1975 that a claimant to be entitled to the pension for any day must on that day be incapable of work and must have been "so incapable" for a period of not less than 196 consecutive days ending immediately before that day. Regulation 4(2) of the NCIP regulations originally provided (it has now been somewhat modified) that for the purpose of determining whether a person was so incapable for 196 consecutive days a day should not be treated as a day of incapacity if "on" that day he was absent from Great Britain. Regulation 6(1) of the same regulations however provided and indeed still provides that a person who has been previously entitled to the pension will be deemed to satisfy the 196 day condition on any day in the same period of interruption of employment. The somewhat bizarre result of all this was at the relevant time that a person had to be both incapable of work and in the United Kingdom for 196 consecutive days before he could first become entitled to the pension. Once entitled however absence from Great Britain for a short period (even if it disqualified him for receipt of the pension during such absence) would not take away the right to benefit on his return. Only absence such as brought the period of interruption of employment to an end would have that effect.

5. The claim was made on 5 March 1978. Consequently under section 82(2)(c) of the Social Security Act 1975 benefit is not in any event payable for any day before 5 March 1977. On the other hand it is accepted that the claimant's mental condition since 1971 has been such that there was continuous good cause for late claim so that benefit can, if the other conditions are satisfied, be awarded from the latter date. The claimant however was in France from 22 March to 11 April 1977 from 28 August to 2 October 1977 and from 27 December 1977 to 13 February 1978. These periods would not affect the operation of the 196 day rule if he had been previously entitled to the pension in the same period of interruption of employment. But there was an entry in his passport which was produced to the local tribunal showing a visit to Holland in September 1976. The precise terms of the entry were not recorded by the local tribunal nor by anyone else and the passport itself has now expired and been destroyed. It creates some uncertainty about the case

because more than 196 days elapsed between early September 1976 and 22 March 1977, when the claimant went to France but not between late September 1976 and 22 March 1977.

6. Mr Hill made a submission to me which, if correct would circumvent the problem. He submitted that section 82(2)(c) merely provided that the pension was not payable and that this restriction on payment did not affect his being "entitled" to the pension. If this view were correct, the claimant having become "entitled" to the pension in November 1975 (when it was introduced), he would be treated under regulation 6(1) as satisfying the 196 day test in March 1977. I am however precluded from accepting this argument by Decision R(S) 2/65 which makes it clear that a person to whom benefit is not payable under a provision corresponding to section 82(2)(c) is disqualified for receiving such benefit, and in my judgment this makes it clear that he cannot be regarded as entitled to it when so disqualified.

7. I must therefore examine the evidence about the visit to Holland. I think that it is for the insurance officer if he relies on absence in Holland to prove it. It is unfortunate that the details of the passport entry are now irretrievably lost, but I do not think that the claimant, who or whose advisers produced it, can be blamed for the fact that no note of the relevant entry was taken. I have however a statement from a person who has looked after the claimant, who recalls the claimant's brief visit to Holland in September 1976. She does not remember the exact date but says that the claimant had a day return ticket. I have no other evidence (apart from the passport entry) that the claimant ever went to Holland at all, and the evidence that I have is that he went to Holland either for the inside of a day or for a period that overlapped into each of two consecutive days, so that he was not on either view absent from Great Britain for the whole of any day.

8. It has been held in Decision R(S) 1/66 on what is now section 82(5)(a) of the Social Security Act 1975 that a person is not absent from Great Britain "during" a day unless he is absent throughout it. The wording of regulation 4(2) of the NCIP regulations is not quite the same as it is concerned with absence "on" and not "during" a day. In a sense of course a person is absent from Great Britain on a day if he is absent for any part of it. Equally a person is present in Great Britain on a day if he is present there for part of it. I think that it would be grossly inconvenient and productive of error if I were to hold that a different rule prevailed in relation to part days of absence under regulation 4(2) from that which prevails under section 82(5)(a) and I conceive that I can avoid such a conclusion without doing violence to the language. It could be said with equal accuracy of a person who attended work on a particular day but absented himself (say to attend a football match) an hour before the end of his shift that he was not absent from work on that day or that he was absent from work on that day. I think that the words in regulation 4(2) "on that day absent from Great Britain" should be interpreted in the former sense. It follows that I can ignore the visit to Holland.

9. I can thus award the pension to the claimant for any day of claim from 5 March 1977 on which the claimant was not absent from Great Britain or was relieved from disqualification on account of absence from Great Britain by regulation 2(1) of the Social Security Benefit (Persons Abroad) Regulations 1975 [SI 1975 No 563]. A person must, to be able to take advantage of this provision, satisfy sub-paragraph (a) thereof and one or other of sub-paragraphs (b) or (c). Sub-paragraph (c) requires that the person concerned shall have been continuously incapable of work for the 6 months preceding the day on which the absence began, and this condition has at all material times been satisfied by the claimant. Sub-paragraph (a) stated briefly initially required that it should be reasonable in all the circumstances that the disqualification under section 82(5)(a) should not apply. Until the amendment next mentioned of the regulation it was held in Decision C.S. 5/76 (not reported) for the statutory authorities (the insurance officer the local tribunal and the Commissioner) to decide whether the condition was satisfied. Under the regulation as amended with effect from 14 November 1977 by regulation 2 of the Social Security Benefit (Persons Abroad) (Amendment) Regulations 1977 [S.I. 1977 No. 1679] the condition is somewhat differently worded and the decision rests with the Secretary of State for Social Services. The Secretary of State has decided that the new condition in regulation 2(1)(a) is satisfied in relation to the period from 27 December 1977 to 13 February 1978. It has not been suggested that I should reach a different conclusion in relation to the old condition in the earlier periods of absence from Great Britain and I hold the condition to have been satisfied. In consequence the matter is not affected by the claimant's absences in France.

10. There remains a further point that has been taken by the insurance officer, viz. that the claim dated 5 March 1978 was not based on a medical certificate and for that reason operates only as a claim for periods up to its date. This point was not put forward at the time that the claim was made and the claimant's advisers became alive to it only in time to cause him to make a fresh claim on 31 December 1980. If the point is a good one there is a period between the date of the first claim and 31 December 1979 for which benefit cannot (however good the cause for delaying the second claim) be awarded on either claim.

11. The insurance officer's submission on this point is, as I understand it, based on reasoning that starts from the decision of a Tribunal of Commissioners C.S. 174/49 (KL). It was decided in this case, in the words of its headnote, that in respect of sickness and unemployment benefit a claim must be made in respect of each day and that a claim cannot be made prospectively. It will be noted that (for reasons considered in paragraph 17 below connected with the terms of the regulations then in force) the decision is confined to sickness and unemployment benefits. It is further clear that it has at all times been open to the regulation-making authority to make exceptions. Thus in Decision R(S) 1/55 another Tribunal of Commissioners plainly accepted as valid a prospective claim for sickness benefit under provisions of regulations relating to prospective claim which have no counterpart in current regulations.

12. Section 79(3)(a) of the Social Security Act 1975 re-enacting with modifications first found in section 11 of the National Insurance Act 1966 provides that regulations may make provision -

"for permitting, in prescribed circumstances, a claim for unemployment benefit, sickness benefit, invalidity benefit, non-contributory invalidity pension or injury benefit to be made, or to be treated as if made, for a period falling partly after the date of the claim;"

Reading this provision one might have supposed that but for the enactment of this provision it was not permissible to make regulations allowing prospective claims for benefit at all. This first impression however must be wrong not only because it is inconsistent with Decision R(S) 1/55 but also because there is a range of benefits, not mentioned in section 79(3), for which it is possible in general only to claim prospectively (e.g. attendance allowance and mobility allowance).

13. Regulation 11(1) of the Social Security (Claims and Payments) Regulations 1979 S.I. 1979 No 628 (the Claims and Payments regulations) (re-enacting a provision of earlier regulations first introduced in that form in regulation 21(3) of the NCIP regulations) provides that where a medical certificate has been issued in respect of a person named therein -

"a claim for sickness, invalidity or injury benefit or non-contributory invalidity pension based on the medical certificate shall, unless in any case the Secretary of State otherwise directs, be treated as if made by the claimant for the period specified in that certificate;"

"Medical certificate" is for this purpose defined by regulation 11(6) and is confined to three classes of medical certificate viz. (briefly) (a) a doctor's statement issued in the form prescribed in the Social Security (Medical Evidence) Regulations 1976, S.I. 1976 No 615 (the Medical Evidence regulations) (b) a certificate on a form approved by the Secretary of State that a claimant is in hospital and is expected to remain there for a specified period, and (c) in a form approved by the Secretary of State made by one doctor and based on the report of another doctor in rigidly defined circumstances.

14. The above regulation deals only with the case where a claim is based on a medical certificate within the definition and says nothing about a claim not so based. It does not expressly permit (in the language of section 79(3)) claims for any of the benefits mentioned to be made for periods partly after the date of claim but it no doubt effectively allows them to be treated (if they could not otherwise be treated) as made for the period specified in the certificate so long as that is partly after the date of claim. A previous regulation in broadly the same terms was held to impose no restriction on the interpretation of claims based on medical certificates so far as they related only to periods before the date of claim (see Decision C.S. 2/71 (not reported)). The wording of the provision as a whole suggests to me that its draftsman thought that it was unnecessary to confer express

permission to make forward claims, because such claims were valid independently. I appreciate that in Decision R(S) 5/80 a Tribunal of Commissioners at paragraph 18 treated it as settled law that a claim to benefit (not specifically sickness or unemployment benefit) could not be made unless the Act or regulations made provision for the making of such a claim. The above suggestion is not however inconsistent with this if current regulations do, as in my judgment they do, make such a provision.

15. Mr Aitken argued to the contrary. He submitted that a claim not based on a medical certificate could not operate as a forward claim at all. He accepted that it could operate as a claim in arrears. He was bound to do this because the Medical Evidence regulations themselves provide that evidence of incapacity may be furnished either by means of a certificate in accordance with those regulations or by such other means as may be sufficient in the circumstances of any particular case. Mr Aitken therefore confined himself to arguing that the claim was valid only in relation to past periods.

16. If this submission is right it must be clear that the draftsman of leaflet N.I. 210 on the Non-Contributory Invalidity Benefit misunderstood the position, because under the heading "Proving you are unable to work" it advises a claimant not to ask his doctor for evidence of incapacity until the Social Security office requests him to do so. This is no doubt because the standard forms of medical certificate are not well suited to initial claims for non-contributory invalidity pension as they make no mention of the preceding 196 days. The claimant made his claim on form BF 400 (which is an annexure to leaflet N.I. 210) and in accordance with that leaflet submitted no medical evidence until he was asked for it. When asked for it he submitted a medical report which was not a medical certificate within the meaning of regulation 11(1). Form BF 400 like many approved claim forms contains no provision for stating the period for which the claim is made and in accordance with its tenor ought in my judgment to be read as an open-ended claim. This is certainly convenient with long term benefits, and I should be loth to hold that everyone from the draftsman of leaflet N.I. 210 onwards has been labouring under a misapprehension about the possibility of forward claims not based on medical certificates with the result that the claimant's advisers have been induced to refrain from making a further claim or claims in time.

17. Mr Aitken's argument begins with Decision C.S. 174/49 in which as I have said it was held that claims for sickness and unemployment benefit could not be made prospectively. A reading of the decision shows that the Tribunal who gave it reached their conclusion with some reluctance feeling that they were forced to do so by the language of regulation 11(2)(b) of the National Insurance (Claims and Payments) Regulations 1948 [S.I. 1948 No 1041] which provided that the prescribed time for making a claim for sickness benefit should be a period of days from the day in respect of which the claim was made. The terms of the corresponding provisions now in force (which have been in relation to sickness benefit in like terms since the introduction of the National Insurance (Claims and Payments) Amendment Regulations 1964 [S.I. 1964 No 1110] are different. Under Schedule 1 to the Claims and

Payments regulations the prescribed period for making claims to the pension (as well as to sickness and invalidity benefit) is a period of days from the earliest day in respect of which benefit is claimed; and as the penalty for late claim is disqualification for receiving benefit for any day more than the prescribed number of days before the claim itself a claim made outside the time must be valid for any period within that number of days. In other words a claim may be made under present regulations for any period provided that it begins on or before the first day for which benefit is claimed. This is in line with the phrase partly after the date of the claim in section 79(3). In my judgment the provisions that constrained the authors of Decision C.S. 174/49 to reach their reluctant conclusion are no longer in force and there is nothing in the Act or regulations to preclude a forward claim for the pension other than the restraints on the interpretation of certain claims imposed by regulation 11(1) (and regulation 11(7) in certain cases) of the Claims and Payments regulations. I do not consider that these constraints affect the operation of claims which, like the present, are not within regulation 11(1) or 11(7). And if, as I surmised in paragraph 14 above, the draftsman of regulation 11(1) supposed that it was unnecessary to include any express permission for prospective claims he was quite right. I hold therefore that the claimant's claim dated 5 March 1978 was an operative claim for all periods until it was superseded by his claim dated 31 December 1980. I leave it to the insurance officer to deal with the latter claim and I award benefit down to the date of that claim accordingly. The appeal is allowed.

(Signed) J G Monroe
Commissioner

Date: 29 January 1982

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Region: London West