

SOCIAL SECURITY ACT 1975
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

DECISION OF THE COMMISSIONER

Mr. COMMISSIONER ROWLAND

Claimant:

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Tribunal:

Cwmbran social security appeal tribunal

Date of tribunal decision:

8 October 1996

Tribunal Registration No.

3/07/96/01776

Date: 19 August 1999

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DECISION OF THE COMMISSIONER

1. This is an appeal, brought by the claimant with the leave of the tribunal chairman, against a decision of the Cwmbran social security appeal tribunal dated 8 October 1996 whereby they held that the claimant was not entitled to invalidity benefit from 14 September 1995 to 15 September 1985 and was not entitled to an increase of invalidity benefit in respect of this wife from 14 September 1985 at all but was not required to repay the amount of the increase already paid from 29 October 1990. I held an oral hearing of the appeal at which the claimant was represented by Mr John Colegate and the adjudication officer was represented by Mr Huw James, solicitor, as agent for the Solicitor to the Departments of Social Security and Health. I am grateful to both representatives for the assistance they have given me.

2. As the dates I have already mentioned suggest, this case has quite a history behind it. The claimant is a former miner. He had suffered an industrial accident and had been in receipt of invalidity benefit during various spells of incapacity for work from 7 June 1984 to 7 September 1985. When in receipt of personal invalidity benefit, he had also been in receipt of an increase in respect of his wife. He returned to work as a surface worker on Monday, 9 September 1985 but fell ill on Friday, 13 September 1985 and was sent home. He claimed personal invalidity benefit on a form dated 26 September 1985 in which he said he had become unfit for work on 16 September 1985, had last worked at 2.00 pm on 13 September 1985 and that his incapacity was due to an old back injury and was due to an accident at work. Personal invalidity benefit was awarded from Monday, 16 September 1985. The claimant also claimed, on 10 October 1985, an increase of invalidity benefit in respect of his wife but that was refused on the ground that his wife earned in excess of £28.45 per week.

3. It is not in dispute under the legislation in force before 16 September 1995, the claimant would again have been entitled to an increase in respect of his wife. However, on 16 September 1985, regulation 3 of the Social Security Benefits (Dependency) Amendment Regulations 1985 provided for the substitution for regulations 8 and 9 of the Social Security Benefits (Dependency) Regulations 1977 of a new regulation 8. It is not disputed that, if the new regulation 8(1) and (2) apply, the claimant was rightly refused the increase. However, regulation 8(6) provides:-

"Where on 14 September 1985, a beneficiary was entitled to an increase of benefit for that day or for a period including that day under any of the provisions of the Act to which paragraph (1) or (3) applies the provisions of the Act and of these Regulations relating to the reduction of the rate of such increase on account of the earnings of the adult dependant in force on that day shall, if more favourable to the beneficiary, continue to apply after that day, to the exclusion of the provisions of this regulation, until such time as the beneficiary first ceases to be entitled to that increase."

The adjudication officer took the view that the claimant was not entitled to the benefit of that saving provision because he was not entitled to the increase on 14 September 1985. The

claimant appealed against the refusal of the increase but, on 7 March 1986, a tribunal dismissed the appeal.

4. For five years, no further action was taken. Then, on 28 October 1991, the claimant sought a review. On 14 April 1992, the adjudication officer reviewed the initial decision awarding personal invalidity benefit from 16 September 1985 on the ground that that award had been based on a mistake as to a material fact. In my view, *ignorance* of a material fact would have been the more appropriate ground but nothing turns on that minor distinction. What is clear is that the adjudication officer now accepts that the claimant was in fact incapable of work on 14 September 1985 and so had an underlying entitlement to both personal invalidity benefit and the increase in respect of his wife on that date. The original decisions had been made on the understanding that the claimant had been incapable of work only from 16 September 1995 which is what he had said on his claim form. In the light of the review of the award of the personal invalidity benefit, the claimant was paid an increase of invalidity benefit from Monday, 29 October 1990, i.e. a year before the claimant had applied for the review. The adjudication officer now concerned with the case says that there was no review of the decision of the tribunal of 7 March 1986 and that the increase was "merely put into payment". As Mr James readily accepted, if that is so, there was plainly a breakdown in procedures because payment should not be made without the authority of an adjudication officer's decision. In any event, the claimant challenged the "decision" to pay the increase only from 29 October 1990 in a document dated 26 September 1994 which was accepted as being a late appeal and, in the absence of any real "decision" in respect of the increase, the appeal was treated as an appeal against the decision of 14 April 1992 reviewing the award of personal invalidity benefit. Nonetheless, the adjudication officer's submission to the tribunal dealt fully with the question of the claimant's entitlement to the increase and nobody seems to have been in any doubt that that was the real issue for the tribunal. In the course of the submission, the adjudication officer drew the tribunal's attention to CSB/773/89 in which the Commissioner said that "it is not competent by way of a review of [an] award to raise a question involving backdating of the claim" and he or she suggested that the award of invalidity benefit should not have been reviewed so as to find the claimant entitled to invalidity benefit from 14 September 1985 (albeit not entitled to receive payment) with the consequence that the claimant ought not to have been paid the increase in respect of his wife from 29 October 1990. The tribunal, sitting on 8 October 1996, accepted that suggestion and decided that the claimant was not entitled to personal invalidity benefit from 14 September 1985 to 15 September 1985 and was not entitled to the increase for any period since 14 September 1985, although the amount that had been paid to him since 1990 was not recoverable. The claimant was therefore worse off than he had been before submitting his appeal. It is from that decision that the claimant now appeals.

5. Mr Colegate and Mr James were agreed that there should have been a proper decision of an adjudication officer awarding the increase of invalidity benefit. I do not think that the lack of such a decision vitiates these proceedings. The reality is that everyone knew the procedural history of the case and that there were before the tribunal related issues about entitlement to the personal invalidity benefit and entitlement to the increase and the tribunal were, in my view, entitled to make all decisions necessary to deal with those issues, even though the adjudication officer had not done so. The adjudication officer's omission was of a purely technical nature and had no practical significance in the circumstances of this particular case. I suspect that the problem arose because decisions relating to increases of

invalidity benefit are usually dealt with within the award of the personal benefit, despite the need for a separate claim, and the administration does not seem to have been attuned to deal with cases where an appeal had been brought against a decision relating only to the increase.

6. The first real question that arises before me is whether the tribunal were right to follow CSB/773/89 and to hold that the adjudication officer had been wrong to review the original award of personal invalidity benefit. I drew the parties' attention to my decision in CIS/17514/96 where I had distinguished CSB/773/89 and other cases concerning supplementary benefit because the relevant legislation was distinguishable from that now in force. I had followed CIS/14082/96 in holding that, in cases under the Social Security (Claims and Payments) Regulations 1987, it was competent to raise by way of review an issue as to the date from which benefit should be awarded. Mr James asked that the adjudication officer should have the opportunity of commenting on my earlier decision. I rejected that request. The adjudication officer is perfectly entitled not to attend a hearing before a Commissioner and his or her solicitors are perfectly entitled to arrange for an agent to appear at the hearing. However, where that happens and a new point is raised at the hearing, natural justice requires that the agent has the opportunity of commenting upon it but it does not require that the adjudication officer or his or her solicitors have that opportunity. Of course, there are occasions where a Commissioner will be better assisted if the adjudication officer or the Solicitor to the Department comments but I do not consider this to be one of them. The issue that arises in this case is the same as that that arose in CIS/17514/96. Having been refused the adjournment, Mr James submitted that CSB/773/89 and R(SB) 9/84 should not be distinguished from the present case. I reject that submission as I rejected it in CIS/17514/96. As Mr Colegate argued, the question of the date from which an award should be made is just one question arising on an initial claim and it would be anomalous if it were the only question that could not be reconsidered on review. Under supplementary benefit legislation, a person could be entitled to benefit before the date of claim only if the claimant expressly raised that question before the initial claim was determined. That limitation does not apply under the current legislation. I am therefore satisfied that the tribunal did err in applying the approach taken in CSB/773/89 to the present case which is concerned with an increase of invalidity benefit rather than with supplementary benefit.

7. It follows that it was proper for the local adjudication officer to hold that the claimant was entitled to personal invalidity benefit on 14 September 1985. However, on review, a decision cannot be revised so as to make benefit *payable* in respect of a period earlier than the date provided for by (at the material time) regulation 64A and 65 of the Social Security (Adjudication) Regulations 1986. In the context of the 1986 Regulations, the expression "invalidity benefit" in regulation 65(1) must include an increase of that benefit. The adjudication officer plainly accepted that there was good cause for delay in making the application for review for the purposes of regulation 65(2) but, nevertheless, the earliest date from which benefit could be paid, having regard to regulation 65(3), was 12 months before the application for review, unless regulation 64A applied. Regulation 64A provided:-

- (1) In the case of the review to which either paragraph (2) or paragraph (3) applies, the decision given shall have effect from the date from which the decision being reviewed had effect or from such earlier date as the authority giving the decision being reviewed could have awarded benefit had that

authority taken account of the evidence mentioned in paragraph (2) or not overlooked or misconstrued some provision or determination as mentioned in paragraph (3).

- (2) This paragraph applies to a review under section 104(1)(a) of the 1975 Act (review for error of fact) of any decision, whether that decision was made before or after the coming into force of this regulation, where the reviewing authority, that is to say the adjudication officer or, as the case may be, the appeal tribunal, is satisfied that -
- (a) the evidence upon which it is relying to revise the decision under review is specific evidence which the authority which was then determining the claim or question had before it at the time of making the decision under review and which was directly relevant to the determination of that claim or question but which that authority failed to take into account; or
 - (b) the evidence upon which it is relying to revise the decision under review is a document or other record containing such evidence which at the time of making the submission to the authority which was then to determine the claim or question, the officer of the Department of Social Security, the Department of Employment or the former Department of Health and Social Security who made the submission had in his possession but failed to submit; or
 - (c) the evidence upon which it is relying to revise the decision under review did not exist and could not have been obtained at that time, but was produced to an officer of one of those Departments or to the authority which made that decision as soon as reasonably practicable after it became available to the claimant.
- (3) This paragraph applies to a review under section 104(1A) of the 1975 Act (review for error of law) of any decision, whether that decision was made before or after the coming into force of this regulation, where the adjudication officer or, as the case may be, the appeal tribunal, is satisfied that the adjudication officer, giving the decision under review, overlooked or misconstrued either -
- (a) some provision in an Act of Parliament or in any order or regulations; or
 - (b) a determination of the Commissioner or the court,
- which, had he taken it properly into account, would have resulted in a higher award of benefit or, where no award was made, an award of benefit.

(4)

(5)”

8. I do not consider that any of the sub-paragraphs within regulation 64A(2) can be said to be satisfied in the present case and I do not understand Mr Colegate to have contended that they might. He relied on regulation 64A(3) and referred to paragraph 13 of CIS/17514/96 in which I considered the effect of that paragraph. He submitted that the fact that in the present case the claimant had said both that he had last worked at 2.00 pm on 13 September 1985 and that his incapacity was due to an industrial accident meant that the adjudication officer and tribunal considering the original claims should at least have investigated the question whether the claimant had been rendered incapable of work on 13 September 1985 and that they erred in law in not doing so. I do not accept that proposition. Had the date on which the claimant last worked and the evidence of incapacity being due to an industrial accident been the only pieces of evidence on the claim form, Mr Colegate's submission would have had some force but, unlike in CIS/17514/96, the claim form in the present case went further and asked a specific question as to the date from which the claimant had become incapable of work which was directed to determining the date from which benefit should be paid. The claimant said in terms that his incapacity had begun on 16 September 1985 and in the face of that assertion the adjudication officer determining the original claim for personal invalidity benefit was quite entitled not to investigate the issue further. In the absence of an error of law by the adjudication officer, regulation 64A(3) has no application. So far as the tribunal sitting on 7 March 1986 is concerned, there does not seem to have been any additional information before that tribunal suggesting that the claimant had been incapable of work on 14 September 1985 but, even if the tribunal ought to have raised that question since the claimant was there before them, that does not assist the claimant in the present appeal because a decision of a *tribunal* could not be reviewed under section 104(1A) of the Social Security Act 1975 on the ground of error of law and so regulation 64A(3) cannot come into play on any review of a tribunal's decision. Accordingly, I am quite satisfied that the conditions of regulation 64A are not satisfied and that the local office were right to take the view that the increase of invalidity benefit was payable to the claimant only from 29 October 1990.

9. Mr Colegate raised two alternative arguments. The first is that I should refer to the Secretary of State the question whether the form Med 3 submitted by the claimant at the time of his original claim should be treated as having been a separate claim in respect of 14 September 1985. That Med 3 has now been destroyed in a "weeding" exercise which is understandable. The consequence is that it is no longer possible to see what was written on the certificate. It seems to me to be inconceivable that the Secretary of State would treat as a claim a document that he cannot now read, when a claim was in fact submitted on a proper form at the proper time and it failed to refer to the proper date only because the claimant made a mistake. In those circumstances, I decline to make the reference. The second argument is that the application for review should have been treated as an amendment of the original claim under regulation 5(1) of the 1987 Regulations (replacing in different language regulation 8(2) of the Social Security (Claims and Payments) Regulations 1979) which provides:-

"Any person who has made a claim may amend it at any time by notice in writing received in an appropriate office before a determination has been made on the claim,

and any claim so amended may be treated as if it had been so amended in the first instance."

However, the limiting phrase "before a determination has been made on the claim" plainly refers to the first decision on the initial claim. It is arguable that an amendment can be made before an appeal from that first decision has been finally determined (if R(U) 2/79 can properly be distinguished), but I do not accept Mr Colegate's submission that an amendment can be made subsequently on the basis that any such amendment would necessarily give rise to a fresh determination on the claim as amended and so would be made "before a determination". If Mr Colegate's submission were correct, the words of limitation would have no purpose.

10. Accordingly, I allow the claimant's appeal in part only. I set aside the decision of the Cwmbran social security appeal tribunal dated 8 October 1996 and I give the decision which they should have given which is to dismiss the claimant's appeal from the decision of the adjudication officer in respect of the personal invalidity benefit and to add to that decision the decision the adjudication officer ought also to have given reviewing the decision of the social security appeal tribunal dated 7 March 1986 on the ground of ignorance of the material fact that the claimant was incapable of work and therefore entitled to an increase of invalidity benefit on 14 September 1985, and revising that decision so as to award the increase and make it payable from 29 October 1990. The consequence of my decision is that payment of the increase may be reinstated, subject to any material change of circumstances since payment stopped in 1996. The local office will doubtless make any necessary enquiries before paying the arrears.

M. ROWLAND
Commissioner
19 August 1999