

C.V.A.G

PEA - Given to Monica
Enrollment - International
VISA CLAIM FOR IUB

★ 20/96

DGR/SH/18

Commissioner's File: CI/11015/1995

DSS File:

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

1. My decision is that the decision of the social security appeal tribunal given on 29 June 1995 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that the adjudication officer's decision dated 9 July 1994 should be set aside, so as to leave the claimant's then current award of reduced earnings allowance undisturbed.

2. This is an appeal by the adjudication officer, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 29 June 1995. I directed an oral hearing. At that hearing the claimant, who was not present, was represented by Mr D Forsdick of Counsel, instructed by Messrs. Mortons, Solicitors, whilst the adjudication officer appeared by Mr S Cooper of the Solicitor's Office of the Department of Social Security.

3. On 9 July 1994 the adjudication officer reviewed the award to the claimant of reduced earnings allowance, and his revised decision was that, from and including 21 July 1994, the claimant ceased to be entitled to reduced earnings allowance, but from that date became entitled to retirement allowance at the rate of £9.32 per week. Thereupon, the claimant sought a review, but on 11 January 1995 the adjudication officer refused to review the decision of 9 July 1994. In due course, the claimant appealed to the tribunal, who allowed the appeal. They decided that the adjudication officer was wrong to refuse to review, and declared that the claimant was not disentitled to reduced earnings allowance from 21 July 1994.

4. Section 59B of the Social Security Act 1975, which was introduced as from 10 April 1989, and amended on 1 October 1989 and 1 October 1990, set out the conditions for converting reduced earnings allowance to retirement allowance. In its final form it was re-enacted as paragraph 13 of Schedule 7 to the Social Security Contributions and Benefits Act 1992, and now reads, so far as is relevant to this appeal, as follows:-

" 13. (1) Subject to the provisions of this Part of this Schedule, a person who -

- (a) has attained pensionable age; and
- (b) gives up regular employment on or after 10 April 1989; and
- (c) was entitled to reduced earnings allowance (by virtue either of one award or of a number of awards) on the day immediately before he gave up such employment,

shall cease to be entitled to reduced earnings allowance as from the day on which he gives up regular employment.

- (2) If the day before a person ceases under subsection (1) above to be entitled to reduced earnings allowance he is entitled to the allowance (by virtue of either one award or of a number of awards) at a weekly rate or aggregate weekly rate of not less than £2.00, he shall be entitled to a benefit to be known as 'retirement allowance'."

It is to be noted that if the conversion is to take place pursuant to paragraph 13, all the conditions have to be satisfied.

5. On 1 April 1990 the Social Security (Industrial Injuries) (Regular Employment) Regulations 1990 [S.I.1990 No.256] ("The Regular Employment Regulations") came into effect. Regulation 2 provides as follows:-

- " 2. (1) Subject to the following provisions of this regulation, 'regular employment', for the purposes of [paragraph 13 of Schedule 7 to the Social Security Contributions and Benefits Act 1992], means, in relation to any person and any week, gainful employment, whether or not under a contract of service, which the person undertakes for 10 hours or more in a week which forms part of a period of 5 or more consecutive weeks in which such employment is undertaken.

(2) For the purposes of [paragraph 13 of Schedule 7 to the Social Security Contributions and Benefits Act 1992], a person -

(a) if he is so engaged in regular employment, shall be regarded as not having given up that employment; or

(b) if he is not so engaged, shall be regarded as having returned to regular employment,

in any week falling within a period of 5 consecutive weeks during which the total number of hours gainfully employed when averaged over the whole of that period, amounts to 10 or more for each week within that period.

(3) A person shall be regarded for those purposes as not having given up regular employment in any week in which he has one or more days of interruption of employment."

6. At the relevant time "days of interruption of employment" were defined in paragraph 13(10) of Schedule 7, which read as follows:-

"'Day of interruption of employment' has the same meaning for the purposes of this paragraph as it has for the purposes of provisions of this Act relating to unemployment benefit, [sickness benefit or invalidity benefit].

(The words in brackets have since been removed)

Manifestly, the phrase "days of interruption of employment" in regulation 2(3) had the same meaning as it had in section 57(1)(c) of the Social Security Contributions and Benefits Act 1992 which provided as follows:-

"57. (1) For the purposes of any provisions of this Act relating to unemployment benefit, [sickness benefit or invalidity benefit] -

...

(c) 'day of interruption of employment' means a day which is a day of unemployment or of incapacity for work; ..."

(Section 57(1)(c) without the words in brackets has been replaced by section 25A(1)(c)) .

by section 25A(1)(c))

It follows that so long as a claimant was in receipt of unemployment benefit, sickness benefit or invalidity benefit, he had to be regarded as not having given up regular employment.

7. In the present case, the claimant attained pensionable age on 25 July 1989. However, he did not actually claim retirement pension on reaching the age of 65. He took no action, and continued to receive invalidity benefit. But on attaining the age of 70 on 25 July 1994, he automatically became entitled to retirement pension and no longer eligible for invalidity benefit. On 9 July 1994 the adjudication officer took the view that on 21 July 1994 the claimant had automatically retired from regular employment - seemingly he treated the words "retired from" as synonymous with "given up" - and that the claimant satisfied the conditions set out in paragraph 13(1). He was therefore no longer entitled to reduced earnings allowance, but could be awarded retirement allowance instead. As at the date when the adjudication officer made his review decision, it was not in dispute that the claimant had attained pensionable age, and that he had been entitled to reduced earnings allowance at all relevant times. The real issue was whether or not he had given up regular employment on or after 10 April 1989 within paragraph 13(1)(b). For unless this condition was satisfied, he was not caught by paragraph 13, and was entitled to the continuance of his reduced earnings allowance.

8. It is not in dispute that the claimant had ceased to work, to use a neutral phrase, by about 1981, and that he was in receipt of sickness/invalidity benefit from that date continuously up to the time of his attaining the age of 70. Mr Cooper contended that the authorities established that giving up employment was not the same thing as ceasing to be employed. It involved a conscious intention to stop working. He cited in this connection R(I) 2/93 where at paragraph 13 the Commissioner said as follows:-

" 13. There is no difficulty in understanding the ordinary meaning of the words 'gives up'. To 'give up' according to the Shorter Oxford English Dictionary means 'To resign, surrender, to hand over' also 'to forsake, relinquish, desist from, relinquish the prospect of; ...'. The phrase denotes some conscious act on the part of the doer. Likewise, the phrase 'gives up regular employment' denotes an intention on the part of the person to give up regular employment."

It should be noted that in the above instance the Commissioner was dealing with the case where the claimant had been dismissed. He decided that in those circumstances the claimant had not given up employment. Indeed, I suppose it could be said that the employment had given up the claimant. Mr Cooper contended that, in the present case, there was no evidence as to when the claimant actually gave up work, as distinct from ceased to work. All that we knew was that he had ceased to work, and had

simultaneously claimed sickness/invalidity benefit. However, in Mr Cooper's submission, it did not matter. For if the claimant formulated the intention to give up work, either on becoming incapacitated and claiming sickness/invalidity benefit, or at some later date during the course of receiving that benefit, paragraph 2(3) of the Regular Employment Regulations operated so as to prevent his being treated as having given up regular employment until the expiry of the award. The award expired on the claimant's attaining his 70th birthday, namely on 25 July 1994. That was after 10 April 1989, so that the claimant satisfied condition (b) of paragraph 13. He ceased therefore to be entitled to reduced earnings as from the week commencing 21 July 1994.

9. However, Mr Cooper failed to deal with the possibility that, if he could not identify a moment of time when the claimant gave up employment, it might be said that he never gave it up at all. The fact that, on attaining the age of 70, he ceased to be entitled to invalidity benefit, but received instead retirement pension, did not ipso facto mean that he had given up work. The fact that a person, on attaining the age of 70, automatically becomes entitled to retirement pension (not having previously claimed it at an earlier age) does not necessarily mean that he has given up work. People do continue working after the age of 70. However, by not accepting that there was evidence that the claimant had given up his employment, Mr Cooper introduced an unnecessary complication. I agree with Mr Forsdick that it is clear beyond peradventure that, if a person ceases to work for reasons of ill-health, he has given up work. Indeed, it is a very common expression - "I have given up work because of my health". A person who ceases to work and simultaneously claims sickness/invalidity benefit demonstrates that he can no longer work. Initially, he may only have accepted that he was unable to carry on his regular employment, but after a period, if he continues to receive benefit, he will be treated as being incapable of all forms of employment. In the present instance, the claimant claimed benefit for the whole period from around 1981 to 1994. Of course, had he, after a period of time, resumed work, then it could be said that he only gave up work for a limited period. However, in the present instance the claimant clearly gave up work for the whole period during which he claimed sickness/invalidity benefit, and it would be wholly unrealistic to proceed on the basis that he throughout nurtured an intention to resume work at some time after 1994. Manifestly, he gave up work, at least from the time he was considered unfit for all forms of employment, and this occurred long before 10 April 1989. However, notwithstanding this, Mr Cooper contended that regulation 2(3) of the Regular Employment Regulations operated to prevent the claimant from being treated as having given up employment until he had ceased to be entitled to invalidity benefit, i.e. until he had attained of the age of 70, and this was after 10 April 1989.

10. Mr Cooper dealt with the possible contention, considered "at least arguable" by the Commissioner in CI/294/1994, that although a claimant might on attaining the age of 70 cease to be entitled

to invalidity benefit, this did not necessarily mean that he ceased to be incapable of work, and if he was still able to work, there was no period of interruption of employment necessary for the activating of regulation 2(3). Mr Cooper argued that as "days of interruption of employment" had the same meaning as that attributed thereto in section 57(1)(c), they necessarily embraced days of incapacity for work. But incapacity for work only had significance in the context of claiming sickness/invalidity benefit, and when once entitlement to claim that particular benefit was lost, as it was on attaining the age of 70, the concept of "incapacity for work" was meaningless. Therefore, the suspending effect of regulation 2(3) ceased to have any effect from the date the claimant attained the age of 70. His earlier giving up of work now took effect. He reinforced this approach by referring to regulation 7(1)(c)(ii) (which was in operation at the relevant time) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [S.I.1983 No.1598], which provided that a day should not be treated as a day of incapacity for work if it was a day in respect of which a person had made no claim for sickness or invalidity benefit. Mr. Cooper argued that, when a claim for sickness/invalidity benefit had been adjudicated upon and the award expired, it could in no meaningful way be said any longer to have an existence. Accordingly, on that ground also there could be no day of incapacity, and therefore no day of interruption of employment, after the claimant was no longer entitled to invalidity benefit. On the meaning of incapacity I accept Mr. Cooper's submission.

11. Mr Cooper reinforced his contention that regulation 2(3) operated to suspend the giving up of work, until the claimant ceased to be entitled to invalidity benefit, by reference to Commissioner's decision CI/292/92. Moreover, when an application was made to the Court of Appeal for leave to appeal, two Lord Justices of Appeal, following an oral hearing, thought that there was no arguable error in law in the Commissioner's decision. However, Mr Cooper conceded that there had been no argument on the particular point on which he now relied, nor had the Lords Justices given a reasoned judgment, still less one specifically dealing with the point now in issue. Mr Cooper further contended that in so far as a different view was taken by the Commissioner in CI/294/1994, such view was misconceived.

12. However, Mr Forsdick submitted that there was a fundamental fallacy underlining Mr Cooper's above submission, albeit it was not relied on by the Commissioner in CI/294/1994. He argued that it was abundantly clear, for the reasons given above, that the claimant had given up work long before 10 April 1989, but that Mr Cooper could not call in aid regulation 2(3) to suspend the date of retirement until after 10 April 1989, because the Regular Employment Regulations did not come into effect until 1 April 1990, by which time the claimant had already given up employment. In other words, there was nothing on which regulation 2(3) could bite. There had been a period from the date when the claimant gave up work up to 1 April 1990 when there had been no statutory suspension of the date of giving up, and that date had occurred long before 10 April 1989. The Regular

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Employment Regulations were not retrospective in operation (see CI/294/94 - and Mr Cooper did not seek to challenge this), and when they did come into effect, they were simply too late to have any effect. The claimant had already given up work before the statutory date. I invited Mr Cooper to refute this argument, but he was unable so to do. Accordingly, I accept Mr Forsdick's submission, with the result that the claimant remained entitled throughout to reduced earnings allowance, and the adjudicating officer who reviewed the award on 9 July 1994 erred in so doing, as did the adjudication officer on 11 January 1995 in refusing to review the latter decision. No review action should have been taken on 9 July 1994; the award of reduced earnings allowance should have been left undisturbed.

13. The tribunal reached the correct conclusion, but their reasoning was defective, and I must accordingly set aside their decision. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently substitute my own decision.

14. Accordingly, my decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

(Date) 01 APR 1996