

C.17 8/1/1981

JBM/SG

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the insurance officer awarding mobility allowance from 29 July 1976 to 25 May 1993 (both dates included) as a result of a claim received on 29 July 1976 cannot be reviewed; Social Security Act 1975, section 37A(7) section 104(1)(b) and regulation 12 of the Mobility Allowance Regulations 1975.

2. The insurance officer's decision reviewing and revising the award of mobility allowance in respect of a claim received on 29 July 1976 is in the following terms:-

"I have reviewed the decision of the Insurance Officer awarding mobility allowance from 29.7.76 to 25.5.2003 (both dates included) because there has been a relevant change of circumstances since the decision was given (Social Security Act 1975, Section 104) and in respect only of the period from and including 21.9.79 my revised decision is as follows:-

Mobility allowance is not payable from and including 21.9.79 because the claimant is not ordinarily resident in Great Britain (Social Security Act 1975, section 37A(1) and the Mobility Allowance Regulations reg 2(1)(a)).

As a result an overpayment of mobility allowance has been made amounting to £40. As I am satisfied that the claimant has throughout used due care and diligence to avoid overpayment in obtaining and receiving the benefit repayment is not required (Social Security Act 1975, section 119 and the Mobility Allowance Regulations, Regulation 23)."

The insurance officer's decision contains a typographical error in the termination date for the award which is stated to be 25 May 2003 but should be 25 May 1993.

3. This is an appeal by the insurance officer against the unanimous decision of the local tribunal reversing the insurance officer's decision set out in paragraph 2 of my decision above. The payment of benefit is being suspended by the Secretary of State under regulation 13 of the Social Security (General Benefit) Regulations 1974.

4. The appeal is validly before me. Though the claimant's appeal to the local tribunal was without the prescribed time for making an appeal the chairman of the local tribunal granted an extension of time. On 6 August 1981 the chairman of the Hoxton Local Tribunal granted leave in accordance with the Social Security Act 1980, section 15(1)(a) for an appeal to be made to the Commissioner. The claimant's solicitors had submitted that leave to appeal should not be granted on the grounds that the insurance officer's application was out of time. The Social Security (Determination of Claims and Questions) Regulations 1975, regulation 12A(b) provides for an application to be made in writing within 28 days beginning with a date when a copy of the record of the tribunal's decision was given to the person concerned. A copy of form LT3 (the record of the tribunal's decision) was sent by the clerk to the tribunal to the insurance officer on 18 June 1981, and the application was sent to the clerk on 14 July 1981. Accordingly the application was within due time.

5. The facts, though I rehearse them in detail immediately below, are in essence simple. The claimant was awarded mobility allowance when ordinarily resident in Great Britain. The claimant thereafter ceased to be ordinarily resident in Great Britain and became ordinarily resident in the Republic of Ireland. In more detail the facts are as follows. The claimant was awarded mobility allowance from 29 July 1976 to 25 May 1993 as a result of a claim received on 29 July 1976. The post mistress of Ballintogher Post Office in County Sligo, Republic of Ireland gave notification on 24 October 1979 that the claimant had attempted to cash his mobility allowance order book at her Post Office. The post mistress accordingly returned the mobility allowance book so that the payment could be made to the claimant direct by the Mobility Allowance Unit. On 27 February 1980 a letter was received from Fitzgerald, McCormick and Kelly, the claimant's solicitors informing the Department of Health and Social Security that the claimant and his wife had moved to the Republic of Ireland and enquiring about future payments of mobility allowance. On 28 April 1980 a letter was sent to the claimant via his solicitors requesting details of his absence from Great Britain. On 12 May 1980 a reply was received from the claimant, stating that he was now living in the Republic of Ireland that he definitely intended to return to the United Kingdom but that he was not maintaining a home in the United Kingdom. On 20 May 1980 a further enquiry was made to the claimant requesting the date he went to the Republic of Ireland, the date he intended to return to the United Kingdom, and whether the property he had given up in Great Britain was rented accommodation. On 11 June 1980 a reply was received from the claimant stating that he went to the Irish Republic on

20 September 1979, that he was uncertain as to what date he would return to the United Kingdom and that he had owned his property in Great Britain. Letters were received from the claimant's solicitors dated 4 July 1980 and 8 August 1980 requesting information about the claimant's entitlement to mobility allowance. On 29 July 1980 a letter was sent to the claimant advising him that a doubt has arisen as to whether he was entitled to the payments of mobility allowance he had received for the periods 21 September 1979 to 23 October 1979 amounting to £40. He was asked for his observations as to why he continued to cash his mobility allowance book when he had left the United Kingdom on 20 September 1979 to live in the Republic of Ireland. On 12 August 1980 the claimant replied that he was entitled to mobility allowance whilst living in the Republic of Ireland under the Treaty of Rome. On 7 October 1980 a further enquiry was sent to the claimant requesting information as to the reasons for his residence in the Republic of Ireland and the length of his intended stay. On 27 October 1980 a reply was received from the claimant's then solicitors Kelly and Ryan stating that the claimant had moved to the Republic of Ireland for socio-medical reasons. They were unable to state how long the claimant intended to remain in the Republic. On 5 December 1980 the insurance officer reviewed the decision awarding mobility allowance because the claimant was living permanently in the Republic of Ireland from 21 September 1979 and he disallowed mobility allowance from and including 21 September 1979. The insurance officer's decision also informed the claimant that as a result of his leaving the United Kingdom he had been overpaid mobility allowance amounting to £40. As the insurance officer was satisfied that the claimant had throughout used due care and diligence to avoid overpayment he was not required to repay this sum. The claimant's solicitors appealed on his behalf out of time to the local tribunal and the chairman granted an extension of time. The claimant's appeal was allowed by the local tribunal on 2 June 1981. They gave admirably full consideration to the matter and set out detailed reasons for their decision.

6. The insurance officer appealed against the decision and an oral hearing was requested by the claimant to which I acceded. Accordingly on 14 July 1981 I held an oral hearing at which Miss A V Windsor of the solicitor's office, Department of Health and Social Security appeared for the insurance officer and Mr R Sheldon of counsel instructed by Mr J E Lake of Messrs Marcan and Dean, Solicitors appeared for the claimant. To both of them I am indebted. Interesting questions under EEC Council Regulation No. 1408/71 were canvassed before me. However on the view I take of the case I do not need to consider them. After the hearing I made a direction for a further written submission as set out below:

"1. The Social Security Act 1975, section 37A(7) provides:-

"Except so far as may be provided by regulations, the question of a person's entitlement to a mobility allowance shall be determined as at the date when a claim for the allowance is received by the Secretary of State".

This would appear to prevent a review under Section 104(1)(b) of the Social Security Act 1975.

However as this was a point not raised at the hearing I would welcome a further submission.

2. I draw your attention to Article 87 of Reg (EEC) No 1408/71 as to medical examination".
7. On the view I take of the case I do not need to consider further the second part of the direction. So far as relevant to the first part of my direction, the insurance officer now concerned made a written submission dated 20 August 1982 as follows:-

"

2. Although Section 37A(7) of the Social Security Act 1975, which the Commissioner quoted, provides:

[the section is here set out]

there are in my submission regulations which apply section 104(1)(b) of the Act to mobility allowance and permit a decision to be reviewed where there has been any relevant change of circumstances since the decision was given. Regulation 12 of the Mobility Allowance Regulations 1975 (Brown Book page 2538) provides:

"The provisions of Part III of the Act (determination of claims and questions) and of any regulations made in the exercise of any power in that Part or in any enactment which that Part re-enacts or replaces, shall apply, as appropriate, to the determination of any question arising in connection with an allowance, subject to the modifications, additions and exclusions set out in the following provisions of this Part of these regulations".

The modifications, additions and exclusions are not, I submit, relevant to the current issue. Section 104(1)(b) comes within Part III of the Act and accordingly, in my submission, regulation 12 applies section 104(1)(b) to the determination of any question arising in connection with a mobility allowance.

3. Section 104(1)(b) of the Act provides:

"Any decisions under this Act of an insurance officer, or local tribunal or a Commissioner may be reviewed at any time by an insurance officer or, on a reference from an insurance officer, by a local tribunal, if -

(a); or

(b) there has been any relevant change of circumstances since the decision was given; or

(c)"

It is in my submission, therefore, that section 104(1)(b) as applied by regulation 12 overrides section 37A(7) and thus for the reason stated in paragraph 6 of my appeal I submit that the insurance officer had the power to, and was entitled to, review the insurance officer's decision."

8. For completeness paragraph 6 referred to in paragraph 3 of the above written submission of the insurance officer now concerned states:-

"6. The Social Security Act 1975, section 104(1)(b) (Brown Book page 92) permits any decision under the Act of an insurance officer to be reviewed if there has been any relevant change of circumstances since the decision was given. I submit that the claimant's move from Great Britain to the Republic of Ireland on 20.9.79 was such a change and accordingly that the insurance officer was entitled to review the insurance officer's decision awarding mobility allowance from 29.7.76 to 25.5.2003 and was justified in so doing."

9. As noted in paragraph 1 of my decision the reference of the insurance officer now concerned to "25.5.2003" is a typographical error for 25 May 1993.

10. By letter dated 7 September 1982 the claimant's solicitors stated that it was unnecessary to make any further observations on the further submissions made by the insurance officer now concerned.

11. Under Social Security Act 1975, section 37A, to be entitled to mobility allowance a person must satisfy in addition to the medical conditions, prescribed conditions as to residence and presence in Great Britain.

12. The prescribed conditions which are set out in regulation 2 of the Mobility Allowance Regulations 1975 are:-

(a) that the claimant is ordinarily resident in Great Britain, and

(b) that he is present in Great Britain, and

(c) that he has been present in Great Britain for a period of, or for periods amounting in aggregate to, not less than 52 weeks in the 18 months preceding that day.

Those conditions must be satisfied in respect of any day.

13. The Social Security Act 1975, section 82(5)(a) provides that except where regulations otherwise provide, a person shall be disqualified for receiving any benefit for any period during which he is absent from Great Britain. The Social Security Benefit (Persons Abroad) Regulations 1975 regulation 10A (added by regulation 10 of S.I. 1975 No. 1573 as from 1 October 1975) provides:-

"A person shall not be disqualified for receiving mobility allowance by reason of being absent from Great Britain".

14. I do not accept the written submissions of the insurance officer now concerned dated 20 August 1982. Regulation 12 of the Mobility Allowance Regulations 1975 quoted in that submission does not add anything relevant in the present context. The power to review under section 104(1)(b) exists independently of regulation 12. Whether or not section 104(1)(b) applies independently of regulation 12 or is applied by regulation 12, the power to review does not apply in the present circumstances. Section 37A(7) expressly provides (except in so far as may be provided by regulations) that the question of a person's entitlement to a mobility allowance "shall be determined as at the date when a claim for the allowance is received by the Secretary of State". Accordingly that date is 29 July 1976 when the claim was received. At that date the claimant satisfied the prescribed conditions and was awarded benefit. I do not see that regulation 12 can be construed as changing or empowering a change in "the date when a claim for the allowance is received by the Secretary of State" as provided by section 37A(7). In any event it would be pointless to review under section 104 when a revised decision must under section 37A(7) be the same as the original reviewed decision. "Any relevant change of circumstances" in section 104(1)(b) imports that a decision which was right when it was given has become wrong. At paragraph 28 of Commissioner's Decision R(I) 56/54 the Commissioner states: "a relevant change of circumstances postulates that the decision has ceased to be correct". Decision R(I) 56/54 is supported by the later Commissioner's Decision R(A) 2/81, paragraph 15. In the absence of an express regulation providing for the question of a person's entitlement to a mobility allowance to be determined as at the date of the review I cannot see that section 104(1)(b) can be applied here, or if a review is applied the revised decision would be the same in that the original decision is correctly based on the relevant circumstances as at the date when a claim for mobility allowance was received by the Secretary of State, that is in this case 29 July 1976. At the date when the claim was received the claimant satisfied the medical and other prescribed conditions for an award of mobility allowance. That the claimant has subsequently left Great Britain for ordinary residence in the Republic of Ireland is not in my view a relevant circumstance for the purposes of section 104(1)(b).

15. Accordingly the insurance officer's appeal is dismissed.

(Signed) J B Morcom
Commissioner

Date: 15 November 1982

Commissioner's File: C.M. 81/1981
C I O File: I.O. 7018/MOB/81
Region: North Fylde Central Office