

Resources: no provision under IS (as true was under SPS) to disregard an "ill-health" pension.

MIG/SH/41

Commissioner's File: CIS/6/1989

Region: North Eastern

SOCIAL SECURITY ACT 1986

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 18 August 1988, as that decision is not erroneous in law: Social Security Act 1975, section 101 (as amended).

2. This is an appeal to the Commissioner by the claimant, a man aged 62 at the relevant time living with his wife then aged 61. Unfortunately both he and his wife are disabled. The appeal is against the unanimous decision of the social security appeal tribunal dated 18 August 1988 which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 25 February 1988 in the following terms,

"The claimant is not entitled to Income Support from 11.4.88. This is because his income exceeds his weekly applicable amount."

3. The claimant appeals on two grounds -

- (i) that the tribunal wrongly interpreted the law as to income support and
- (ii) that in any event there was a breach of natural justice in the constitution of the tribunal, as regards the person who was its chairman (see below).

I deal with each of these grounds in turn.

4. First, as to the law of income support. The only issue is whether there should be taken into account in calculating the claimant's income an "ill-health" pension paid by his former employer of £51.42 every four weeks and, if so, how much of that sum should be taken into account. Under the law of supplementary benefit which preceded the coming into force on 11 April 1988 of the income support scheme, an occupational pension "did not include ... any element of that pension payable by way of compensation for injury, disease, disablement or death suffered by a person by reason of the service or employment in which he was engaged" (Supplementary Benefit (Resources) Regulations 1981, regulation 2(1)). However, there is no corresponding provision in the Income Support (General) Regulations 1987 (S.I. 1987 No. 1967). The Supplementary Benefit (Resources) Regulations 1981 ceased to have effect automatically on the repeal of the legislation under which they were made. The fact

therefore that the Income Support (General) Regulations 1987 do not contain an express revocation of the Supplementary Benefit (Resources) Regulations 1981 is immaterial. I mention this point because it is referred to by the claimant in his grounds of appeal.

5. The question therefore is whether or not there is any exemption in the income support legislation for disregarding the whole or part of the claimant's ill-health pension. Regulation 40 of the Income Support (General) Regulations 1987 deals with "calculation of income other than earnings". There is no doubt that the claimant's ill-health pension is "income other than earnings". The claimant's contention to the contrary (in his observations dated 10 April 1989) cannot be sustained (a) because by its very nature an ill-health pension is not of the nature of "earnings" and (b) in any event regulation 35(1) of the Income Support (General) Regulations 1987 expressly includes from the definition of "earnings" both "any remuneration paid by or on behalf of an employer to the claimant who for the time being is unable to work due to illness .." and also "any occupational pension". See also the definition of "occupational pension scheme" in section 66(1) of the Social Security Pensions Act 1975, cited by the adjudication officer now concerned, in his submission dated 13 September 1989. In my view this present payment has both characteristics and cannot be treated as "earnings".

6. Regulation 40(1) of the Income Support (General) Regulations 1987 provides that in the calculation of income other than earnings "the income of a claimant which does not consist of earnings to be taken into account shall .. be his gross income .." Regulation 40(2) then provides that "there shall be disregarded from the calculation of the claimant's gross income under paragraph (1), any sum, where applicable, specified in Schedule 9".

7. I have examined with care Schedule 9 to the 1987 Regulations but there is no provision therein corresponding to the former provision that an occupational pension did not include an element "payable by way of compensation for injury, disease, disablement or death suffered by a person by reason of the service or employment in which he was engaged" (see para. 4 above). Consequently for income support purposes the claimant's ill-health pension, whether that be regarded as the whole of the weekly sum payable by the employer or simply an enhancement of £5 per week (see claimant's observations dated 10 April 1989 and 14 September 1989), must be taken into account in full for income support purposes. Even though the £5 per week enhancement is compensation for the back injury sustained by the claimant at work in January 1981, it is still nevertheless, being paid periodically, in the nature of income. As a result because of the relevant calculations (which do not appear to be challenged) the claimant has greater income than his weekly applicable "amount" (including a premium under paragraph 10(2)(b)(i) of Schedule 2 to the 1987 Regulations - pensioner premium). I note that Schedule 2 to the 1987 Regulations also lists (paragraphs 11 and 13) additional premiums named "disability premium" and "severe disability premium". Those however do not appear to apply to the claimant since "disability premium" involves either the claimant or his partner being aged less than 60 which is not the case here. "Severe disability premium" does not on its facts (eg. receipt of attendance allowance) appear to apply either.

8. I now come to the claimant's second ground of appeal, namely that he objects to the fact that Mr S was the chairman of the tribunal. I pause to note that the claimant was present at the hearing and took no objection then to Mr S being the chairman. The claimant's objections are as follows. First in a letter dated 18 September 1988 (applying to the tribunal chairman for leave to appeal) the claimant states,

"The Tribunal Chairman (Mr S) was also the chairman at a previous Tribunal that I attended on 26 May 1987, and for that reason I feel that he may have been unfairly biased against me. Had I applied for a Judicial Review on a point of law at Criminal Proceedings I would not have had the same Judge presiding for that very reason, as natural justice would not be seen to be done, and with the best will in the world he would not view the proceedings through 'Independent' eyes."

9. The claimant takes up the point again in observations (in reply to the adjudication officer's submissions of 15 March 1989) dated 10 April 1989 as follows,

"I move on now to the conduct of the chairman at the Social Security Appeal Tribunal dated 18.8.88. At this tribunal, I was excluded from the room prior to the Tribunal taking place, even though the adjudicator [adjudication officer] was allowed to sit in together with the Appeal Bench. I am therefore unaware of whatever took place prior to the Appeal (please find enclosed a decision to partly reinforce this [the claimant refers to the summary in Neligan's Digest of reported Decision CP/127/49]). In addition to this, the chairman was the same chairman as had been at a previously unconnected appeal, and because of his previous attitude to myself I felt that he was personally biased against me, and rather than chair the appeal he appeared to be the guiding authority, and the other members of the Bench merely his pawns. I therefore felt that any decision the Bench arrived at, would be by his dictate. I was not notified in advance that he would be the Chairman, otherwise I would have objected, as I now understand it to be my right to do so. I consider this in itself is contrary to natural justice."

10. As to this, reported Decision CP/127/49 refers to a case where it was shown to the satisfaction of the Commissioner that "the case for the insurance officer was put to the tribunal before the claimant was called before them and that the insurance officer remained with the tribunal while they were considering their decision". Not surprisingly, the Commissioner set the tribunal's decision aside in those circumstances. But that is not what has occurred here. All that has happened is that the adjudication officer at some stage may have been in the tribunal room before the claimant's case was called on but that of course would doubtless be explained by the fact that there were previous appeal cases being heard by the tribunal at which the adjudication officer (who acted as presenting officer that day) had to be present. There is nothing sinister in this and there is no suggestion, that the claimant's own case was the subject of prior discussion by the adjudication officer with the tribunal.

11. As to the chairman being the same chairman as had heard an earlier appeal by the claimant, this of itself does not constitute any breach of the rules of natural justice. Indeed it must occur quite frequently. The situation is not the same as that by which the claimant refers to "judicial review" which is a kind of re-examination by the High Court of a lower court or tribunal's decision, where of course one would not expect the same judge. But here there is no reason why the same chairman should not have presided over the tribunal and I note that at the hearing itself the claimant took no objection to this. As to the allegation that the chairman was "personally biased against me"; this kind of allegation has to be substantiated by specific allegations and instances. Generalised allegations of this kind cannot be entertained by the Commissioner without some specific statements of alleged misconduct of the proceedings. None such are alleged here. As to the chairman being contended by the claimant "to be the guiding authority and the other members of the Bench merely his pawns", this is a not uncommon complaint about social security appeal tribunals. But of course the legally qualified chairman must be the guiding authority for the tribunal and the fact that the other two members of the tribunal may not intervene during the actual hearing does not indicate that they do not fully participate in the discussion in private which results in the actual decision.

12. Consequently for all of the above reasons, although I realise this will be a disappointment to the claimant who has suffered some financial hardship and also unfortunately suffers from nervous debility, I have no alternative in this case but to dismiss the claimant's appeal.

(Signed) M.J. Goodman
Commissioner

Date: 18 September 1989