BACKDATED CLAIMS FOR SMA CAN BE MADE 76/96

MR/JW/2W

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Wallsend People's Centre 0191 295 4641

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: John Patrick Maguire

Social Security Appeal Tribunal: North Shields

Case No: 41: 15291

1. This is an appeal, brought by the claimant with the leave of a Commissioner (who extended the time for applying for leave), against the decision of the North Shields Social Security Appeal Tribunal dated 25 June 1992, whereby they held that reduced earnings allowance was payable in respect of the period of 1 November 1989 to 21 May 1991 at the maximum statutory rate but held that he was not entitled to reduced earnings allowance in respect of the period from 1 April 1985 to 31 October 1989. At the oral hearing before me, the claimant was represented by Ms Natalie Lieven of Counsel instructed by the Wallsend People's Centre, and the adjudication officer was represented by Mr Jeremy Heath of the Office of the Solicitor to the Departments of Social Security and Health.

2. In view of the considerable measure of agreement in this case I can set out the history fairly briefly. On a form dated 30 October 1989 and received by the Department of Health and Social Security on 1 November 1989, the claimant claimed disablement in respect of vibration white finger. An adjudicating medical authority assessed the extent of disablement resulting from the disease at 8 per cent. from 1 April 1985 (when vibration white finger was first prescribed as an industrial disease) for life. A disablement gratuity was awarded, but it was not until 22 August 1991 that the claimant made a claim for reduced earnings allowance in respect of the disease. On his claim form he said that he wished to claim from "my date of claim for V.W.F. Oct.. '89". That was read by the adjudication officer as a claim in respect of the period from 1 November 1989. The adjudication officer awarded reduced earnings allowance from 22 May 1991 but decided that the claimant was not entitled to benefit in respect of the period 1 November 1989 to 21 May 1991 on the

ground that the claim was late and the claimant had not shown good cause for the delay for the purposes of regulation 19(2) of the Social Security (Claims and Payments) Regulations 1987. The claimant appealed "against the adjudication officer's decision not to backdate my REA to 1.4.85". The claimant was represented at the hearing before the tribunal by Ms Maureen Madden of the Wallsend People's Centre. The tribunal accepted her suggestion that they should treat the letter of appeal as a claim for reduced earnings allowance in respect of the period from 1 April 1985 to 31 October 1989. They accepted that the claimant did have good cause for the delay in respect of the claim from 1 November 1989 to 21 May 1991 because they found that he had been misled by the wording of the disablement claim form. However, they found that the claimant did not have good cause for the delay in claiming in respect of the period 1 April 1985 to 31 October 1989.

3. The tribunal gave no reason at all for finding that there was no good cause for delaying the claim in respect of the period 1 April 1985 to 31 October 1989 and it is common ground that the decision is therefore erroneous in point of law for want of compliance with the duty to record the tribunal's reasons, imposed on the chairman by regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986. It is also common ground that the tribunal erred in law in treating the letter of appeal as a claim for reduced earnings allowance in respect of the period from 1 April 1985 to 31 October 1986, because only the Secretary of State had power to do so by virtue of regulation 4(1) of the Social Security (Claims and Payments) Regulations 1987. That provides:- "Every claim for benefit shall be made in writing on a form approved by the Secretary of State for the purpose of the benefit for which the claim is made, or in such other manner, being in writing, as the Secretary of State may accept as sufficient in the circumstances of any particular case."

4. Save in one respect, there is also agreement as to the decision I should give. Since the tribunal's decision, the Secretary of State has agreed to treat the letter of appeal to the tribunal as a claim for reduced earnings allowance only in respect of the period from 1 October 1986 to 31 October 1989. That is because reduced earnings allowance was introduced only from 1 October 1986. It replaced "special hardship allowance" which had previously had been payable under section 60 of the Social Security Act 1975. The Secretary of State has not treated the letter of appeal to the tribunal as a claim for special hardship allowance in respect of the period from 1 April 1985 to 30 September 1986. That creates a difficulty because, by virtue of section 1(1) of the Social Security Administration Act 1992 (which re-enacts section 165A(1) of the Social Security Act 1975), it is a condition of entitlement to benefit that there should have been a claim for it. Subject to that difficulty, it is, however, common ground that I should substitute my own decision for that of the

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tribunal and find that there was good cause for the delay in claiming special hardship allowance in respect of the period 1 April 1985 to 30 September 1986 (if there has been a claim for it) and good cause for the delay in claiming reduced earnings allowance in respect of the period from 1 October 1986 to 21 May 1991. The adjudication officer awarding the disablement gratuity plainly accepted that it had been impractical for the claimant to claim benefit in respect of vibration white finger before 1 November 1989 (see regulation 13 of the Social Security (Industrial Injuries and Diseases) Miscellaneous Provisions Regulations 1986). The tribunal found good cause for the delay from 1 November 1989 until the date of the original claim for reduced earnings allowance. Any further delay was due simply to the claimant miswording the claim for reduced earnings allowance. He probably meant to claim for the whole period in respect of which disablement benefit had been awarded on the claim received on 1 November 1989, rather than to claim only from that date. He may not have appreciated that the gratuity had been paid in respect of any earlier period and he obviously did not appreciate the distinction between reduced earnings allowance and special hardship allowance.

5. The crucial question in this case is whether the claim for reduced earnings allowance may be treated as a claim for special hardship allowance. I directed the oral hearing in this case because, at a very late stage, the adjudication officer introduced a novel point in her submission of 6 June 1996.

> "4 The Secretary of State has now certified that that letter may be accepted as a claim for Reduced Earnings Allowance for the period 1 October 1986 to 31 October 1989 and the certificate is attached to the papers.
>
> 5. I respectfully bring to the attention of the Commissioner the fact that, in the past, the Adjudication officer has maintained that a claim to REA could be accepted by the Secretary of State as also a claim for SHA for the period prior to 1 October 1986. Our submissions to Commissioners have proceeded on that basis and in fact Commissioners have accepted that practice in their decisions. However, we have now received advice from our Solicitors which is contrary to legal advice of the past.
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> 6. Legal advice is now that when REA was introduced on 1 October 1986 there was, in fact, no legal provision made in the regulations for claims to SHA

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6. Legal advice is now that when REA was introduced on 1 October 1986 there was, in fact, no legal ~~provision made in the regulations for claims to SHA~~ being accepted after that date. We now submit that, in fact, SHA no longer existed after 30 September 1986 and therefore any claim made would be invalid after that date.

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7. I respectfully submit therefore that, in this case, the letter received in the form of an appeal and a request for backdating to 1 April 1985 can only be considered by the Secretary of State as a claim for benefit backdated to 1 October 1986. The Secretary of State's certificate validates that claim".

6. The Secretary of State has not issued any forms specifically for claims of special hardship allowance since special hardship allowance was replaced by reduced earnings allowance from 1 October 1986. It is therefore necessary in every case for him to treat a claim for reduced earnings allowance, or some other document, as a claim for special hardship allowance if the claimant is to become entitled to special hardship allowance. Ms Lieven submitted that the Secretary of State's failure to issue any forms specifically to claiming special hardship allowance made it difficult for him properly to refuse to treat a claim for reduced earnings allowance as being also a claim for special hardship allowance so far as is necessary. That may be so, but a Commissioner has no jurisdiction over the Secretary of State in that respect.

7. It is unclear whether the Secretary of State has actually decided not to treat the claim for reduced earnings allowance as a claim for special hardship allowance or whether the adjudication officer has not referred that question to him. It does not really matter in the present case because whatever decision has been made seems to have been based upon a view that the law provides that no claim for special hardship allowance may now be made. It has long been established that, while it is for the Secretary of State to determine whether a particular document should be treated as a claim, it is for an adjudication officer, Social Security Appeal Tribunal or Commissioner to determine whether it is capable of being a claim (see R(U)9/60). By the same token, it is for an adjudication officer, social security appeal tribunal or Commissioner to determine whether a claim could succeed, although it may be that, in a plain case, the Secretary of State can properly have regard to the lack of prospects of success for a would-be claimant in determining that a document

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may refer the matter back to him so that he may reconsider his position in the light of my ruling.

8. The terms of paragraph 6 of the adjudication officer's submissions of 6 June 1996 led me to expect that Mr Heath would submit that no claim could now be made in respect of special hardship allowance in respect of a period before 1 October 1986 simply because special hardship allowance had been abolished with effect from that date. However, he did not do so. Such an argument would have been untenable in view of the presumption against retrospectively, both at common law and by virtue of section 16 of the Interpretation Act 1978, particularly in the light of such authorities as Hamilton Gell v White [1922] 2 K.B. 422 and Free Lanka Insurance Co Ltd v Ranasinghe [1964] A.C. 541 and the fact that the whole of the statutory mechanism necessary for the determination of a claim for special hardship allowance remains intact.

9. In the event, Mr Heath advanced a different argument that was no less bold. He relied on section 1(2) of the Social Security Administration Act 1992 which provides:-

> "Where under subsection (1) above a person is required to make a claim or to be treated as making a claim for a benefit in order to be entitled to it -
> (a) if the benefit is a widow's payment, she shall not be entitled to it in respect of a death occurring more than 12 months before the date on which the claim was made or treated as made and
> (b) if the benefit is any other benefit except disablement benefit or reduced earnings allowance, the person shall not be entitled to it in respect of any period more than 12 months before that date,
> except as provided by section 3 below."

That subsection re-enacts section 165A(2) of the Social Security Act 1975 as it was in force in 1992. That section of the 1975 Act had undergone several changes over the years since 2 September 1985 when it was first inserted into the Act but it has consistently been the law that a person has not been entitled to benefit in respect of any period more than 12 months before the date on which the claim is made, except in the cases of disablement benefit, industrial death benefit (before 6 April 1987) and, reduced earnings allowance (since 1 October 1986). Indeed, there was a similar provision, referring to payment rather than entitlement, in section 82(2)(c) of the Social Security Act 1975 as first enacted. That provision was replaced by section 165A following the decision of the House of Lords in Insurance Officer v McCaffrey [1984] 1 W L.R. 1353. Mr Heath's argument was that, as special hardship allowance was not expressly excepted from the general rule that entitlement (or payment) could not arise in any period more than 12 months before the date of claim, that general rule applied to special hardship allowance

Accordingly, he submitted, it had not been possible since 1 October 1987 for a person to claim special hardship allowance, a fact that had been overlooked by everybody since then. Indeed, as it has always been accepted special hardship allowance was not subject to the 12 month limit, Mr Heath's argument implied that everyone concerned with claims for special hardship allowance over at least the last 21 years was acting on mistaken understanding of the law.

10. Ms Lieven submitted that special hardship allowance fell within the scope of the term "disablement benefit" in section 1(2) of the Social Security Administration 1992. Special hardship allowance was not in fact the statutory name for a benefit. The name was taken from the side note to section 60 of the Social Security Act 1975 and its predecessors (see section 14 of the National Insurance (Industrial Injuries) Act 1946 and section 14 of the National Insurance (Industrial Injuries) Act 1965). In most legislation, it is known as "an increase of disablement pension under section 60 of the 1975 Act". Section 60(1) and (7) of the 1975 Act provided:-

> "(1) The weekly rate of a disablement pension shall, subject to the following provisions of this section, be increased by an amount not exceeding the appropriate amount specified in Schedule 4, Part V paragraph 6, if as the result of the relevant loss of faculty the beneficiary -
>
> (a) is incapable, and likely to remain permanently incapable of following his regular occupation; and
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> (b) is incapable of following employment of an equivalent standard which is suitable in this case,
>
> or if as the result of the relevant loss of faculty the beneficiary is, and has at all times since the end of the injury benefit period been, incapable of following that occupation or such employment.
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> ...
>
> (7) Regulations may make as respects a disablement gratuity provision corresponding to that made by this section as respects a disablement pension, and may include provision for payment of a pension in lieu of a gratuity."

Regulation 18 of the Social Security (General Benefit) Regulations 1982 enabled a person who had been awarded a disablement gratuity to be paid special hardship allowance. There is, on Ms Lieven submitted, no doubt from the opening words of section 60 (1) that special hardship allowance was merely an increase of disablement benefit.

11. Ms Lieven's argument may be supported by reference to the predecessors of section 1(2) of the Social Security Administration Act 1992. As the 1992 Act was a consolidation act, the term "disablement benefit" in that section must have the same meaning that it had in section 165A of the Social

Security Act 1975. In view of the circumstances of the enactment in 1985 of section 165A, it is reasonably clear that the term "disablement benefit" in that section must have had the same meaning that it had had in section 82(2)(c) of the 1975 Act. The 1975 Act was also a consolidation act. It brought together for the first time industrial injuries benefits (i.e., injury benefit, disablement benefit with its increases and industrial death benefit), previously payable under the National Insurance (Industrial Injuries) Act 1965, and other benefits, previously payable under the National Insurance Act 1965. Substantially, section 82(2) of the 1975 Act re-enacted section 49(4) of the National Insurance Act 1965 (as amended by regulation 2(5) of the National Insurance (Claims and Payments and Miscellaneous Provisions) Regulations 1972). However, there had been no equivalent provision in respect of industrial injuries benefits, save, from 1966, in respect of injury benefit (see section 5(4) of the National Insurance Act 1966 as explained in R(1)9/68), In R(I) 10/74 a claim for special hardship allowance made in 1970 was effectively back-dated for a period well in excess of 12 months. As a provision within a consolidation act, section 82(2) of the 1975 Act must have been drafted so as to preserve the law as it had been before its enactment and therefore the term "disablement benefit" in section 82(2)(c) must have been intended to include its increases. It retains the same meaning in section 1(2) of the 1992 Act.

12. However, throughout its history, special hardship allowance has been treated as a separate benefit for the purpose of claims. Currently, regulation 2(3) of the Social Security (Claims and Payments) Regulations 1987 provides:-

> "For the purposes of the provisions of these Regulations relating to the making of claims every increase of benefit in respect of a child or adult dependent under the Social Security Act 1975 or an increase of disablement benefit under sections 60 (special hardship), 61 (constant attendance), 62 (hospital treatment allowance) or 63 (exceptionally severe disablement) of the Social Security Act 1975 shall be treated as a separate benefit..."

That provision does not affect the scope of the term "disablement benefit" in the primary legislation. It is, however, the reason why a separate entry for special hardship allowance was inserted in Schedule 4 to those Regulations. Paragraph 10 of that schedule was amended by regulation 9 of the Social Security (Claims and Payments) Amendments Regulations 1988 with effect from 11 April 1988. Before then, there had been period from 1 October 1986 to 10 April 1988 when no time for claiming special hardship allowance had been prescribed at all, although whether that meant that there was no time limit or whether it was implicit that the previous

time limit continued to be effective is a matter of minor controversy.

13. Mr Heath recognised that the references to special hardship allowance in the 1987 Regulations, which only came into effect some eighteen months after special hardship allowance was abolished, would have been unnecessary if it had already ceased to be possible to claim special hardship allowance. He said they were "an anachronism". On the other hand he sought to rely on the fact that no reference was made to special hardship allowance in regulation 19(4A) of the 1987 Regulations which was inserted by regulation 3 of the Social Security (Industrial Diseases) (Miscellaneous Amendments) Regulations 1996 so as to prevent reduced hardship allowance being awarded for any period earlier than 12 months before the date on which the claim was made. It is sometimes permissible to look at statutory instruments as aids to the construction of primary legislation. However, one may do so only if the primary legislation is ambiguous.

14. In this case, I do not think there is any ambiguity at all in the primary legislation. The term "disablement benefit" in section 1(2) of the Social Security Administration Act 1992 and its predecessors clearly encompasses special hardship allowance. Accordingly, there was no bar upon the claimant making a claim for special hardship allowance in 1991 or 1992 and there remains no bar to him doing so now. The claimant could not have made his desire to claim special hardship allowance in respect of the period from 1 April 1985 to 30 September 1989 any plainer than he now has and I hope that the Secretary of State will now treat his letter of appeal to the tribunal, or some other document, as constituting a claim for special hardship allowance.

15. On 22 October 1991, the adjudication medical authority expressed the opinion that the claimant had been incapable of his regular occupation but had been capable of some unspecified remunerative employment. Although the adjudication officer may accept the claimant qualified for the maximum rate of special hardship allowance (if there is a claim for it) and reduced earnings allowance in respect of the whole of the relevant periods not covered by the award made by the tribunal, I do not think I should consider questions relating to capacity for work and loss of earnings. I shall limit my decision to the questions that were expressly put before me.

16. I therefore allow the claimant's appeal. I set aside the decision of the North Shields Social Security Appeal Tribunal of 25 June 1992 and I substitute my own decision which is as follows:-

(a) in respect of the period from 1 April 1985 to 30 September 1986, I find that, if any document that

is already in existence is treated by the Secretary of State as a claim for special hardship allowance, the claimant had continuous good cause for his delay in claiming special hardship allowance;

(b) in respect of the period from 1 October 1986 to 31 October 1989, I find that the claimant had good cause for his delay in claiming reduced earnings allowance;

(c) in respect of the period from 1 November 1989 to 21 May 1991, I award reduced earnings allowance at the maximum rate, although any payment made in consequence of the tribunal's decision must be treated as a payment on account of his award.

All other questions must now be considered by the adjudication officer who should refer (again, if it has already been done before) to the Secretary of State the question whether any document may be treated as a claim for special hardship allowance in respect of the period from 1 April 1985 to 30 September 1986.

(Signed) M. Rowland
Commissioner

(Date) 18 NOV 1996