MJG/SH/7

Commissioner's File: CI/287/1991

28/92

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Frank McKeirnan

Appeal Tribunal: Manchester

Case No: 614:20430

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 18 June 1991, as that decision is erroneous in law and I set it aside. I give the decision which the tribunal should have given, namely:-

(i) the decision of the social security appeal tribunal dated 5 July 1990 awarding to the claimant Disablement Benefit for occupational deafness from 3 October 1983 for life should stand;

(ii) the decision of the adjudication officer dated 17 September 1990 purporting to review and revise the said tribunal's decision was invalid as there was no available ground for review. Social Security Act 1975, sections 101 and 104 (as amended).

2. This is an appeal to the Commissioner by the claimant, a man born on 3 January 1916. The appeal is against the unanimous decision of a social security appeal tribunal dated 18 June 1991, which dismissed the claimant's appeal from a decision of the adjudication officer issued on 17 September 1990 in the following terms,

> "I have reviewed the decision dated 5.7.90 of the Social Security Appeal Tribunal awarding disablement benefit from and including 3.10.83. There has been a relevant change of circumstances since the decision was given. This was that Schedule 6, paragraph 4(3) of the Social Security Act 1990 retrospectively restored regulation 25 ... [of the Social Security (Industrial Injuries) (Prescribed Diseases] Regulations 1985 - S.I. 1985 No. 967 - "the Prescribed Diseases Regulations"] My revised decision for the period from and including 3.10.83 is as follows:-Disablement benefit is not payable from and including 3.10.83 because the period between the claim made on 15.7.86 and the latest

date before then on which the claimant worked in an occupation prescribed in relation to occupational deafness, which was 31.12.80. was more than 5 years."

3. The appeal was the subject of an oral hearing before me on 27 March 1992 at which the claimant was represented by Mr R Drabble of Counsel and the adjudication officer was represented by Mr N Butt, Counsel, of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mr Drabble and to Mr Butt for their assistance to me at the hearing.

4. The circumstances in which this appeal arose are as follows. On 15 July 1986 the claimant claimed (on form BI100(OD)) disablement benefit for Prescribed Disease A10 (occupational deafness) - see Part I of Schedule 1 to the Prescribed Diseases Regulations. He indicated that he last worked in a prescribed occupation in December 1980, so that his claim dated 15 July 1986 was more than five years after he last worked in that prescribed occupation. His claim was disallowed by reference to regulation 25 (1) and (2) of the Prescribed Diseases Regulations, which, so far as relevant, reads as follows,

> "Time for claiming benefit in respect of occupational deafness
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> 25. (1) Regulation 14 of the Claims and Payments Regulations [1979] (time for claiming benefit) shall not apply in relation to occupational deafness .....
>
> (2) ... disablement benefit .. shall not be paid in pursuance of a claim in respect of occupational deafness which is made later than 5 years after the latest date, before the date of the claim, on which the claimant worked in an occupation prescribed in regulation to occupational deafness unless -
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> (a)-(d) [not applicable to this case]."

5. However by a decision dated 26 October 1989 in the case of McKiernan v Chief Adjudication Officer, the Court of Appeal (on appeal by this particular claimant) held that the five year time limit in regulation 25(2) of the Prescribed Diseases Regulations was ultra vires, because it was at variance with section 165A of the Social Security Act 1975, as in force at the relevant time. So far as is relevant, section 165A read as follows,

> " 165A. (1) Except in such cases as may be prescribed, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied -
>
> (a) he makes a claim for it

(i) in the prescribed manner; and

(ii) subject to subsection (2) below, within the prescribed time or

(b) [not relevant in this case]

(2) Regulations shall provide for extending, subject to any prescribed conditions, the time within which a claim may be made where it is not made within the prescribed time but good cause is shown for the delay.

(3) Notwithstanding any regulations made under this section, no person shall be entitled -

(a)-(b) [not relevant in this case];

(c) to any other benefit (except disablement benefit, reduced earnings allowance or industrial death benefit) in respect of any period more than 12 months before the date in which the claim is made." (my underlining.)

6. The Court of Appeal decided that regulation 25(2) of the Prescribed Diseases Regulations, by not making an exception to the five years period for "good cause .. for .. delay", as required by section 165A(2) of the 1975 Act, was ultra vires. The Court held that regulation 25(2) was not 'saved' by the power contained in section 77(2) of the Social Security Act 1975 which, as then in force, provided as follows,

" 77. (2) In relation to prescribed diseases ... regulations may provide -

(a) for modifying provisions of this Act relating to disablement benefit and the administration of such benefit;"

7. The Court of Appeal held that section 165A of the 1975 Act was not a provision of the Act "relating to disablement benefit and the administration of such benefit" (section 77(2)(a)), since section 165A related to other kinds of benefit and was not confined to disablement benefit. Moreover, the Court of Appeal also decided that regulation 25(2) could not in any event be taken to have exercised a modifying power, because it did not refer at all to the "good cause" requirement in section 165A(2) but in effect simply ignored it.

8. The Court then referred back to a social security appeal tribunal the question of whether the claimant had in fact shown "good cause" for his delay in claiming, On that reference, a social security appeal tribunal unanimously decided (on 5 July 1990) that the claimant had shown "good cause" for the delay and that he was therefore entitled to a life award of disablement benefit from 3 October 1983, based on the fact that he had been medically assessed as 64% disabled for life (from 1 January 1983) on account of his deafness.

9. However, on 13 July 1990, there came into force paragraph 4 of Schedule 6 to the Social Security Act 1990. Paragraph 4 provides as follows,

> "Regulations relating to industrial injuries and diseases
>
> 4. (1) .....
>
> (2) In section 77 [of the Social Security Act 1975], at the end of subsection (2) (power to modify provisions relating to disablement benefit and its administration) there shall be added the words -
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> 'and for the purposes of this subsection the provisions of this Act which relate to the administration of disablement benefit or reduced earnings allowance shall be taken to include section 165A and any provision which relates to the administration of both the benefit in question and other benefits.'
>
> (3) Regulations 6(2)(c), 25 and 36 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (onset of occupational deafness and time for claiming in respect of occupational deafness or occupational asthma), and any former regulations which they directly or indirectly re-enact with or without amendment, shall be taken to be, and always to have been, validly made."

10. It was as a result of the coming into force on 13 July 1990 of those provisions of para.4 of Schedule 6 the 1990 Act that the adjudication officer on 17 September 1990 gave the review decision quoted in paragraph 2 above based on "relevant change of circumstances" and stating that that change, "was that Schedule 6, paragraph 4(3) of the Social Security Act 1990 retrospectively restored regulations 25 and 36." The reference to "relevant change of circumstances" derives from section 104(1)(b) of the Social Security Act 1975 which, so far as is relevant, provides as follows,

> "Review of decisions
>
> 104. (1) Any decision under this Act of an adjudication

officer, a social security appeal tribunal or a Commissioner may be reviewed at any time by an adjudication officer ... if -

(a) .....
(b) there has been any relevant change of circumstances since the decision was given;"

It is common ground that there was no possible ground of review other than "relevant change of circumstances".

11. At the hearing before me, Mr Drabble contended that "relevant change of circumstances" was not appropriate to the enactment of paragraph 4 of Schedule 6 to the Social Security Act 1990 and in particular was not appropriate to the case of the present claimant who had, by the combined decisions of the Court of Appeal and the social security appeal tribunal, an actual award of disablement benefit for occupational deafness. Mr. Drabble referred to the decision of the Court of Appeal in Eyre v. Wynn-MacKenzie [1896] 1 Ch. 135 (see below). Mr Butt submitted, however, that there was a proper ground for review and that the adjudication officer was correct in revising on review, so as to make disablement benefit no longer payable to the claimant. He relied on reported Commissioner's decisions and in particular on paragraph 10 of R(G) 3/58, (a decision of a Tribunal of Commissioners - see below).

12. The first part of Mr Drabble's argument was directed to this particular claimant. He contended that this claimant had the benefit of an award under the combined decisions of the Court of Appeal and of the social security appeal tribunal and that therefore the question was in his case res judicata. There was Mr. Drabble said, nothing in paragraph 4 of Schedule 6 to the Social Security Act 1990 that constituted any relevant change of circumstances affecting that award. He drew attention to the decision of the Court of Appeal in the Eyre case (cited in para.11 above). In that case an application was made to the Court of Appeal for an extension of time for asking for leave to appeal from the decision of the High Court that a solicitor was not entitled to charge his mortgagor profit costs. The extension was asked for because section 3 of the Mortgagees Legal Costs Act 1895 (enacted since that High Court decision) had provided that such costs could be charged by a solicitor mortgagee. Moreover, section 3(2) provided, "This section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act.".

13. In dismissing the application, Lindley L.J. said (at page 137),

"If this application is to be regarded as an appeal on the merits, it is impossible for us to say that the judgment was wrong as the law stood at the time when it was given [i.e. before the passing of the 1895 Act]. It is obvious that the Act was not intended to interfere with judgments

which had already been given by the Court. If we give leave to appeal in this case, we should be re-opening all judgments of a similar kind which had been given prior to the passing of the Act. We cannot do that."

14. Mr Drabble contended that the same general rule, which he derived from that judgment, applied here. Although paragraph 4(3) of Schedule 6 to the Social Security Act 1990 was avowedly retrospective in terms, it could not, Mr. Drabble submitted, affect the validity of a decision already given by the Court of Appeal before the 1990 Act came into force. However, I do not consider that the Eyre case is in pari materia with the present case. That case was concerned with whether or not there should be a grant of leave to appeal to the Court of Appeal, out of time. Here I am concerned with a statutory power of review in section 104(1) of the Social Security Act 1975. It is of course clear that that power of review can be used in appropriate cases to take away, or diminish, the benefit of an award, adjudication or decision, which was otherwise res judicata. In paragraph 10 of the decision of the Tribunal of Commissioners in R(G) 3/58, it was said,

> "We are of the opinion that if [a particular social security regulation], was retrospective in its operation, the coming into force of that regulation would be a 'relevant change of circumstances since the decision was given' ..."

That ruling is binding on me and I reject Mr Drabble's argument, as related to this particular claimant, based on the Eyre decision.

15. However, Mr Drabble also put before me a separate and broader argument, based in effect on the way in which paragraph 4(3) of Schedule 6 to the Social Security Act 1990 is worded. He conceded that a legislative provision even retrospective in nature, which clearly took away a claimant's right to social security benefit would constitute a "relevant change of circumstances", allowing a review. However, Mr.Drabble contended that paragraph 4(3) of Schedule 6 to the 1990 Act was not in that category. He submitted that all that paragraph 4(3) did was to cure the ultra vires of regulation 25 of the Prescribed Diseases Regulations 1985, thus reversing the ruling to that effect of the Court of Appeal in the McKeirnan case. He pointed to the words in para.4 of Schedule 6,"regulation ... 25 ... shall be taken to be, and always to have been, validly made."

16. I consider that that contention is correct. Paragraph 4(3) of Schedule 6 to the 1990 Act makes no provision as to the ceasing of continuing entitlement to benefit. It merely restores the validity of regulation 25 as a whole and in particular regulation 25(2) (the absolute five year limit). That means that all cases are to be governed by regulation 25 and its absolute five year limit whenever the claim was made and whenever the period of five years was running, thus achieving a degree of retrospection. But there is nothing in paragraph 4(3) to affect cases where there has already been a decision that a claim is

timeous by reason of an adjudication, correct at the date it was made. There will have been a number of adjudications in the period since the McKeirnan decision was given by the Court of Appeal on 26 October 1989 and the coming into force on 13 July 1990 of paragraph 4(3) of Schedule 6 to the 1990 Act, based on an extension of the five years period for "good cause". Those adjudications were correct when made and paragraph 4(3) of Schedule 6 to the 1990 Act does not constitute in those cases any relevant change of circumstances. Such an adjudication is to the effect that a claim was in time when made. It was a once and for all decision, which was then correct. The claim is not subsequently invalidated by para.4 of Schedule 6 to the 1990 Act. Regulation 25(2) states, "disablement benefit ... shall not be paid in pursuance of a claim in respect of occupational deafness which is made later than 5 years ... "etc. That must be read in the light of the Court of Appeal's decision in McKiernan, i.e. a requirement of "good cause" is super-added, at least until the enactment of the 1990 Act. Even though payment of benefit is a continuing matter, the validity of the claim can and must be judged only once.

17. In construing the application of the phrase "relevant change of circumstances" in section 104(1)(b) of the Social Security Act 1975 to the provisions of paragraph 4(3) of Schedule 6 to the Social Security Act 1990, I have borne in mind the statement of principle enunciated in paragraph 16 of R(I) 1/71, in which the then Chief Commissioner said,

> "I think that this case illustrates how important it is that at all levels the fundamental difference between a decision on a claim and a decision on an application for a review and the nature of the grounds for review should be understood. The difference depends on a simple principle. A claimant must in general prove his title to a benefit. Once he has done so and has been awarded, and perhaps paid, the benefit, he can fairly insist that those who contend that the award should be cancelled or varied on review must show that there are valid grounds for review."

18. In my judgment, in the present case also, that fundamental difference must be borne in mind. The claimant in this case had proved his title to disablement benefit for occupational deafness by establishing "good cause" in accordance with the law as laid down by the Court of Appeal. For that entitlement then to be removed, it must be shown by the adjudication officer that there are valid grounds for review and revision. I have already indicated above that I do not consider that the adjudication officer has discharged that burden in the present case.

19. Lastly, I should add that I have proceeded throughout this decision on the assumption that, were it not for the fact that the claimant had already established by a favourable adjudication that his claim was timeous, he would not now be able to assert the claim to be in time, because of paragraph 4(3) of Schedule 6 to the Social Security Act 1990 which, on one construction at least, would re-impose the absolute five year time limit in

regulation 25(2) of the Prescribed Diseases Regulations, without any exception for "good cause" However, I understand that a Commissioner's decision to that effect (on file CI/532/1989 Chatterton) is to be the subject of appeal to the Court of Appeal. Moreover, I was also given to understand at the hearing before me on 27 March that the Divisional Court had also recently ruled on this subject in the case of McIntyre.

20. In those circumstances I consider it better if I express no opinion one way or the other on whether the construction adopted by the Commissioner in the Chatterton case is the correct one. I am aware that an alternative construction has been put forward by Mr Drabble, namely that all that paragraph 4(3) of Schedule 6 to the 1990 Act does is to take away the ultra vires of regulation 25(2) of the Prescribed Diseases Regulations but leaves in that regulation the requirement of "good cause", so far as concerns claims prior to the coming into force of the 1990 Act on 13 August 1990. He prays in aid the fact that paragraph 4(2) of Schedule 6 to the 1990 Act is not retrospective. I consider it better if I express no opinion on that argument, bearing in mind that this is now a point which hopefully will in due course be the subject of a decision by the Court of Appeal.

(Signed) M.J. Goodman
Commissioner

(Date) 3 April 1992