C1 437/1979

MJG/JW

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR INDUSTRIAL DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.I. 3/82 = R(I) 5/82

1. My decision is that there is payable to the claimant a disablement gratuity, based on an assessment of 10% for the period from 16 March 1969 for the claimant's life of £275, being the sum appropriate to the period taken into account by the assessment: Social Security Act 1975, section 57(5) and the Social Security (Industrial Injuries) (Benefit) Regulations 1975, S.I. 1975 No 559, regulations 6 and 49(3). The claimant's appeal against the decision of the local tribunal is therefore dismissed.

2. This appeal concerns the correct amount of a disablement gratuity. Should it be the amount in the scale in force at the time of the end of the injury benefit period following the industrial accident or the larger amount current at the time of claim? The point is critical in this case because the end of the injury benefit period and the claim to disablement benefit are separated by over 7 years, in which time the relevant amount of disablement gratuity had been increased from £275 to £1045. For the reasons set out below I have concluded that the proper figure in this case is £275 and not the figure current at the time of claim. The appeal was the subject of an oral hearing, directed by me, on 8 May 1981, at which the claimant was represented by Mr M Rowland of Counsel and the insurance officer by Mr J P Canlin of the Solicitors' Office of the Department of Health and Social Security. I am much indebted to Mr Rowland and Mr Canlin for their assistance and research in this difficult case. Following the oral hearing, further written submissions were made by the parties' representatives and the oral hearing was to have been resumed on 14 January 1982 but a railway strike prevented it. The parties' representatives have, therefore, consented to my giving a decision on the appeal without a further hearing, which I now proceed to do.

3. The claimant is a man, now aged 59, who on 31 December 1968 had an industrial accident in which he sustained injury to his neck and spine. He apparently did not claim injury benefit but the "injury benefit period" (under section 56(4) of the Social Security Act 1975 "the 1975 Act") expired on 15 March 1969 (according to a medical

board's report of 14 October 1977) presumably because the claimant then ceased to be incapable of work.

4. However, it was not until 24 June 1976 that the claimant asserted that the accident was an industrial accident and the insurance officer "accepted" it as such in July 1977 (presumably by a declaration under section 107 of the 1975 Act). On 11 July 1977 the claimant made a claim for disablement benefit and, as a result, he was examined by a medical board on 14 October 1977. The medical board decided that the accident had resulted in a loss of faculty from the end of the injury benefit period, causing the claimant painful and restricted neck movements. They assessed the resulting disablement at 10% and stated that the assessment was to begin at the end of the injury benefit period and not at a later date. The assessment was for life and final. They added, "The assessment is taken as an average over the whole period".

5. The claimant appealed to a medical appeal tribunal, whose hearing was on 6 June 1978. His representative urged the tribunal to make the assessment run from the date of claim (presumably 11 July 1977) adding "though /the claimant/ was disabled before". However, the tribunal confirmed the medical board's decision, stating, "We do not accept /the claimant's representative's/ submission that the assessment of disablement attributable to loss of faculty should in the case of a late claim be related to the date of claim rather than to the end of the injury benefit period". No appeal has been made to the Commissioner from that decision of the medical appeal tribunal. The national insurance local tribunal upheld the insurance officer's decision that the correct figure for the gratuity was £275, the figure current at the end of the injury benefit period. The claimant then appealed to the Commissioner.

6. Various contentions have been made to me by the parties as to suggested anomalies or injustices that can ensue whichever of the two figures for gratuity is chosen but, in my view, the matter is to be determined by interpretation of the statutory provisions reviewed below. It is, however, clear in my view that the intention of the legislature is that disablement gratuity, unlike weekly disablement pension, was intended to be a once-and-for-all lump sum payment and not to be subject to subsequent accretions, eg financial increases, of the scales of social security benefits as a result of upratings (see section 57 of the 1975 Act). The fact that if a claimant is in receipt of weekly "special hardship allowance" (under section 60 of the 1975 Act), he can elect (as the present claimant has in fact done) to receive disablement gratuity as a weekly pension (which is subject to up-rating) does not detract from the general proposition. Indeed the fact that a specific provision of regulations is needed to achieve that result (see Social Security (Industrial Injuries) (Benefit) Regulations 1975, /S.I. 1975 No 559/ regulation 10) tends to support the general proposition.

7. Section 57 of the 1975 Act provides,

> "57(1) Subject to the provisions of this section, an employed earner shall be entitled to disablement benefit if he suffers as the result of the relevant accident from loss of physical

or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 1 per cent.

(2) .....

(3) .....

(4) Disablement benefit shall not be available to a person until after the third day of the period of 156 days (disregarding Sundays) beginning with the day of the relevant accident nor until after the last day (if any) of that period on which he is incapable of work as the result of the relevant accident: .....

(5) Where the extent of the disablement is assessed for the period taken into account as amounting to less than 20 per cent, disablement benefit shall be a disablement gratuity -

(a) of an amount fixed, in accordance with the length of the period and the degree of the disablement, by a prescribed scale, but not in any case exceeding the amount specified in Schedule 4, Part V, paragraph 2 /that paragraph provides for a maximum disablement gratuity of £3,210/; and

(b) payable, if and in such cases as regulations so provide, by instalments /see, eg regulation 10 of the Industrial Injuries Benefit Regulations referred to in paragraph 6 above/.

(6) Where the extent of the disablement is assessed for the period taken into account as amounting to 20 per cent or more, disablement benefit shall be a disablement pension for that period payable at the weekly rate specified in Schedule 4, Part V, paragraph 3:

Provided that where that period is limited by reference to a definite date, the pension shall cease on the death of the beneficiary before that date."

8. Those provisions of section 57 make it clear that the medical authorities have a discretion in assessment of disablement, both as to the starting date of the period of assessment (provided it is not earlier than the end of the injury benefit period) and as to its termination. In the present case, the medical board and medical appeal tribunal clearly considered that the appropriate starting point for the period of assessment was immediately after the end of the injury benefit period, ie 16 March 1969.

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9. Regulation 6 of the Industrial Injuries Benefit Regulations 1975 (cited in paragraph 1 above) provides,

> "6. Where the extent of a claimant's disablement is assessed at any of the degrees of disablement severally in column 1 of Schedule 2 to these regulations, the amount of any disablement gratuity payable shall -
>
> (a) /these sub-paragraphs make detailed provision
> (b) as to the calculation of disablement gratuity as a percentage of the maximum disablement gratuity specified in paragraph 2 of Part V of Schedule 4 to the Act - see paragraph 7 above/.
>
> Provided that, whenever such maximum disablement gratuity is altered by virtue of the passing of an Act or the making of an up-rating order, corresponding variations in the scale of gratuities payable under this regulation shall be payable only where the period taken into account by the assessment of the extent of disablement in respect of which the gratuity is awarded begins on or after the date of coming into operation of the provision altering the amount of the maximum disablement gratuity." (my underlining)

10. Prima facie, the above-cited proviso to regulation 6 is fatal to the claimant's appeal, since in his case "the period taken into account by the assessment of the extent of disablement in respect of which the gratuity is awarded" began on 16 March 1969 and no increases in the scale or amount of disablement gratuities, effected by annual up-ratings since the 1975 Act and regulations came into force, can therefore affect the calculation of his gratuity.

11. So far as concerns up-ratings between 16 March 1969 and the coming into force of the 1975 legislation, regulation 49(3) of the Industrial Injuries Benefit Regulations 1975 provides,

> "49(3) The /regulations revoked by these 1975 regulations/ shall continue to apply for the purpose of determining the rate or amount of any benefit payable in respect of any period before, or in respect of any assessment of disablement taking into account any period commencing before, the date of the coming into operation of these regulations" (my underlining).

The relevant revoked regulations (eg S.I. 1964 No 504, regulation 3, as substituted by regulation 3 of S.I. 1975 No 125, and S.I. 1974 No 1041, regulation 2(2)) contained provisoes similar in wording and effect to the above-cited proviso to regulation 6 of the Industrial Injuries Benefit Regulations 1975 and prima facie therefore have the effect of preventing increases in the scale or amount of disablement gratuities after 16 March 1969 (end of claimant's injury benefit period) affecting the assessment of the claimant's gratuity.

12. I have used the expression "prima facie" in describing the effect of the provisoes because Mr Rowland, on behalf of the claimant, submitted (i) that the provisoes were ultra vires and (ii) if they were not ultra vires, the provisoes merely had the effect of preventing annual up-rating increases being paid to beneficiaries who had already received their disablement gratuity as a lump sum but did not prevent an "up-to-date" figure being taken when initially calculating the amount of gratuity.

13. It is convenient to consider Mr Rowland's second contention first. I do not consider that the provisoes have such a limited effect. There would be no need for a proviso to achieve such a result, which would ensue in any event from the fact that disablement gratuity (save in exceptional cases) is assessed and paid as a lump sum in accordance with the relevant legislation in force at the beginning of the period of assessment. Once paid by the Department, its liability would, on general principles, be at an end. In my judgment, the plain effect of the provisoes is to exclude consideration of all up-ratings after the beginning of the assessment period (ie 16 March 1969, in the claimant's case). This is particularly necessary as there is no time limit for a claim for disablement gratuity, unlike disablement pension where (subject to "good cause" for delay) the time limit is 3 months (see now Social Security (Claims and Payments) Regulations 1979, [S.I. 1979 No 628], regulation 14 and Schedule 1, paragraph 8). It would be wrong that a claimant could inflate the amount of a disablement gratuity by making a long-delayed claim, even though he could have had interest on the money if he had claimed it earlier and invested it. Moreover, in this case, the claimant has had the benefit of an assessment by the medical board which expressly covered the whole period from 16 March 1969 for his life and was stated to be an average for the whole period. The percentage of the assessment might not have been as high if it had not gone back as far as 16 March 1969 but was merely based on the claimant's disablement in July 1977, when he made his claim.

14. As to the contention that the provisoes were ultra vires, this was extensively argued before me at the hearing and following the hearing, I issued the following direction (on 2 June 1981),

> "Having considered the arguments addressed to me at the hearing on 8 May 1981, I have come to the provisional conclusion that the Proviso to regulation 6 of [the Industrial Injuries Benefit Regulations 1975] is ultra vires, though I am willing to consider any further submissions the parties may wish to make on the point. I therefore request further submissions from the parties on the effects on this case of [the pre-1975 legislation]."

No further submissions on the vires point were received.

15. However, although the point is not free from difficulty, I have, on further consideration, concluded that the proviso to regulation 6 of the 1975 Regulations is not ultra vires, and neither are similar provisos in the pre-1975 legislation. The problem arises from the fact that the proviso to regulation 6 is apparently made under the power contained in paragraph 3 of Schedule 14 to the 1975 Act, which provides,

> "Variation of disablement gratuities
>
> 3. Where in consequence of the passing of an Act, or the making of an order, altering the rate of disablement pension under section 57 of this Act, regulations are made varying the scale of disablement gratuities under section 57(5), the regulations may provide that the scale as varied shall apply only in cases where the period taken into account by the assessment of the extent of the disablement in respect of which the gratuity is awarded begins or began after such day as may be prescribed." (My underlining.)

16. Paragraph 3 of Schedule 14 doubtless envisaged a continuance of the pre-1975 practice of including a 'non-retrospective' proviso, (similar to that now in regulation 6 of the Industrial Injuries Benefit Regulations 1975) in each annual set of up-rating regulations. However, that practice has not been followed, the draftsman having taken what Mr Canlin described as a "short cut" by inserting once-and-for-all the 'non-retrospective' proviso into regulation 6 of the Industrial Injuries Benefit Regulations 1975. The difficulty is that those 1975 regulations are not, to quote paragraph 3 of Schedule 14 to the 1975 Act (see paragraph 15 above), "regulations ... varying the scale of disablement gratuities ... " - they merely fix a scale for the first time under section 57(5)(a) of the 1975 Act (see paragraph 7 above).

17. However, paragraph 3 clearly empowers the substance of a 'non-retrospective' proviso and the fact that the specified machinery has not been exactly used by the draftsman does not, in my judgment, vitiate the proviso to regulation 6 of the Industrial Injuries Benefit Regulations 1975. There has been no excess of power in the wording of the proviso and Parliament clearly intended that a proviso, with the effect it has in regulation 6, could and should be brought into operation by regulations. It is a technicality that the regulations in question are 'misdescribed' in paragraph 3 of Schedule 14 to the 1975 Act.

18. In any event, even if that were not so, I consider that the making of the proviso to regulation 6 is empowered by the following general provisions of section 166(2) of the 1975 Act,

> "166(2) Except in so far as this Act otherwise provides, any power conferred thereby to make ... regulations or an order may be exercised -

(a) either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or class of case;

(b) so as to make, as respects the cases in relation to which it is exercised -

(i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise),

(ii) the same provision for all cases in relation to which the power is exercised, or different provision for different cases or different classes of case or different provision as respects the same case or class of case for different purposes of this Act,

(iii) any such provision either unconditionally or subject to any specified condition

and where such a power is expressed to be exerciseable for alternative purposes it may be exercised in relation to the same case for any or all of those purposes; and powers to make ... regulations ... for the purposes of any one provision of this Act are without prejudice to powers to make regulations ... for the purposes of any other provision."

19. In R v National Insurance Commissioner, Ex parte Fleetwood reported in (1978) 122 Solicitors' Journal Reports 146 and in Appendix to R(S) 3/78, the Divisional Court held that the above cited provisions of section 166(2) of the 1975 Act have a very wide effect. I am satisfied from the breadth of the Court's judgment that they authorised the making of the proviso to regulation 6 of the Industrial Injuries Benefit Regulations 1975. I have already explained why I consider that that proviso (and similar provisoes in earlier regulations) are fatal to the claimant's contentions, with the result that this appeal must fail.

(Signed) M J Goodman
Commissioner

Date: 9 March 1982

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