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Commissioner's File: CI 1658/02

SOCIAL SECURITY ACTS 1992-1998

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Claim for:	Disablement Benefit
Appeal Tribunal:	Newcastle
Tribunal Case Ref:	U/44/228/2001/02599
Tribunal date:	14 February 2002
Reasons issued:	1 March 2002

Introduction

1. This is an appeal by the claimant with the leave of the tribunal chairman against the decision of the Newcastle appeal tribunal which on a rehearing on 14 February 2002 confirmed two decisions by officers on behalf of the Secretary of State dated respectively 8 November 2000 and 25 January 2001, on how the interaction of his various claims and assessments of disablement for six different industrial accidents and diseases fell to be dealt with for disablement benefit purposes.

2. The first decision (page 9) was made as the result of a request by the claimant on 2 May 2000 that his overall entitlement to disablement benefit should be looked at again, with a view to giving him further benefits on the basis of "aggregation" for three industrial accidents and one disease for which he had already received final lump sum gratuity payments under the industrial injuries scheme as in force before 1 October 1986.

3. The second decision (page 15) was in response to a completely fresh claim for prescribed disease D1 pneumoconiosis he made on 8 November 2000, the same day as he was notified of the first decision rejecting his application for extra benefit for his other accidents and diseases on the basis of aggregation. There is no doubt or dispute that this new application fell to be determined entirely in accordance with the rules about entitlement and the making of claims under the industrial injuries scheme at the date it was in fact made, though the pneumoconiosis itself was of much earlier origin.

4. The issues which arose on the two decisions were so interconnected that the parties and the tribunal seem very sensibly to have dealt with them by common consent as one for the purposes of the appeal before the tribunal. No party having objected to

this I will do the same for the purposes of the present appeal, against the tribunal's decision on the substantive questions of the claimant's entitlement under his application for review and/or his fresh claim for benefit in respect of the separate disease.

5. It was not and is not disputed by the Secretary of State that the claimant does have a substantial further entitlement to disablement pension on the basis of that fresh claim, at the 40% rate from and including the date of the fresh claim on 8 November 2000, applying the "aggregation" provisions from that date so as to include the assessed percentages from all the claimant's previous accidents and diseases.

6. The issue before the tribunal, and now before me, is whether the claimant was entitled to even more benefits, on that basis or otherwise, for any period before that date. The contention put forward on his behalf by the Sunderland welfare rights officer acting as his representative, and accepted by an earlier tribunal sitting on 9 July 2001 though their decision was later set aside, is that he is now entitled to an award of disablement pension at not less than the 40% rate going right back over the whole period to 1 October 1986 when the provisions for aggregation of disablement percentages under the industrial injuries scheme were first introduced.

7. The background, and the conceptual problems to which those provisions and the way they were superimposed on the earlier industrial injuries scheme gave rise, will now be familiar to those versed in this rather esoteric branch of the law: they are rehearsed in the recent decisions in cases **CI 2107/01** and **CI 1532/02** to which reference can be made if needed, and I will not lengthen this decision by setting all that out again here. Suffice it to say by way of introduction to this case that such problems arose in relation to the claimant, a man now aged 72 who formerly worked I think in the mining industry, and to the five separate final awards of benefit he had received under the pre-1 October 1986 provisions of the industrial injuries scheme in respect of four separate accidents and one industrial disease, A11 vibration white finger, suffered or contracted at different times over the years from 1948 to 1976. Each of those had been dealt with and made the subject of a *final* award under those provisions, without any question arising of aggregating the separate percentages.

The "review" application

8. What was first sought on his behalf in the application for review in May 2000 (made, I think, as part of a benefits take-up campaign as were many similar applications) was for a fresh round of benefit in respect of the same accidents and disease to be awarded to him by virtue of the new aggregation provisions, even though no fresh claim

for benefit or reassessment had been made to which the new provisions were in terms expressed to apply. Such an award was said to be required for consistency with the treatment of other claimants, where new assessments of disablement required under the new provisions had from 24 July 1995 onwards been held, as explained in the decisions referred to above, to require inclusion of earlier assessed disablement percentages even though those had already been the subject of separate final awards of lump sum benefit under the system of "gratuities" in force before 1 October 1986.

9. That argument was rejected by the first decision under appeal to the tribunal given on 8 November 2000, on the ground that this principle applied only where some fresh assessment of disablement was called for under a new claim or a new medical review within the scope of the new provisions: and here there was none. That ground of rejection of any question of additional benefit for the period between 1 October 1986 and the making of the new claim in November 2000 was also for practical purposes repeated and incorporated in the further decision of 25 January 2001 given on that claim, and confirmed by the tribunal on appeal.

The decision on the new claim

10. That decision, set out succinctly and clearly in the signed record at page 15 and in substance confirmed in its entirety by the tribunal decision of 14 February 2002, embodied a number of points which it is convenient to summarise here.

(i) It was expressed to be a decision under section 10 **Social Security Act 1998** "superseding" from the date of the new claim the separate final award dated 3 October 1977 on one of the claimant's earlier claims: that for his accident on 12 May 1976, on which he had been awarded and was continuing to receive a disablement pension at the rate appropriate to a 15% disablement, under a special provision of the pre-1986 scheme allowing certain claimants to take such a "pension in lieu" on an assessed disablement of under 20% even though ordinarily the disablement benefit for such a disablement at that time would have been a lump sum gratuity: regulation 18(2) **Social Security (General Benefit) Regulations** 1982 No. 1408. (The Secretary of State's submission to the tribunal confirmed he had been eligible and had elected for this as a person entitled at that time to special hardship allowance).

(ii) The decision then recited the other separate final disablement assessments in respect of the claimant's three earlier accidents and the one prescribed disease A11, totalling another 22%, in each case continuing for life from a date before 1986: all of

them made under the pre-October 1986 provisions, and all the subject of lump sum final gratuity payments made to him under those provisions.

(iii) It then held that as the claimant had now been assessed on his new claim made on 8 November 2000 as suffering from a further 5% disablement from prescribed disease D1 from 16 April 1986 for the remainder of his life, he was entitled to have the aggregation provisions in section 103 **Social Security Contributions and Benefits Act** 1992 applied in determining his benefit entitlement following that claim.

(iv) Applying the department's guidance on the effect of the caselaw on those provisions, it further held that as more than seven years had elapsed from the start of each of the relevant "gratuity periods" by the time the fresh claim was made, all the previous assessments for which gratuities had already been paid, *plus* the 15% for which the pension in lieu was still in payment, *plus* the new 5% for disease D1 pneumoconiosis, could be aggregated together for the purposes of calculating the benefit on the fresh claim, giving 42% in all; which rounded down to the nearest 10% under section 103(3) gave him an entitlement to a 40% disablement pension for life from 8 November 2000, in place of his existing pension for the 15%.

(v) However no additional entitlement could be awarded for any period before that date, since (first, impliedly) from 1 October 1986 and until the fresh claim was made, there was no right to aggregation of any earlier percentage or reopening of any previous award, for the reason given in the earlier decision of 8 November 2000. Second, and contrary to the normal position on a claim where by regulation 19 **Social Security (Claims and Payments) Regulations** 1987 No. 1968 the prescribed time for claiming disablement benefit under section 1 **Social Security Administration Act 1992** allows for entitlement up to three months before the date of the claim itself, there could in this instance be no entitlement at all for any period before the claim.

(vi) The decision explained that the reason the normal prescribed time for claiming was unavailable was because procedurally the fresh claim had to be treated not as a claim at all, but as an "application to supersede" the earlier decision of 3 October 1977:

> **"[The claimant] is in receipt of a disablement pension, 15% PIL payable at 20% from 18.11.76 for life in respect of the accident on 12.5.76 – decision made on 3.10.77. [The claimant] has now been awarded a 5% assessment for PDD1 from 16.4.86 for life – claim made on 8.11.00. There can only be one claim for Dis Ben – any other claim is, under DMA, a change of circumstances to the original claim. In this case the relevant change of circumstances is more advantageous to the claimant and is therefore restricted to the date of claim i.e. 8.11.00. Social Security Act 1998, section 10(5). Assessment to be aggregated from 8.11.00."**

11. "PIL" is the disablement pension in lieu of the gratuity to which the claimant had otherwise become entitled for that accident, substituted by virtue of regulation 18(2) of the General Benefit Regulations cited above: I am not quite clear why this one was awarded at 20% for a 15% disablement instead of the 15% prescribed by Schedule 4 to those regulations, but fortunately nothing turns on that for the present purpose. "DMA" is a reference to the decisionmaking structure under the **Social Security Act 1998**, applicable to the new claim; and the reason the officer making that decision thought he or she was bound not to award benefit on that claim for the normal three months before the date it was made is that, if it did have to be treated as an application by the claimant to "supersede" his existing 15% pension award under section 10, then the rules that govern a "superseding" decision in regulations 6 and 7, **Social Security and Child Support (Decisions and Appeals) Regulations** 1991 SI No. 991 prevented it conferring any increased entitlement from a date earlier than that of the application.

Tribunal decision

12. All of the reasoning involved in that decision appears to have been accepted, expressly or impliedly, by the tribunal which confirmed it at the appeal rehearing on 14 February 2002. However it is conceded by the Secretary of State that the tribunal's statement of reasons sent to the parties on 1 March 2002 (at pages 55-56) was deficient in that it failed to address at least one material issue raised in argument by the claimant's representative, or to give a sufficiently clear understanding of why they held he could not take advantage of the aggregation provisions or get any further entitlement until his new claim was actually made on 8 November 2000.

13. The submission on behalf of the Secretary of State by Mr P Brylov dated 15 July 2002 at pages 69 to 75 therefore concedes that I should set the decision aside, but then suggests I should substitute my own, holding the aggregation provisions are *not* triggered by the new claim for prescribed disease D1, because on Mr Brylov's analysis as I understand it, those provisions are on the authority of case **CI 12311/96** only to be applied on such a claim when it is to the claimant's advantage, and that is said not to be the case here when one works out the figures and applies the special rules for respiratory diseases in regulation 20(1A) **Social Security (Industrial Injuries) (Prescribed Diseases) Regulations** 1985 SI No 1967 that allow a separate 10% pension for a 5% disablement. The claimant's representative in reply at pages 120-122 addresses further arguments on the general points of principle on aggregation and suggests that the result should instead be a combination of the two positions: a award or awards of benefit for some or all of the period from 1 October 1986 on the basis of a total aggregation of 37% rounded up to 40%, *and* an additional 10% for PDD1 on the fresh claim.

No right to additional benefit on old claims alone

14. These submissions and the history of this case raise a number of points on the way the industrial injury and disease scheme is supposed to work after 1986 when there are successive injury and disease claims to be taken into account. Two of the main points of principle on the "aggregation" claimed here have already been determined after full argument in another recent case, and those I can deal with quite shortly.

15. The first question is whether on facts such as those set out above the claimant had any entitlement on the application he made for review in May 2000 to have the new provisions about aggregation applied so as to give him a fresh round of benefit entitlement for his earlier injuries and diseases alone, when there was at that time *no* fresh claim or occasion for reassessment of any individual percentage, and each had already been finally assessed and the subject of a final award of benefit made under the pre-October 1986 provisions.

16. For the reasons given in more detail on the same point in case **CI 1532/02**, there was in my judgment no such entitlement. No occasion had arisen for any fresh assessment of disablement to which the post-September 1986 aggregation provisions could apply, and the claimant's entitlement to benefit on each of his earlier claims had already been finally assessed and awarded under the law relevant to those claims which was that in force before 1 October 1986.

17. Secondly, as also held in **CI 1532/02** it can make no difference for this purpose that one of those claims (the one for prescribed disease A11 vibration white finger) had not in fact been made until 19 June 1989; since by a valid and unaltered decision under the transitional provisions at that time in force (regulation 13 **Social Security (Industrial Injuries and Diseases) Miscellaneous Provisions Regulations** 1986 SI No. 1561) it was to be treated as made on 30 September 1986. That separate decision accepting it as a delayed claim for good cause so as to bring it within the old provisions and thus still entitle the claimant to a lump sum gratuity was accepted by the claimant at the time and remained unchallenged: it was not the one under appeal to the tribunal, and was not open to question before them. The only way its correctness might now be reopened is by the Secretary of State himself as explained in paras 21 to 22 of case **CI 1532/02**, *if* there should be any question of error within the department in dealing with the case in 1989 to give rise to a "revision" under section 9 **Social Security Act 1998**, but that is a matter the claimant or his representative must take up separately with the Secretary of State if they wish it pursued: it is not something that can affect the validity of the tribunal's decision or the case as it stands before me.

18. That leaves the additional questions that arise in this case on the way the aggregation provisions should have been applied under the post-1986 scheme on the fresh claim for D1 pneumoconiosis made on 8 November 2000, and from what date any additional entitlement on that claim can start to run: in particular, whether the claimant was rightly deprived of the ordinary entitlement for the previous three months under regulation 19 of the Claims and Payments Regulations on a claim made within the "prescribed time".

Aggregation on a new claim under the post-September 1986 scheme

19. Under section 103(2) **Social Security Contributions and Benefits Act 1992,** and the extension of the system of aggregation to prescribed disease claims under regulations 15A and 15B of the Prescribed Diseases regulations cited above, the claimant is entitled to have added to his assessed percentage of disablement from the relevant injury or disease on a fresh claim (in this case, the 5% for D1 pneumoconiosis):

> **"15A - (1)... the assessed percentage of any present disablement of his resulting from**
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> **(a) any accident after 4 July 1948 arising out of and in the course of his employment, being employed earner's employment, or**
>
> **(b) any other relevant disease due to the nature of that employment and developed after 4 July 1948,**
>
> **and in respect of which a disablement gratuity was not paid to him under the Act after a final assessment of disablement."**

This is subject to the "rounding" provision in section 103(3)-(4) and regulation 15B:

> **"15B - (1) Subject to the provisions of this regulation, where the assessment of disablement is a percentage between 20 and 100 which is not a multiple of 10, it shall be treated –**
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> **(a) if it is a multiple of 5, as being the next higher percentage which is a multiple of 10; and**
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> **(b) if it is not a multiple of 5 as being the nearest percentage which is a multiple of 10,**
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> **and where it is 14 per cent. or more but less than 20 per cent. it shall be treated as 20 per cent.**
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> **(2) In a case to which regulation 15A (aggregation of percentages of disablement) applies, paragraph (1) shall have effect in relation to the aggregate percentage and not in relation to any percentage forming part of the aggregate."**

20. For persons assessed as suffering disablement from pneumoconiosis the special rules under regulation 20 provide that they do not have to meet the normal 14% threshold for entitlement to a disablement pension under section 103 of the 1992 Act:

> **"20. - (1) On a claim for disablement pension in respect of pneumoconiosis ... section [103](1) shall apply as if for '14 per cent' there was substituted '1 per cent'.**
>
> **(1A) Where on a claim for disablement pension in respect of pneumoconiosis ... the extent of the disablement is assessed at 1 per cent. or more, but less than 20 per cent., disablement pension shall be payable at the 20 per cent. rate if the resulting degree of disablement is greater than 10 per cent. and if it is not at one-tenth of the 100 per cent. rate, ..."**

Thus apart from any question of aggregation, the benefit for this claimant's pneumoconiosis on his assessment of 5% disablement from that disease would be a disablement pension at 10% of the maximum pension rate.

Aggregation where pension payable in lieu of gratuity

21. Two initial points on the aggregation of his earlier percentages can be made. First, there is no doubt in my judgment that for the purposes of the industrial injuries scheme including any question of aggregation after September 1986, the claimant's (undisputed and continuing) entitlement to a disablement pension in lieu of gratuity on his earlier 15% assessment for his accident of 12 May 1976 is to be treated in exactly the same way as any other disablement pension to which he remains entitled under either the pre- or the post-1 October 1986 provisions: cf. the decision of Mr Edwards-Jones QC in case **R(I) 2/84.** The option for such a pension had to be made before any gratuity was paid; and it must follow that since the 15% assessment was a final one, a gratuity was never paid on it and it remains a present disablement the express terms of regulation 15A entitle the claimant to have that percentage brought into aggregation on his new claim.

How aggregation affects benefit

22. Nor in my judgment is there any room for doubt that where a percentage from a previous accident or disease for which benefit has already been awarded is included by aggregation in the assessment on a subsequent claim for some other relevant accident or disease, the effect so far as benefit is concerned is that the award made under the second claim on the aggregated assessment is a combined award, incorporating the entire entitlement for both the previous accident or disease and the later one from that time on. That is in my judgment the clear intention of section 103(2) and regulation 15A, by necessary and irresistible implication even though they do not expressly say at any point that the previous award must then cease to exist as a separate entitlement in its own right. The procedural aspects of that will have to be considered further later, but so far as the substantive entitlement is concerned that is the only rational way of construing the legislation: Parliament plainly intended that from the date of any new aggregated award (a) the claimant should have one increased entitlement, incorporating any benefit

attributable to the earlier percentage, and (b) the new aggregated entitlement should be in place of, and not in addition to, any previous entitlement for that percentage.

Final "gratuity" percentages also included

23. The Secretary of State concedes in this case, for consistency with the treatment of others where previous finally assessed percentages have been allowed into aggregation on a fresh assessment under the post-September 1986 provisions despite having already been the subject of lump sum gratuity payments under the previous provisions, that in addition to the 15% for his 1976 accident this claimant is also entitled to have all his other assessed percentages totalling 22% added under regulation 15A to the 5% for his pneumoconiosis so to increase the disablement pension on his fresh claim.

24. That further entitlement is conceded by the Secretary of State as being the effect of the principle in **CI 522/93** as explained in **CI 1698/97 (R(I) 3/00),** even as regards percentages finally determined entirely under the pre-October 1986 provisions, never afterwards altered, and already fully compensated under those provisions by final lump sum gratuity payments. Though I do for my part confess to some difficulty in following how that can be so when section 103(2) and regulation 15A(1) appear to say the opposite, it is as noted in **CI 1532/02** far too late to reopen its correctness now.

Combined effect

25. The effect of applying regulation 15A(1) in conjunction with that concession was therefore that the claimant could have all of his previous finally assessed percentages added in with the 5% on his new claim to make a total aggregate assessment of his disablements at 42%, or 40% when rounded down to the nearest 10 under regulation 15B(2). On that basis, he was entitled on his new claim to a new combined award of disablement pension for all his assessed accidents and diseases, at the 40% rate.

26. That is what he was awarded from the date of that claim by the second decision under appeal; and so far as the calculation goes the tribunal were right to confirm it, as there can be no doubt of its arithmetical correctness in terms of regulations 15A and 15B. Moreover despite the suggestions to the contrary in Mr Brylov's submission it is also clear that the combined award applying the aggregation provisions in that way was more advantageous to this claimant than what he could have got without them by taking a separate pension on the new pneumoconiosis claim at the 10% rate under regulation 20(1A), and leaving his existing disablement pension for the 1976 accident unaffected: even if a 20% pension for that 15% disablement was correct, two pensions

totalling 30% are still not as much as one at 40%. Hence it is not necessary for me here to decide the question to which the submission very properly draws my attention in reference to case **CI 12311/96**, of whether aggregation is compulsory on all disablement assessments made under the post-September 1986 scheme, or something only to be operated in favour of a claimant where the resultant combined pension is more advantageous than keeping the entitlement from two or more disablements separate.

Aggregation an entitlement not a penalty

27. I would for my part desire to reserve a final view for a case that actually turns on the point, but I can say that on the material before me I see no reason to doubt the correctness of the principle accepted by the Secretary of State on the authority of case **CI 12311/96,** that at least where pneumoconiosis claims are concerned aggregation is an entitlement for the claimant, not a penalty to be applied against him to deplete the benefits he would otherwise get without it; and for that matter it is hard to see a reason in logic or in the regulations to confine that principle to such claims alone.

28. To apply aggregation as a beneficial, not a penal, provision is I think consistent with the probable genesis of section 103(2) and regulation 15A, in the earlier right under the pre-1986 scheme in regulation 38 of the **General Benefit Regulations 1982** for a claimant who had suffered successive accidents and had an existing disablement pension for the first, to opt for a percentage increase in it in place of any lump sum gratuity on a later assessment under 20%: this applied in his favour if the result was a higher pension, but not otherwise. It also explains the otherwise curious use of the word "may" in section 103(2) (and notably also in section 109(4)(a)-(b), so that the use of "shall" in regulations 15A and 15B cannot validly impose any harsher rule on industrial diseases); and is consistent with the possibility expressly recognised in case **CI 12311/96** and in the legislation itself (section 107(1)(a): see further below) of people continuing to have separate concurrent awards of disablement benefit for different accidents or diseases under the post-1986 scheme, subject to an overall 100% maximum, if that suits them.

But applicable as a whole or not at all

29. However it is I think clear in this context that on any assessment under the post-September 1986 provisions aggregation of available previous percentages must either apply, or not apply, as a whole: in other words the choice is between adding them all in and then applying the rounding provisions, or not adding in any of them at all. The legislation contains nothing to justify cherrypicking among individual percentages for this purpose, with the consequence that many of the complications rehearsed in the

submission on behalf of the Secretary of State, which stem from such an approach, do not in my judgment arise. So far as this claimant is concerned therefore, he is entitled to have all of his previous percentages added in, and as that gives him the best overall entitlement of a 40% combined pension on his new claim, it is to be done.

Start of entitlement on new claim

30. The only remaining substantive question is the date from which the fresh award of that increased pension should have effect. I can for my part see no reason for this purpose to treat the fresh claim for D1 pneumoconiosis he made on 8 November 2000 as anything other than what it in truth was: a fresh claim, for a separate disease and a separate loss of faculty, made many years after his several previous claims in respect of other accidents or diseases had all been dealt with individually and finally determined. It was in no way derived from any of those previous claims, and its only relation to them was that the same person happened to be involved, and that the new aggregation provisions (applicable to it, though never to them) might require earlier assessments to be brought into the combined calculation of benefit to be awarded on the new claim.

Separate awards and claims post-September 1986

31. That the post-September 1986 industrial injuries scheme does still allow for two or more separate and concurrent awards of entitlement to disablement benefit to co-exist in the same person in respect of different accidents or diseases is in my judgment apparent from section 107(1)(a) of the 1992 Act, which speaks expressly of a person being entitled for the same period to benefit by way of two or more disablement pensions for successive accidents [or diseases], subject to the overall limit of 100% it imposes on the total he can receive from these different entitlements. I can see nothing that limits this to awards all previously made under the pre-1986 provisions, and no reason in principle why it should be so limited: and as already noted, the Commissioner in **CI 12311/1996** recognised and applied the principle of concurrent entitlement in the post-1986 scheme when he held that the claimant could keep his entitlement to a 10% separate pension for pneumoconiosis in addition to his 20% pension for an earlier accident (each on a claim made under the post-1986 provisions), instead of aggregating the actual disablement percentages of 5% and 15% on the occasion of the second claim so as to give one less advantageous overall figure.

32. If there can be separate concurrent entitlements to disablement benefit under the post-1986 scheme for different accidents or diseases, then it must follow that they can be separately claimed. The need for a claim to establish each such entitlement is axiomatic:

section 1 **Social Security Administration Act 1992**. In my judgment therefore there was no need for the artificiality adopted in this case by the Secretary of State's officer dealing with the fresh claim for pneumoconiosis made on 8 November 2000, in treating it instead as in some way an application by the claimant for reconsideration of the final award made many years ago on the entirely separate claim for the accident of 12 May 1976, which of course he was in no way querying or seeking to have altered.

33. Removing that artificiality and treating the claim of 8 November 2000 as the fresh claim it really was, for a different disease and a different loss of faculty from anything previously claimed and awarded, enables the provisions about the prescribed time for claiming to be given their intended and normal effect. Thus any right to a new disablement pension on that claim will be quantified as prescribed by the regulations applicable to *that* claim (not some earlier claim, made when the rules were different), and can take effect in the normal way to confer the new entitlement, whatever the new rules say that is to be, for up to three months before the date of the claim itself under regulation 19 and schedule 4 of the Claims and Payments regulations cited above.

34. In determining that the new claim could not be treated in that way the Secretary of State's officer no doubt had in mind some observations of another Commissioner in case **CI 420/94,** that the 1986 amendments to the industrial injuries scheme "**stopped the making of separate awards**" so from then on there could only ever be one award of disablement benefit in respect of any period. However it appears that unfortunately the continued provision in the post-1986 legislation for a person to have two or more disablement pensions for successive accidents (section 107(1)(a) above, and its predecessor section 91 **Social Security Act 1975),** was not drawn to the Commissioner's attention in that case. Moreover the later decision in **CI 12311/96** above plainly holds otherwise, and a similar line of reasoning on separate claims for reduced earnings allowance has since been overruled by the Court of Appeal, in **Hagan v Secretary of State** [2001] EWCA Civ 1452, 30 July 2001. I do not therefore think what was said in **CI 420/94** should be taken as a ground for depriving claimants of the benefit of the normal prescribed time for claiming a new entitlement in the way that happened here.

35. In my judgment therefore the claimant is entitled to his new combined disablement pension of 40% on his pneumoconiosis claim, incorporating his continuing entitlement for all his previously assessed disablement percentages in consequence of the aggregation rule on the basis determined by the Secretary of State's officer and confirmed by the tribunal, but from 8 August 2000 onwards instead of from the date of his claim on 8 November 2000.

Procedure to extinguish previous award

36. The one remaining loose end to be tidied up is what happens procedurally about the claimant's previous running award of a disablement pension in lieu of gratuity for his accident of 12 May 1976. Since as explained above his actual entitlement to benefit for this accident will be entirely absorbed into the new 40% award from the effective date of 8 August 2000, all that is needed is for the decision of 3 October 1977 that awarded the separate 15% (or 20%) pension for life to be formally revoked and extinguished from 8 August 2000, since from that date it has become obsolete as a separate award by the relevant benefit entitlement being incorporated into the new aggregated one.

37. The power to supersede and extinguish the old award as a separate entitlement is in section 10 **Social Security Act 1998** and the Decisions and Appeals regulations already referred to, albeit under different heads from those referred to in the decision on page 15 to supersede it from 8 November 2000. Regulation 6(2)(a) and/or 6(2)(e) (it does not frankly matter which) permits any separate or additional right to benefit under the old award to be formally extinguished by reason of the fresh award of a relevant benefit on the pneumoconiosis claim conferring the new combined entitlement from 8 August 2000, and that can quite properly be made to coincide with the start of the new award under either regulation 7(2)(c) or regulation 7(7); again it makes no practical difference which, and a decision to that effect can simply be substituted for the "superseding" part of the decision under appeal.

Conclusion

38. For those reasons I allow the appeal, set aside the decision of the tribunal and in exercise of the power in section 14(8)(a) **Social Security Act 1998** substitute the decision I am satisfied they should have given on the material before them, as follows:

> (a) the claimant is entitled from and including 8 August 2000 and for the remainder of his life to disablement pension at the rate of 40% on the claim for prescribed disease D1 pneumoconiosis he made on 8 November 2000, based on the 5% assessed disablement for that disease but also incorporating from that date under the aggregation and rounding provisions all continuing and further entitlement to disablement benefit in respect of his previous finally assessed disablements from other accidents and diseases totalling 37%; and
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> (b) his previous award of disablement pension in lieu of gratuity for the accident of 12 May 1976 under the earlier decision of 3 October 1977 referred to on

page 15 is revoked and extinguished from and including 8 August 2000 under the superseding provisions mentioned above instead of in the way set out in the decision of the Secretary of State's officer on that page; and

(c) any payments of disablement pension made to him under that previous award for the period from 8 August 2000 onwards are to be treated as paid on account of his entitlement under the new combined award from that date.

(Signed)

P L Howell
Commissioner
18 February 2003