

Aggravation - *Wid & Gratuity*

JMH/SH/6

Commissioner's File: CI/522/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: W

Appeal Tribunal: Wigan

Case No: 617 07029

1. My decision is that the decision of the SSAT was erroneous in point of law. I set it aside, and, in pursuance of the powers in that behalf contained in section 23(7) of the Administration Act 1992, I substitute my own decision. I decide that in the calculation of the awards on review on the grounds of unforeseen aggravation:-

- (i) in respect of the accident on 16.5.71, the gratuity of 2% is to be disregarded as from 3.1.80;
- (ii) in respect of the accident on 14.1.80 the gratuity of 4% is to be disregarded as from 12.12.87; and
- (iii) in respect of the accident on 25.3.81 the gratuity of 5% is to be disregarded entirely.

Accordingly the reviewed awards can be aggregated and since the claimant achieved a percentage of more than 14% on 18.6.89 a pension of 20% is payable.

2. This is an appeal with the leave of the chairman from the decision of a SSAT dated 9.2.93. The claimant had claimed disablement benefit in respect of four accidents. He had been awarded a percentage in respect of each, which had been satisfied by payments of gratuities. The claimant later made claims for review, on the grounds of unforeseen aggravation, and, in respect of three accidents, was awarded 7% for life, 7% for life, and 3% for life, respectively, therefore, making a total of 17%, rounded up to 20%.

3. I have not found this point easy. Indeed I found it so far from easy that I raise directions firstly on 19.4.94 ("the first directions") and secondly on 8.8.94 ("the second directions") but even then I could not resolve the point to my satisfaction. I, therefore, held an oral hearing on 20.6.94. At that hearing, Mr Kennedy appeared for the claimant, and Mr Dunlop, of Counsel, appeared for the Department. Although I have rejected both of their submissions, I am nevertheless extremely grateful to both since they have clarified the issue and, paraphrasing Dr. Johnson, "they have ~~cleared~~ ^{clarified} my mind wonderfully".

4. The question which I have to determine is whether and, if so, how far, should the gratuities be taken into account in determining the percentages awarded on the last review. As part of his submissions to the tribunal, the adjudication officer most usefully prepared an Appendix showing the details of the awards in respect of the four accidents. That Appendix is reproduced as an Appendix to this decision but I have numbered each accident and, in this decision, I have referred to them respectively as "Accident 1", "Accident 2", "Accident 3", and "Accident 4" respectively. By way of background, and for the sake of completeness, I would add that the claimant also has awards in respect of accidents in 1968, 1974 and 1978. I do not need to consider these awards and indeed they are not before me. Doubtless questions of aggregation will arise and will be dealt with by the adjudication officer.

5. It will be seen from the Appendix that the award for Accident 1 was for life, for Accident 3 also for life but for Accident 4 only for the period 23.9.81 to 22.6.82 (final). Since no award on review on the grounds of unforeseen aggravation was made in respect of Accident 2, accident two can be dismissed from consideration.

6. (1) The adjudication officer initially submitted to the tribunal (para 6.4 - T46) that:-

- (a) in respect of Accident 1 the claimant's entitlement was 7% less the 2% gratuity paid - i.e. 5%;
- (b) in respect of Accident 3 the entitlement was 7% less the 4% gratuity paid - i.e. 3%; and
- (c) in respect of Accident 4 the entitlement remained at 3% since the original award, under which the gratuity was paid, was in respect of a fixed period, which ended before the new award of 15.1.88.

This made only 11% and therefore the claimant did not qualify.

In effect the tribunal accepted this submission.

(2) The adjudication officer then submitted to the

Commissioner that under the General Benefits Regulations, regulation, 14 the life of a gratuity expires after 7 years. Thus the 2% gratuity paid in respect of Accident 1 expired on 3.1.80, did not overlap with the award on 18.6.89. The 4% gratuity paid in respect of Accident 3 expired on 12.12.88 and did not overlap with the 7% awarded from 11.1.88 as from 12.12.88. Therefore, the adjudication officer submitted that the awards of 7% and 7% and 3% could be aggregated as from 11.1.88 to form 17%, rounded up to 20%.

The date of 11.1.88 was in fact wrong since - and this is agreed - the claimant only achieved the aggregate award of 14% or more only on 18.6.89 and that is the appropriate date.

Although I have now come to the same conclusion but by a different route, I raised the first directions (pps 66/7). Regulation 14 seemed to me immaterial to the point at issue.

- (3) In response to the first direction, the adjudication officer modified the submissions and submitted that the question was whether for aggregation purpose an award for life meant "life" or was restricted to seven years. She submitted that an award for life meant life unless the award came within regulation 5(1) of the Payments on Account Etc Regulations. That regulation, as Mr Kennedy rightly submits, only contains powers to deal with cases where a subsequent award of one benefit replaces an earlier award of a different benefit and refers me to the note to that effect in Bonner (1994). The AO submits that regulation 5(1) is irrelevant, and the award was therefore for life and the tribunal's assessment therefore correct. This was the argument which Mr Dunlop was instructed to, and did, put forward at the hearing.

I was still puzzled by these submissions and I raise the second directions in order to clarify the matter.

- (4) The adjudication officer then changed tack again and, referring me to regulation 85(1) of the Adjudication Regulations 1984 - not subsequently revoked - she submitted that a life assessment is treated as lasting for seven years only and this could also apply to a gratuity. That being so, it would follow, that a figure of 17% rounded up to 20% would be payable. The adjudication officer usefully referred me to R(I) 11/77.

7. At the hearing, the following submissions were made.

(i) Mr Kennedy, on behalf of the claimant, submitted that the claims on review are to be treated as new claims. He cited CI/515/1989. The gratuities were paid in respect of the old claims and therefore did not affect the new claims. By the payment of the gratuities the slate is, as it were, wiped clean and, certainly so far as aggregation is concerned, that is so - see section 57(1A) of the 1975 Act and section 103(1) and (2) of the 1992 Contributions and Benefits Act. Mr Kennedy distinguished regulation 5(1) of the Payments on Account Etc Regulations, which submission I have accepted above. His submission certainly has the attraction of simplicity and I think Mr Dunlop, for the Department, felt a certain difficulty in refuting the argument. But I ask myself the question why should a gratuity not be taken into account? If gratuities had not been paid, the relevant percentages for life would have been taken into account.

(ii) Mr Dunlop, on behalf of the Department, was instructed to, and did, argue in the sense of the adjudication officer's submissions in response to the first direction vis sub-para (3) of para 6 above. If there are no provisions limiting the gratuity, then the gratuity is for life and must be taken into account accordingly. There was, I thought, something inherently unfair in this proposition. A gratuity is in the nature of a capital sum whereas the normal disablement pension is in the nature of an annual payment and prima facie it is wrong, or at least odd, to deduct from an annual payment, being of the nature of income, a sum which is essentially of the nature of capital each year.

8. However, it seems to me that regulation 85 of the Adjudication Regulations 1984 - as I have said, unrevoked - in fact holds the key. The decision in R(I) 11/67 was based on regulation 28 of the Determination of Claims and Questions Regulations 1948 as amended in 1962. The amendment in 1962 was made by regulation 10 of the Family Allowances, National Insurance Industrial Injuries (Consequential) Regulations 1962 which substituted a new regulation 28. The new regulation 28 is in form, mutatis mutandis, identical to the present regulation 85. The decision in R(I) 11/67 is authority that a gratuity expires after seven years and I follow that decision. It seems to me that regulation 85 is applicable and I do not think I need set it out in full. It suffices to say that during a period referred to as "the common period" if any sum is revised on a review it shall be treated as paid on account of any benefit which is payable to the claimant in respect of the same accident or disease. Thus in respect of Accident 1 the 2% for life would have been treated as having been paid on account of the 7% for life awarded on 18.6.89 on review on the grounds of unforeseen

aggravation, were it not for the fact that the 2% gratuity was paid. Under subsection (2) a gratuity is treated as a periodical payment and where the period of the original award is more than seven years it is deemed to be one of seven years. Thus the gratuity as regards Accident 1 having been paid on 3.1.73, it expired on 3.1.80. Although the end decision in this case is the same as that for which Mr Kennedy contended, it will be readily seen that that would not necessarily always be the case and is only the case if the seven year period has in fact expired.

9. It seems to me therefore that the correct is as set out in paragraph 1 above and so I hold.

(Signed) J.M. Henty
Commissioner

(Date) 24 JUL 1995