COPY FOR INFORMATION

DGR/SH/6

Commissioner's File: CP/10/1985
C A O File: AO 1019/P/85
Region: Midlands

SOCIAL SECURITY ACTS 1975 TO 1985
CLAIM FOR RETIREMENT PENSION
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Ruby Lush (Mrs) Appointee for Leonard Lush (deceased)
ppeal Tribunal: Worcester
Case No: 01/01

[ORAL HEARING]

1. My decision is as follows:

(i) that the original decision of the insurance officer (now the adjudication officer) awarding an increase of retirement pension for the claimant's wife from and including 1 April 1972 should be reviewed pursuant to section 104(1)(b) of the Social Security Act 1970, there having been a relevant change of circumstances since such decision was given, and

(a) in respect of the inclusive periods from 28 April 1982 to 1 May 1982 and from 13 November 1982 to 16 November 1982, when the claimant's wife was in receipt of sickness benefit, should be revised, so that no such increase of retirement pension is payable therefor (Social Security (Overlapping Benefits) Regulations 1979, [S.I. 1979 No. 597] regulation 10), and

(b) in respect of the inclusive periods from 20 November 1975 to 27 April 1982, from 2 May 1982 to 12 November 1982, and from 17 November 1982 to 1 June 1983 should be revised so as to take into account the weekly earnings of the claimant's wife, and

(ii) that repayment is required from the claimant of the increase of retirement pension overpaid, the claimant not having established that throughout he exercised due care and diligence to avoid such overpayment, but that no responsibility devolves on the claimant's widow as his agent.

2. Sadly the claimant died on 2 January 1985, and this is an appeal by his widow ('Mrs Lush') (having been appointed to represent him) against the decision of the appeal

tribunal confirming the insurance officer's decision shown in Box 1 of Form LT2, the necessary leave having been given by a Commissioner.

3. Mrs Lush asked for an oral hearing, a request which was acceded to. At that hearing she was present and gave evidence, and was represented by Mr Roger Smith, solicitor from the Child Poverty Action Group, whilst the adjudication officer appeared by Mr K Turner of the Chief Adjudication Officer's Office.

4. The claimant was with effect from 6 April 1972 awarded a retirement pension together with an increase in respect of his wife "subject to reduction for earnings where appropriate". On 7 June 1983 the latter reported to the local office of the Department that she had been employed by Worcester and District Area Health Authority since 1 October 1975. Details of her earnings were subsequently obtained from her employer's records by an inspector of the Department, and on 19 March 1984 an insurance officer reviewed and revised the original award in the terms set out in Box 1 of Form LT2. In due course, the claimant appealed to the tribunal who in the event upheld the insurance officer's decision.

5. Manifestly, after the award of an increase of retirement pension there was a material change of circumstances, in that Mrs Lush resumed employment in the nursing service from 1 October 1975. The first question is whether or not it was open to the insurance officer to review his original decision pursuant to section 104(1)(b) of the Social Security Act 1975. As stated above, the award was made "subject to reduction for earnings where appropriate". In R(P)3/84 it was held that an award which was qualified by such words as "subject to earnings" was not a complete decision but an inchoate decision. It might be perfected or counteracted by a subsequent decision awarding or refusing pension, but in the absence thereof, review on the grounds of earnings was not possible, and repayment could not be required under section 119(1) of the Social Security Act 1975. However, the learned Commissioner in R(P)3/84 sought to resolve the matter by reliance on section 119(2A), which at that time read as follows:

> "119. - (2A) Where in pursuance of a decision, an amount of benefit was paid which would not have been paid if the facts established for the purpose of any subsequent decision by an insurance officer, local tribunal or Commissioner had been known and
>
> (a) the subsequent decision is given in relation to the same benefit but is not given on an appeal against or a review of the earlier decision; and
>
> (b) the circumstances are not such as to enable the earlier decision to be reviewed;
>
> the subsequent decision shall require repayment of that amount (except so much of it as is directed by the decision to be treated as having been properly paid) unless it is shown to the satisfaction of the insurance officer, tribunal or Commissioner that in the obtaining and receipt of the benefit the beneficiary, and any person acting for him, has throughout used due care and diligence to avoid overpayment."

6. The Commissioner took the view that any difficulty arising out of an inchoate award could be obviated by resort to section 119(2A). He said at paragraph 19:

> "19. At all events the new sub-section appears to be well designed to surmount the difficulty. When retirement pension is paid on the strength of an inchoate decision awarding pension subject to earnings as per section 28(1) a payment made without any further specific decision authorising it is made pursuant to the inchoate decision. The inchoate decision can co-exist with, and does not conflict with, a subsequent decision

to the effect that by reason of earnings no benefit or less than the full benefit is or was payable. I consider that, no subsequent decision having been given to the effect that specific weeks' benefit was payable, it is now competent for me to decide whether benefit is or was actually payable for any particular week; and in paragraph 1(b) and (c) above I have given decisions to the effect that only graduated pension was payable in relation to the weeks before me. Having given such decision I hold that section 119(2A) comes into operation and that, in relation to the weeks in which interim payments were not made, I am obliged by that section to require the amount overpaid... [to be repaid] unless it has been shown to my satisfaction that in the obtaining and receipt of the money the claimant throughout used due care and diligence to avoid the overpayment."

7. Some anxiety was felt as to the correctness of this decision and the Chief Commissioner appointed a Tribunal of Commissioners to consider the matter in an appeal on Commissioner's file CP/63/1983. Unfortunately, when that case came to be heard, it transpired that the relevant award had not been made "subject to earnings" and in the judgment of the tribunal was a "complete decision" and not an "inchoate decision". Apparently, they did not accept the view of the Commissioner in R(P)3/84 that words like "subject to earnings" were to be treated as qualifying the award, even if they were not expressly used. Accordingly, as the tribunal were satisfied that the awarding decision before them was complete, they held that "it was susceptible of review in the context of the earnings rule and of section 119(1) of the Act upon the relevant change of circumstances referable to the claimant's earnings position, in further consequence of which the material review decision by the insurance officer was properly founded".

8. However, the Tribunal did consider R(P)3/84 and the possible application of section 119(2A) to an award which was specifically made "subject to earnings". In paragraph 12(3) the majority cast doubt on the applicability of that section. They pointed out that the matter had never been argued before the Commissioner concerned, and suggested that it could have no relevance because the opening words "where in pursuance of a decision" were fatal, in that on the learned Commissioner's own argument that there had not been a complete decision but only an inchoate one, then there was no decision in pursuance of which an amount of benefit had been paid which ought not to have been paid. They put the matter this way:

> "And whilst prima facie it may be averred that decision R(P)3/84 already stands as authority that 'all is well'..., we gauge also that since the point does not appear to have been argued in that case, the element of that decision which rests upon an affirmative conclusion as to the payment made 'in pursuance of a decision' constituted a decision per incuriam, any payment made having, so the argument would run, stemmed from adminstrative action taken 'in the light of' the inchoate decision, but not, materially, 'in pursuance of' that or any decision."

9. I see the force of the above criticism; the learned Commissioner in R(P)3/84 in trying to overcome what he thought to be a difficulty was relying on a provision which was subject to the same limitation which gave rise to the difficulty in the first place. In the tribunal decision CP/63/1983 the dissenting Commissioner did not feel able to agree with the majority in respect of certain of their remarks contained in paragraphs 7 to 14 of that decision and took the opportunity of expressing his own views as to the correctness or otherwise of R(P)3/84. He said as follows:

> "21. My understanding is that prior to about April 1978 the normal form of decision made in regard to a person claiming retirement pension was as follows:-
>
> > Retirement pension is allowed from [date] at the weekly rate shown below, subject to reduction for earnings where appropriate.

Where an increase of retirement pension was paid in respect of a wife the normal decision was in the following terms:-

> 'Increase in respect of wife allowed at (rate) a week from (date) subject to reduction for earnings where appropriate.'

In my opinion such decisions were not inchoate. They made awards of pension and, where appropriate, increases in respect of a wife at specified rates and therefore cannot in my opinion be regarded as having been inchoate. The addition of the words "subject to reduction for earnings where appropriate" did not in my view render such decisions inchoate. These additional words merely advised claimants that the specified rate of pension would fall to be reduced or extinguished if in fact claimants or their wives started to earn more than the appropriate amount of earnings set forth in the relevant statutory provisions relating to earnings. When the earnings of a claimant or his wife warranted an alteration in the rate of pension, that in my view could be done, and was in fact done, by applying the review provisions contained in section 104 of the Social Security Act 1975 and the question of repayment of any overpayment was dealt with under the provisions of section 119(1) and (2) of the said 1975 Act.

22. In decision R(P)3/84 a Commissioner considered that the claimant in that case had had a decision relating to his retirement pension made to him in terms which fell to be regarded as inchoate. I respectfully disagree with that view. ..."

10. The view of the dissenting Commissioner was, of course, obiter because it was accepted in that case that the award the tribunal had to consider was not made "subject to earnings". However, I think that the dissenting Commissioner's approach was the correct one. It enables the original award to be treated as a complete decision and avoids the illogicality of trying to remedy what the Commissioner in R(P)3/84 took to be a difficulty by resort to a provision which by its very terms was inapplicable to an inchoate decision. Accordingly, in the present case I am satisfied that the insurance officer was entitled to treat the original award as a complete decision, albeit a decision defeasible by means of review in the event of the relevant earnings exceeding a prescribed amount and to review it pursuant to section 104(1)(b).

11. Mr Smith accepted that in the present case there had been an overpayment. As regards the two short periods from 28 April 1982 to 1 May 1982 and from 13 November 1982 to 16 November 1982, the award of sickness benefit to Mrs Lush effectively precluded an increase of retirement pension in respect of her by virtue of regulation 10 of the Social Security (Overlapping Benefits) Regulations 1979 and accordingly there had been an overpayment of £20.71. As regards the overall period from 20 November 1975 to 1 June 1983 (save for the two periods referred to above), the insurance officer had calculated the extent of the overpayment as amounting to £2,897.15. Whilst accepting that there was an overpayment, Mr Smith challenged the sums alleged, but felt that he could dispose of the matter satisfactorily by direct negotiation with the adjudication officer rather than by arguing this point at the hearing. I agreed with his approach. I anticipate that, insofar as a new calculation is necessary in the light of my decision, the arithmetic involved will be satisfactorily resolved between Mr Smith and the adjudication officer, but in the event of disagreement the matter may be referred to me.

12. It remains for me to consider the question of repayment. The effect of section 119(1) and (2) is that repayment of benefit overpaid must be required unless it is shown to the satisfaction of the adjudicating authority that in the obtaining and receipt of the relevant benefit the beneficiary, and any person acting for him, used throughout due care and diligence to avoid overpayment. It is to be noted that a claimant is bound by the action of his agent. Furthermore, regulation 3 of the Social Security (General Benefit, Claims and Payments) Regulations 1980 [S.I. 1980 No. 1621], subsequently replaced by regulation 7 of

the Social Security (General Benefits) Regulations 1982 [S.I. 1982 No. 1408], extended the liability for repayment to any agent. However, the original provision only came into effect on 24 November 1980, and accordingly on no footing could Mrs Lush, if she was at the relevant time the claimant's agent, be liable for more than the overpayment attributable to the period from 24 November 1980 onwards.

13. As regards the claimant himself, I have no doubt that he failed to exercise the requisite standard of care and diligence. In the course of her written submissions to me Mrs Lush said:

> "I found out about the overpayment because a new pension book came to the house in June 1983 and either the book or the covering letter said that his pension was to be reduced from 13 September 1983, which was my own 60th birthday.
>
> I asked my husband why this was to be reduced and he indicated that he had known he should not have claimed for me whilst I was working but he took the view that he was 'a poor blind man and entitled to all he could get'."

In her oral evidence to me she confirmed that this was in fact the case. In the light of such vidence - and I have no reason to doubt the truth of it - manifestly the claimant did not exercise due care and diligence, and Mr Smith did not seek to persuade me otherwise. What Mr Smith was concerned about was the position of Mrs Lush. For the claimant had died virtually with no assets and there was no practical way of enforcing the order for repayment. The position was different in respect of his widow.

14. Now, whether or not Mrs Lush is liable for overpayment as from 24 November 1980 onwards will depend upon whether she was at the relevant time the claimant's agent.

15. Mrs Lush gave evidence before me. She explained that her husband had always been very independent and had managed his financial affairs without reference to any one else. He was not the type of man to brook any interference, and although when in his declining years he suffered from blindness and needed assistance in filling up forms and signing them, this did not affect his mental capacity or his inherent autocratic character. She had admittedly collected the pension for him on some occasions, but in this respect she was purely a messenger. I am satisfied on the evidence that such assistance as Mrs Lush gave to the claimant arose out of his blindness and in no sense did she assume the office of agent. It follows from this that no liability for any part of the overpayment can be attributed to her.

16. I dismiss this appeal.

(Signed) D G Rice
Commissioner

Date: 5 June 1986