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SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow the claimant's appeal. The decision of the Birmingham social security appeal tribunal dated 7 December 1993 is erroneous in point of law. I set that decision aside and I give the following decision in its place: the claimant had continuous good cause for delaying claiming either special hardship allowance or reduced earnings allowance from 1 April 1985 to 8 March 1993.

2. I directed an oral hearing of this appeal at which the claimant was represented by Mr A L Cotton, District Secretary of the Amalgamated Engineering and Electrical Union, and the adjudication officer was represented by Mr Lewis Varley of the Office of the Solicitor to the Departments of Social Security and Health. I am very grateful to both representatives for the considerable assistance they gave me in dealing with the complicated issues arising on this appeal.

3. The claimant claimed disablement benefit in respect of Prescribed Disease A11 (Vibration White Finger) on 18 November 1991. On 23 November 1992, a medical appeal tribunal assessed disablement at 15% from 1 April 1985 (when Vibration White Finger first became a prescribed disease) for life. Disablement pension was awarded from 1 April 1985, it being accepted that the claimant had had good cause for delay in claiming.

4. It was not until 8 March 1993 that the claimant claimed reduced earnings allowance, seeking payment from 5 February 1977. The adjudication officer decided that he was not entitled to reduced earnings allowance from 5 February 1977 to 7 December 1992 on the ground that the claim in respect of that period was not made within the three month time prescribed for

claiming and the claimant had not shown that there was continuous good cause for the delay. The claimant appealed. Before the tribunal, it was accepted that he had good cause for the delay up to the date of the claim for disablement benefit. What was in issue was whether he had continuous good cause for failing to claim between that date and the date of claim for reduced earnings allowance. The tribunal appear to have accepted that the claimant had made enquiries about reduced earnings allowance in November 1991 and that he had either been given inaccurate advice or else he had misunderstood accurate advice and had reasonably believed that he need not make a claim for reduced earnings allowance until his claim for disablement benefit was finally determined. It was also accepted that he did not receive notification of the decision awarding disablement benefit until 30 or 31 January 1992 and that his claim for reduced earnings allowance, which was received on 8 March 1993, had been posted on 4 March 1993. The remaining issue was whether the claimant had good cause for the delay between 30 or 31 January 1992 and 4 March 1993.

5. The claimant gave evidence to the tribunal that he had been admitted to hospital for a hernia repair on 26 January 1993 and had been discharged on the same day. He said that he was in considerable pain thereafter and had twice collapsed in the next few days. He said that his doctor had advised him to stay in bed for four weeks. On 26 February 1993 he had walked to his local Benefits Agency Office and obtained a claim form. He had not sent it back until 4 March 1993 because he had been trying to obtain details from a former employer. While he was recuperating, his wife nursed him but she was at work during the day. He had a telephone at home and there was a pay phone from where his wife could make calls when at work.

6. The tribunal dismissed the claimant's appeal. The last three paragraphs of their reasons for decision were:-

> "We did not accept the evidence of the appellant about having to stay in bed for 4 weeks. Mrs Dawson [a member of the tribunal] pointed out the risk of thrombosis. We did not accept that his wife could be at work (because they needed the money) and see to the appellant's need for help with ablutions and toilet needs. Neither did we believe that the appellant did not leave his bedroom for 4 weeks nor that he or his wife could not have made a telephone call to seek up-to-date information from the Benefits Agency or his union. For all the appellant knew, there could have been many changes in the law and rules since 1991. We are certain that the union would have helped him claim reduced earnings allowance without delay. The claim when made was not complete but it was still accepted as a claim.
>
> We do not think that the appellant could not have got information as he said he did in 1991 during February 1993 and the first 3 days of March and have got a claim form.

We considered the decisions referred to in adjudication officer's submission paragraph 3. We found that the appellant was not in such poor health that he could not have used his home 'phone to enquire about reduced earnings allowance by say 1 February 1993. He had help of the union and of a very competent representative. He had had experience of "the system"."

The claimant now appeals against the tribunal's decision with the leave of the Chief Commissioner.

7. Mr Cotton submitted that the tribunal's decision was erroneous in point of law because the tribunal had, he said, unreasonably refused a request for an adjournment. He said that Mrs Dawson, the member of the tribunal to whom reference was made in their decision, had said that a relation of hers had had a hernia operation and (as was recorded by the tribunal chairman) she suggested that "3 days in hospital and 6 weeks no driving is usual for hernia operation". It appears that she also regarded the "repair" undergone by the claimant as being somewhat less serious than an "operation". Mr Cotton said that he asked for an adjournment so that either he or the tribunal could obtain further medical evidence to answer Mrs Dawson's points but that the chairman had said that it would not be necessary. There is no record within the chairman's note of evidence that there was a request for an adjournment and neither the tribunal nor the local adjudication officer have been asked to comment on Mr Cotton's account of what happened. Mr Varley, however, was not disposed to question Mr Cotton's account and, indeed, he supported this ground of appeal. Despite that support, I am not entirely convinced that this ground of appeal is well founded.

8. One of the reasons that section 40(2) of the Social Security Administration Act 1992 requires that the panel of tribunal members for an area "shall be composed of persons appearing to the President to have knowledge or experience of conditions in the area and to be representative of persons living or working in the area" is that members are expected to bring their experiences to a tribunal. The fact that a member's experience may contradict a claimant's evidence is not necessarily a ground for granting the claimant an adjournment so that further evidence can be produced. On the one hand, a tribunal should be conscious of the fact that one person's experience may not be shared by all others and of the possibility that they are introducing a new point, taking the claimant by surprise. There are many circumstances when a claimant can reasonably expect that the tribunal will accept his own evidence without it being necessary for him to go to the expense of obtaining supporting evidence. On the other hand, a point raised by a tribunal member may be of relatively minor significance, either because the other members do not agree with it, or because the tribunal would have reached the same conclusion on the basis of other evidence, or because the claimant's challenge to the point made by the tribunal member may be regarded as too weak to merit consideration. The circumstances will vary from case to case. What does seem to me to be of importance is that the chairman should record not only

what the tribunal member said but also, if it is challenged, any request for an adjournment and the tribunal's finding on the member's suggestion.

9. Happily, it is not necessary for me to go more deeply into the question whether the tribunal ought to have granted an adjournment in the particular circumstances of the present case because Mr Varley advanced a separate, but in my view not wholly unrelated, ground for holding that the tribunal's decision was erroneous in point of law. He submitted that the tribunal had applied the wrong test when considering whether or not the claimant had good cause for his delay in claiming, because they had asked themselves whether the claimant could have claimed earlier rather than asking whether it was reasonable for him not to have claimed earlier. I accept that submission. The tribunal themselves referred indirectly to the classic description of "good cause" contained in C.S.371/49 to which the local adjudication officer had referred in his or her written submission.

> "'Good cause' means, in my opinion, some fact which, having regard to all the circumstances (including the claimant's state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did."

In R(S) 3/79, the Commissioner said at paragraph 9:-

> ".... the claimant was plainly not a fit man at the time that the documents were sent. He had very recently left hospital where he had been in intensive care on account of a myocardial infarction and he could not have been expected either to attend to the documents at the time or to set them aside methodically for prompt attention when he was better. Documents of this kind sent out to claimants may have an impact at the time of their receipt, but if the claimant is then unfit to deal with them he may be excused for failing to attend to them when at a later stage he is better and has a backlog of matters to attend to."

In the present case, the tribunal appear to have concerned themselves only with what was within the claimant's capacity during the relevant period. That was the wrong test.

10. Mr Cotton also submitted that the tribunal had taken into account an irrelevant matter by referring to the fact that the claimant was represented by his union. It is true that the fact that the claimant might conceivably have received further unsolicited advice from his representative was not material to the question whether the claimant had good cause for his delay but I do not think that that was what the tribunal had in mind. In my view, the tribunal merely regarded the union as a further source of advice and a source of help to whom the claimant could have turned in preference to the Department of Social Security and who would have ensured that a claim for reduced earnings

allowance would have been made.

11. As I consider that the tribunal took too strict a view of the meaning of "good cause", I set their decision aside. I have decided that this is an appropriate case in which to substitute my decision for that of the tribunal. Although the claimant was present at the hearing before me, I did not hear evidence from him because, as Mr Varley accepted, the position is sufficiently clear from the papers.

12. I agree with the tribunal that the claimant had "good cause" for not claiming reduced earnings allowance until he received notification of the decision on his disablement benefit claim on 30 or 31 January, which was four or five days after he had been in hospital. A hernia repair may not be the most serious of operations but any operation is capable of producing considerable discomfort and I accept that it did so in the case of this claimant. In evidence to the tribunal, the claimant said that he had collapsed on 28 January and his doctor had been called out as a result. He had had a similar collapse a day or two after he received the decision on his disablement benefit claim, but this time no doctor was called, presumably because it was regarded as unnecessary in the light of what the doctor had said after the first collapse. Those collapses occurred when the claimant was out of bed. On 26 February, the claimant walked to his local Benefits Agency Office to collect the claim form. It seems to me to be perfectly obvious that during February the claimant gradually became more mobile and that he was able to move around his home - with considerable pain at first and rather less discomfort towards the end of the month. I therefore agree with the tribunal that the claimant could have made a telephone call, quite apart from the fact that he could have asked his wife to do so. The claimant may well have regarded himself as confined to bed for four weeks but one expects people who are slowly recovering from an operation or illness gradually to spend more and more time out of bed as they become able to do those things that can be done sitting quietly in a chair.

13. However, the fact that the claimant could have made a telephone call and obtained the claim form rather earlier than he did is only one factor to be taken into account in considering whether the claimant acted reasonably. It is clear that the claimant did not realise the need to make a claim for reduced earnings allowance as soon as possible. He obtained the claim form within four weeks of the earliest date from which he believed he could claim. The claimant had been ill and doubtless had more pressing things on his mind than his benefit claim. To the extent that he thought about his claim for reduced earnings allowance at all, I do not consider that it was unreasonable for him to think that the delay would not prejudice his claim. It is relevant that, if the claimant had been correct in his belief as to the date from which he could claim, his claim would have been well within the prescribed time of three months. It had also recently taken just over a year to determine his entitlement to disablement benefit and that was not calculated to suggest that speed was of the essence in these matters. Once he got the

form, it seems to me to have been wholly reasonable for the claimant to have spent just a few days trying to find the information necessary to enable him to complete it properly. In the circumstances of this case, I consider that many a reasonable claimant would have failed to act in the same way as this claimant did. Accordingly, I am satisfied that he had good cause for his delay in claiming from the earliest date in respect of which benefit might be payable down to the actual date of claim.

14. It was common ground before both the tribunal and me that no benefit was payable in respect of any period before 1 April 1985 when vibration white finger first became a prescribed disease. It was also common ground before me that reduced earnings allowance was not payable in respect of any day before 1 October 1986 when it was first introduced to replace special hardship allowance. There therefore arises the question whether special hardship allowance might be payable on the present claim in respect of the period from 1 April 1985 to 30 September 1986.

15. Special hardship allowance was payable under section 60 of the Social Security Act 1975 as an increase of disablement benefit. That it is to be regarded as a separate benefit requiring a separate claim to be made for it is shown by the separate entries for special hardship allowance, disablement benefit and reduced earnings allowance in Schedule 4 to the Social Security (Claims and Payments) Regulations 1987. Since the oral hearing of this appeal, the Secretary of State has accepted that the claim for reduced earnings allowance may be treated as sufficient to constitute a claim for special hardship allowance (see regulation 4(1) of the 1987 Regulations). The claim for reduced earnings allowance is therefore to be treated as being also a claim for special hardship allowance.

16. The reason for my directing an oral hearing in this case was that I had serious doubts as to whether disablement benefit ought to have been awarded in respect of the period before 1 October 1986. That was relevant because special hardship allowance was payable only as an increase of disablement benefit. The reason that I had the doubt is that the assessment of disablement benefit in this case was 15% and the claimant was awarded a disablement pension from 1 April 1985. However, before 1 October 1986, a claimant was entitled to a disablement pension only if disablement was assessed at at least 20%. If disablement was assessed at less than 20%, a claimant was entitled to disablement by way of a disablement gratuity. By regulation 18 of the Social Security (General Benefit) Regulations 1982, special hardship allowance was payable if a gratuity had been paid in respect of the relevant period. From 1 October 1986, gratuities were abolished and the relevant amendment was retrospective in its effect, if the claim was made on or after that date, subject to a transitional provision that has no direct relevance here. From the same date, disablement pension became payable if the assessment was at least 14%. When I directed the oral hearing, I was not convinced that that second amendment was also retrospective. If it was not

retrospective, no disablement benefit in respect of the period before 1 October 1986 should have been paid in this case and it would follow that special hardship allowance would not be payable either. Before the hearing, Mr Varley put in a written submission relying, in part, on regulation 18 of the 1982 Regulations which seems to me to have no application to this case at all. However, at the hearing itself, he developed another argument which has persuaded me that this claimant was properly awarded disablement pension.

17. Before 1 October 1986, section 57 of the Social Security Act 1975 provided, so far as is material:-

" (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 one per cent.

....

(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 ....

(6) Where the extent of the disablement is assessed for a 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 appropriate weekly rate specified in Schedule 4, Part V, paragraph 3 ...."

From 1 October 1986, amendments were effected by paragraph 3 of Schedule 3 to the Social Security Act 1986 which provided:-

" (1) In subsection (1) of section 57 (disablement benefit) '14 per cent.' shall be substituted for '1 per cent.'.

(2) The following subsections shall be inserted after that section -

'(1A) ....

(1B) Subject to subsection (1C) below, where the assessment of disablement is a percentage between 20 and 100 which is not a multiple of 10, it shall be treated -

(a) if it is a multiple of 5, as being the next higher percentage which is a multiple of 10; and

(b) if it is not a multiple of 5, as being the nearest percentage which is a multiple of 10,

and where it is a percentage of 14 or more but less than 20 it shall be treated as a percentage of 20.

(1C) .....'.

(3) Subsection (5) of that section shall cease to have effect except in relation to cases where the claim for benefit was made before this paragraph comes into force.

(4) Subsection (6) shall have effect, except in relation to such cases, as if the words 'where disablement benefit is payable for a period, it shall be paid' were substituted for the words from the beginning to 'payable'."

18. There is a presumption, both at common law and by virtue of section 16 of the Interpretation Act 1978, that amendments to legislation do not have retrospective effect. Therefore, generally, a claim made after the date when amending legislation has come into force but in respect of a period before that date will be determined in accordance with the legislation in force before that date. However, that presumption only applies if no contrary intention appears from the language of the amending legislation. In R(I) 1/90, a Tribunal of Commissioners decided that paragraph 3(3) of Schedule 3 to the 1986 Act was retrospective in its effect.

"But then if closer regard is had to the precise terms of paragraph 3(3), it states that section 57(5), of the 1975 Act, is to cease to have effect 'except in relation to cases where the claim for benefit <u>was made</u> before this paragraph comes into force'. The past tense, which we have emphasised, is, to our mind, of prime significance. It is not only a past tense but it is specifically related to time prior to the paragraph coming into force - that is prior to 1 October 1986. If Parliament had intended subsection (5) of section 57 of the 1975 Act to continue in force so far as claims made after the paragraph came into force the provision would have required to be couched in different terms. The tense would have had to be different and the time limit would have been inappropriate. For these reasons we are clear that the language of paragraph 3(3) of Schedule 3 to the 1986 Act evinces a clear intention to cut off any rights that might have been acquired or accrued in regard to a disablement gratuity otherwise conferred under section 57(5) of the 1975 Act. Thus we are satisfied that the contrary intention is sufficiently and clearly contained within the amending statute."

It follows that paragraph 3(4) of Schedule 3 must also be retrospective in its effect in any case where the claim is made after 30 September 1986, because it is expressed as having effect subject to the same exceptions as paragraph 3(3).

19. If paragraph 3(4) is retrospective, two difficulties arise with the construction of section 57(6) in its application to a period before 1 October 1986. As amended, it provides:-

> "Where disablement benefit is payable for a period, it shall be paid at the appropriate weekly rate specified in Schedule 4, Part V, paragraph 3 ...."

What is meant by "where disablement benefit is payable for a period" and what is the "appropriate weekly rate"? These difficult questions raise the further question whether sub-paragraphs (1) and (2) of paragraph 3 of Schedule 3 are also retrospective in their effect even though there is no such indication in those sub-paragraphs read in isolation.

20. It seems to me that the phrase "where disablement pension is payable for a period it shall be paid" in section 57(6) as amended must be construed in the light of the language of the repealed subsection (5) and the former version of sub-section (6) and that the effect is that it is to be read as "Where the extent of the disablement is assessed for the period taken into account as amounting to at least the minimum level at which disablement benefit is payable, disablement benefit shall be paid ...". If sub-paragraphs (1) and (2) of paragraph 3 of Schedule 3 to the 1986 Act do not have retrospective effect, section 57(1) of the 1975 Act would provide, in respect of any period before 1 October 1986, that there might be entitlement to disablement pension if the assessment of disablement were at least 1%. However, there would be no "appropriate weekly rate" if the assessment were below 20%. That is because Schedule 4, Part V, paragraph 3 has never specified a rate in respect of an assessment of disablement less than 20% and, under paragraph (b) of paragraph 5 to Schedule 8 to the 1975 Act (repealed by Schedule 11 to the 1986 Act), there was no power to round up an assessment of less than 20%. On the other hand, if sub-paragraphs (1) and (2) of paragraph 3 of Schedule 3 to the 1986 Act do have retrospective effect, section 57(1) of the 1975 Act would retrospectively provide that there might be entitlement to disablement benefit only if the assessment of disablement were at least 14% but the new section 57(1B) would enable an assessment between 14% and 19% to be treated as an assessment of 20% for the purposes of Schedule 4, Part V, paragraph 3.

21. After some initial hesitation, I have come to the conclusion that Mr Varley is right and that sub-paragraphs (1) and (2) of paragraph 3 of Schedule 3 to the 1986 Act must have the same retrospective effect as sub-paragraphs (3) and (4), despite the apparent contrast in the statutory language. My reason for doing so is that, unless sub-paragraph (2) is given retrospective effect, sub-paragraph (4)

is deprived of the retrospective effect that was clearly intended. The principal point of the amendment to section 57(6) was to enable disablement pension to be paid where the assessment of disablement was less than 20%. I can see no reason for sub-paragraph (4) being made retrospective in its effect unless it was intended that disablement pension should be payable where the assessment of disablement was between 14% and 19% in respect of a period before 1 October 1986 in a case where the claim was not made before that date. In the absence of the new section 57(1B), introduced by sub-paragraph (2), sub-paragraph (4) could not have any practical retrospective effect. I therefore conclude that sub-paragraph (2) also has retrospective effect and, as sub-paragraph (2) seems primarily consequential upon sub-paragraph (1), it seems to me that those sub-paragraphs must both have the same retrospective effect as sub-paragraphs (3) and (4).

22. Although one cannot construe primary legislation by reference to secondary legislation, it is comforting that the Secretary of State, when making regulation 13 of the Social Security (Industrial Injuries and Diseases) Miscellaneous Provisions Regulations 1986, clearly had the same understanding as to the effect of the 1986 amendments. Regulation 13 gave some transitional protection to those who would have been entitled to gratuities had they not made claims on or after 1 October 1986, but it expressly applies only where disablement is assessed at less than 14%. If those whose disablement had been assessed at between 14% and 19% were not entitled to disablement pension, there would have been a serious lacuna in the legislation. As it is, the possibility of an award of disablement pension may be presumed to be the reason for not giving transitional protection to those claimants.

23. Had I been satisfied that disablement pension had not been properly awarded to the claimant, I would have had no jurisdiction to vary the award but I would have adjourned indefinitely the determination of the claim for special hardship allowance. As it is, I am able to give the decision set out in paragraph 1 above. The question of "good cause" for the delay in claiming is the only question I have determined although, in consequence, I have set aside the tribunal's decision on the claim. The determination of all other questions arising on the claim and the final decision on the claim are now matters for the local adjudication officer.

(Signed) M Rowland
Commissioner

Date: 1 May 1995