Lancashire County Council

Welfare Rights Service
FOR YOUR BENEFIT

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Date 13 January 1999

Simon Osborne
Editor
Welfare Rights Bulletin
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Dear Simon

I enclose copies of two unreported Commissioners' Decisions (CI/14535/96 and CIB/664/98) which I have received on cases where I am acting as the representative. I notice that the latter decision is similar to decision CIB/12668/96 which is summarised in the December 1998 issue of the Welfare Rights Bulletin. CIB/664/96 also makes some interesting comments on the observation of the claimant at the hearing and consideration of severe discomfort arising after walking has been finished.

Please feel free to summarise these decisions in a future issue of the Welfare Rights Bulletin if you think that they would be of use to other advisers.

Yours sincerely

Nigel Thackray

Nigel Thackray
Welfare Rights Officer

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David
I have kept CIB/664/98.
Simon.

20/1/99
— Acknowledged by phone
— will try to get them in a future BLN.
So.

Good Cause for Late DS Claim - Failure of DSS to Advise to Best Entitlement Can be Reviewed

ELN/CW/smt/2

Commissioner's File: CI/14535/96

good cause to late claim to Industrial Disablement Pension

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [redacted]

Social Security Appeal Tribunal: Lancaster

Case No: 605/95/17978

1. My decision is that the decision of the social security appeal tribunal sitting at Lancaster on 26 March 1996 is erroneous in law and I set it aside. I remit the case for rehearing and redetermination in accordance with the considerations referred to below to an entirely differently constituted tribunal pursuant to section 23(7)(b) of the Social Security Administration Act 1992.

2. This is an appeal by the claimant against the unanimous decision of the tribunal of 26 March 1996 brought with leave of a chairman of tribunals exercising powers contained in reg. 24(4) of the Social Security (Adjudication) Regulations 1995.

3. The terms of the decision of the adjudication officer which led to the appeal to the tribunal are:-

> "The claimant is not entitled to Disablement Pension from 30/12/69 to 28/02/95 (both dates included). This is because his claim for that period made on 01/06/95 was not made within the time limit set out in the regulations and he has not proved there was continuous good cause for the delay in making the claim."

The tribunal dismissed the claimant's appeal against the decision.

4. The findings of the tribunal on questions of material fact are given as:-

> "Facts found as follows:

1. Facts found as in box 5, summary of facts in the AT2.

2. Facts accepted as stated by (the claimant) in his reasons for the delay in making his claim set out at page 7 of the papers.

3. (The claimant) damaged his left knee at work. He underwent various procedures over 1969-71 period. Soon it became apparent that he could no longer do his normal work as an electrician and was transferred to street lighting. He made no enquiries of the union, a personnel department, or welfare rights or a solicitor."

5. The recorded reasons of the tribunal are:-

"(The claimant) did not know of the benefits he could claim. When he received so serious an injury to his knee that he required several operations and retirement from the job he then did, he was under a clear duty to make enquiries of the authorities. He says he did not do this. In effect, he waited to be told. He is under a duty to make enquiries, did not do so, and has failed to show good cause in delaying his claim until 1.6.95 over 25 years late - R(I)82/53, paragraph 6; R(S)2/63, paragraph 13 (duty), and CS371 1/49(KL) (burden of proof)."

6. The claimant's grounds of appeal to the Commissioner are given as:-

"The tribunal dismissed my appeal because I did not make any enquiries about my potential entitlement to social security benefits following my industrial accident. This does not deal at all with my contention that the Department had enough information to [redacted] my potential entitlement to Industrial Disablement Benefit (see section 4 of representative's submission dated 31/1/96)."

7. Insofar as the claimant's grounds of appeal are merely an expression of his dissatisfaction or disagreement with the tribunal's decision then I agree with the adjudication officer dealing with the appeal to the Commissioner that no error of law in that decision is disclosed thereby. It is reasonably clear from his Notice of Appeal and the accompanying documentation, however, that the claimant is contending that the tribunal failed to deal with the arguments set out in paragraph 4 of his representative's submission to the tribunal. I find it instructive to remind myself of those arguments which were:-

"It is submitted that (the claimant's) claim for Injury Benefit should have alerted the Adjudication Officer to his potential entitlement to Industrial Disablement Benefit. The Adjudication Officer has confirmed that (the claimant) claimed Injury Benefit following the accident on 03.09.69 and that this benefit was paid to him from 04.09.69 to 29.12.96. In Decision R(I)10/74 the Commissioner held that a delayed claim which is a result of the failure by the Department to alert a claimant to entitlement when the information given to the Department indicated a prima facie entitlement to some unclaimed benefit could amount to good cause. Since it appears that the Department has destroyed (the claimant's) claim for Injury Benefit (this is currently being checked with the Department, as well as whether or not it still holds the sick notes for the benefit), it is submitted that it cannot prove that (the claimant) did not alert the Adjudication Officer to his potential entitlement to Industrial Disablement Benefit. Furthermore, Injury Benefit, which was abolished in 1982, was a short-term benefit payable to people who were incapable of work because of an industrial accident or disease. In awarding (the claimant) Injury Benefit the Adjudication Officer must have known that (the claimant) had had an industrial accident and therefore should have advised him to claim Industrial Disablement Benefit. As far as he can remember, (the claimant) did not receive any of the information which it is stated in section 6.6 of the Adjudication Officer's submission would normally have been sent to customers about Disablement Benefit. In any event, it does not appear that the Adjudication Officer can prove that such information was sent out to (the claimant)."

I find the claimant's complaint that the tribunal failed to deal with these matters entirely well founded. It was the tribunal's duty when faced with those arguments to make enquiries about and make findings of fact upon what information was likely to have been before the authorities, what information, if any, would normally have been issued to the claimant by those authorities about disablement benefit in the circumstances of the case and whether such information was actually issued to this claimant. It was their duty to enquire about and make appropriate findings as to what the claimant's beliefs were about his benefit position based on those facts and other pertinent facts which had led him to form those beliefs at that time and throughout the period from then until he actually claimed benefit. The tribunal failed to fulfil their duty in these respects and to give any reason for so doing. They were in error of law thereby and that is sufficient to warrant the setting aside of their decision.

8. The new tribunal are reminded that the ultimate test of whether a claimant has good cause for lateness of his claim is

whether in all the circumstances he acted or failed to act as a reasonable person would have done (see in particular R(SB)6/83 and CI/386/92).

9. In my view the tribunal placed undue emphasis upon two, rather than all relevant matters. Firstly, as the adjudication officer says in his submission to the Commissioner, it is not self-evident why the nature or extent of the injury should in itself prompt a claimant to make enquiries, particularly if circumstances such as those asserted on the claimant's behalf at the hearing and to which I have referred, were established to be present. Secondly, I consider the tribunal to have treated the content of paragraph 6.5 of the adjudication officer's submission to the tribunal as though it embodied a concept of invariable application in late claim cases regardless of the factual context of a particular claimant's own case. He said at that paragraph:-

> "A person is expected to take reasonable steps to acquaint himself with his rights and duties under the Acts and Regulations and to obtain the necessary information, generally by making enquiries at the local Benefits Agency Office."

That paragraph is based almost verbatim upon a passage from the decision of the Commissioner in [redacted] which is referred to both by the adjudication officer and the tribunal. It is now well settled that the concept is not of such application. In particular in [redacted] the Commissioner held that ignorance of ones rights may be good cause if consideration of all the facts leads to a conclusion that the ignorance was reasonable. The Commissioner further held that failure to make enquiries will not of itself defeat a plea of good cause if the claimant can show that he could not reasonably have been expected to have been aware of his rights or that his failure was due to a mistaken belief reasonably held. In particular, the claimant should not be held at fault in failing to make enquiries if a reasonable man would believe that there is nothing, or nothing further, to enquire about. The new tribunal are reminded that circumstances may indicate a duty on the part of the authorities positively to assist the claimant to obtain his or her rights under the Social Security Scheme. Several Commissioners have, for example, held it to be of significance that the claimant has laid before the authorities such facts as should alert them to advise him of entitlement to further benefits and those authorised have failed to follow their own departmental procedures requiring them to give advice by way of follow up leaflet or a claimant has otherwise not received that advice. This consideration is of obvious relevance in determining the reasonableness or otherwise of a claimant's belief that there was nothing further to enquire about in the circumstance of his case. It is of obvious relevance to the principal argument put forward by the claimant's representative in this particular case. One

of the Commissioner's decisions in point is R(I)10/74 which, I note, was expressly relied upon by the representative in his submission to the tribunal but which was apparently ignored or considered of no relevance by them. The new tribunal is referred not only the text of that reported decision but also to that of R(U)3/60 and in particular to paragraph 6 of R(S)3/63 where the Commissioner said:-

> "I am informed that it is the normal practice in cases of this kind to send to the claimant form B.F.11P which is an intimation to him that he may not have claimed all he is entitled to...I am also told that there is no indication..that a copy of that form was sent to the claimant. In my view there is nothing unreasonable or anything unlikely in a claimant believing that when he makes a claim for sickness benefit that that is a claim for all that he is entitled to and if he fails to make enquiry as to further benefit one should be slow to deprive him of the benefit. It is a very different case where a man does not claim at all."

In the light of these considerations I direct the tribunal to treat with caution that part of the adjudication officer's submission to the original tribunal (at paragraph 6.6) which reads "whether or not the Department issued the relevant literature, the onus is still on the customer to make reasonable enquiries to ascertain his entitlement to other benefits".

10. I note that in correspondence with the Benefits Agency prior to the tribunal hearing, the claimant had endeavoured, unsuccessfully, to obtain a copy either of his claim form used in claiming Injury Benefit in 1969 or a blank specimen copy of that form. I note, however, that the adjudication officer appears to have been able to give some evidence of the procedures likely to be followed at the relevant time in relation to a claim for that benefit. I note also that the adjudication officer concerned with the appeal to the Commissioner has been able to elaborate on the nature of Injuries Benefit and to give some indication of its attendant conditions of entitlement. It seems to me that these officers are unlikely to be drawing merely upon personal recollection of matters occurring nearly 30 years ago. They are more likely to be drawing upon some sort of literature or record which might well be of use to the tribunal when endeavouring to establish what information was likely to have been before the adjudication officer at the relevant time. In preparing for the rehearing of this matter, I direct the adjudication officer to place before the tribunal such documentation as he is able to find in this respect, so as to aid them in their task. If there is no such documentation, which I find unlikely, then of course the tribunal will have to find the relevant facts on balance of probabilities as best they can on the material before them.

11. Finally, I find it incumbent upon me to comment upon the adjudication officer's criticisms in his submission to the Commissioner of the method adopted by the tribunal in recording the material facts. I agree that it is usually inappropriate, though not, in my view, invariably so, to find facts merely by reference to other documents. I consider it to be particularly inappropriate, however, where the case involves as here, a fact finding exercise of relative complexity. The new tribunal will no doubt wish to avoid the pitfalls attendant on such an approach, as described by the adjudication officer in his submission, when hearing this matter afresh.

12. Appeal allowed.

(Signed) **E L Newsome**
Deputy Commissioner

(Date) 6 January 1998