

MJG/EA

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.P.1/82

1. My decision is as follows:

- (i) Retirement pension of £64.25 paid to the claimant for the inclusive period from 25 October 1979 to 5 December 1979 is not recoverable from the claimant by the review and revision procedure of sections 104 and 119 of the Social Security Act 1975 as the said retirement pension was not paid by reason of a decision of an insurance officer, but by reason of administrative action by the Department;
- (ii) The decision of the insurance officer dated 3 December 1979 awarding retirement pension to the claimant from 6 December 1979 onwards was properly reviewed as it was given in ignorance of a material fact, namely that the claimant was at the date of the insurance officer's decision in receipt of earnings: Social Security Act 1975 section 104(1)(a):
- (iii) The said decision of the insurance officer was properly revised for the same reason, so as to make retirement pension not payable to the claimant for the inclusive period from 6 December 1979 to 9 January 1980: Social Security Act 1975, section 104;
- (iv) As a result the claimant received retirement pension of £116.50 to which he was not entitled, and as I am not satisfied that in the obtaining and receipt of the said retirement pension the claimant throughout used due care and diligence to avoid overpayment, he is required to repay the said sum of £116.50: Social Security Act 1975, section 119(1) and (2).

Decision C.P.1/82

The claimant's appeal against the decision of the local tribunal succeeds but only to the extent indicated in sub-paragraph (i) above.

2. The claimant is a man born on 18 March 1912 (and not 1913 as stated in the papers before the local tribunal). He therefore attained the pensionable age of 65 years on 18 March 1977 but he did not retire until 25 October 1979. On 31 October 1979, an insurance officer gave a decision as follows:

"Retirement accepted from 25 10 79 subject to carrying out of intentions expressed in notice(s)"

Under the administrative practice of the Department payment of retirement pension was forthwith implemented, i.e. as from 25 October 1979, at the full standard weekly rate. The payment was made to the claimant not under any award by an insurance officer awarding payment for there was none, the only insurance officer's decision being the decision that retirement was accepted (see above). The payment is apparently made by administrative direction of the Secretary of State pending the ascertainment by computer of the exact entitlement to pension of the claimant in relation to his contributions and graduated retirement benefit. There is apparently an inevitable time-lag before this information is available and as a result it was not until 3 December 1979 that the insurance officer gave a further decision in the following terms:

"Retirement pension is allowed from the payable date shown in Box 3 below [25 10 79/ at the weekly rate shown in Box Y of column 1 below [£22.66]".

Future payments of retirement pension from 6 December 1979 onwards were therefore made under the authority of that further decision of the insurance officer and ceased to be made under the administrative direction of the Secretary of State.

3. I have analysed the exact procedure by which the payments of retirement pension for the inclusive period from 25 October 1979 to 5 January 1980 were made, because the local tribunal upheld the insurance officer's decision purporting for the whole of that period (i) to review and revise insurance officers' awards of payment and (ii) to require repayment from the claimant of £180.79 retirement pension, the claimant having been in receipt of earnings for the whole of that period (for details see below). However the insurance officer now concerned, in a written submission dated 5 March 1981, submits (paragraphs 5 and 6) that there was no power to review the payments of pension made for the period not initially covered by the decision (of 3 December 1979) of the insurance officer awarding pension. **That** was because the payments for the period in question, i.e. from 25 October 1979 to 5 December 1979, were not made by reason of an insurance officer's decision but were "interim" payments made by administrative action on behalf of the Secretary of State. The insurance officer has referred me to an unreported Decision on

Commissioners file number C.P. 52/1978 in which the learned Commissioner decided that such "interim" payments cannot be reviewed because the review procedure under section 104 of the Social Security Act 1975 is by its terms made applicable only to the review of the decision of an insurance officer. I naturally accept the decision on Commissioners file C.P. 52/1978 as a correct statement of the law, containing as it does a detailed analysis of the position, following an oral hearing before the Commissioner, in which the matter was fully argued.

4. Nevertheless I felt some disquiet at the fact that this administrative practice means that benefit payable to a claimant to which he is not entitled cannot be recovered at all from the claimant no matter what the circumstances. For that reason on 14 July 1981, I gave the following direction:

"I request a further submission from the insurance officer, in connection with paragraphs 5 and 6 of his submission of 5 March 1981, on whether (i) there was in fact a composite insurance officer's decision, eg at the computer centre, authorising the 'interim' payments of pension, (ii) if not, whether the 'interim' payments must be deemed to have been made with the authority of an insurance officer, having regard to the provisions of sections 98 and 99 of the Social Security Act 1975 which require all claims to be submitted to and determined by an insurance officer".

5. I am indebted to the insurance officer now concerned for his detailed submission (in response to my direction) dated 17 October 1981, in which he explains that the "interim" payments are not in any sense made by the decision of an insurance officer, not even a "composite decision". Such composite decision (on form FF98, a specimen of which has been produced) excepts from the award what it terms "interim and emergency payments authorised by the Secretary of State". Moreover, the insurance officer submits:

"Sections 98 and 99 of the Social Security Act 1975 so far as they can apply to this case require any claim for benefit or any question arising from a claim to be put to an insurance officer forthwith. This insurance officer shall then consider the claim or question and 'so far as is practicable' decide the case in favour of the claimant, adversely to the claimant or refer it to a local tribunal within 14 days of its submission to him.

The insurance officer had the question put to him on 30 10 79 and decided upon it on 31 10 79.

Had the claim in its entirety been put to the insurance officer he would have been unable to decide it within the specified 14 days because of the period required for the Secretary of State to provide full information on the contribution and incremental situation. The insurance officer concerned accepting that it was not practicable to decide the whole claim within 14 days refrained from making a decision on 'the claim'.

Decision C.P.1/82

I submit therefore that the 'interim' payments should not be deemed to have been made with the authority of an insurance officer"

6. Having considered that submission with care, I conclude that it is correct and that I must regard the payments of retirement pension made to the claimant by administrative action on behalf of the Secretary of State as not being made with the authority of an insurance officer, even though the insurance officer's decision of 3 December 1979 awarding payment purports to be retrospective to 25 October 1979.

7. However, it appears at first sight that regulations 5 and 6 of the Social Security Benefit (Computation of Earnings) Regulations 1978 [S.I. 1978 No 1698] would require that, where there had been an overpayment of what the regulations refer to as "interim payments" of retirement pension, such overpayment should be automatically recoverable from the pensioner. I requested a further submission from the insurance officer on this point, and he (in a further submission dated 15 December 1981) has pointed out that regulations 5 and 6 of the 1978 Regulations apply only where the employment being carried on by a retirement pensioner "is such that the earnings derived from it for that week are not immediately ascertainable" (regulation 5(1)(b)). The insurance officer submits that in this case that the claimant knew at the end of each week what his earnings for that week would be, with the result that (as explained in Decision R(P) 1/73 paragraph 21(f)), regulations 5 and 6 do not apply at all. I accept that as being a correct statement of the position as I also accept the statement of the insurance officer that the "interim payments" to which regulation 6 of the 1978 Regulations refers are not the "interim payments" by administrative action with which I am concerned in this case. This is an important matter because it is clear that if regulations 5 and 6 had applied the claimant would automatically have to repay the interim payments for the period up to 5 December 1979, whether or not he could show due care and diligence since the regulations do not import the provisions as to due care and diligence contained in section 119 of the Social Security Act 1975 (Decision R(P) 1/73, paragraph 29). Consequently, I am obliged to hold that there was no power to review those awards of retirement pension amounting to £64.25 under the procedure set out in sections 104 and 119 of the Social Security Act 1975.

8. However, review under section 104 is clearly permissible for the period admittedly covered by the insurance officer's decision of 3 December 1979 awarding payment, effective for this purpose (though expressed to be retrospective to 25 10 79) from 6 December 1979 onwards. Moreover, that decision is clearly reviewable on the ground that throughout the period from 5 November 1979 to 9 January 1980 the claimant was in receipt of earnings, a fact of which the insurance officer who gave the decision on 3 December 1979 (when the earnings were already being received) was ignorant. It was a material fact in that had the insurance officer known of that fact, he would not have made a decision awarding payment until

the circumstances of the earnings had been investigated. It seems to me that that is the proper basis of review and not, as suggested by the insurance officer now concerned, that "there has been any relevant change of circumstances since the decision was given" (1975 Act, section 104(1)(b)), since the circumstances were in existence at the date of the insurance officer's decision of 3 December 1979, and did not change "since the decision was given".

9. Moreover, it is quite clear (and indeed is not disputed by the claimant) that as a result of that review the insurance officer's decision of 3 December 1979 must be revised so as to make retirement pension not payable at all to the claimant for the inclusive period from 6 December 1979 to 9 January 1980, because the claimant's earnings were well in excess of the permissible limit for the whole of that period with the result that he has received retirement pension of £116.50 (5 weeks at £23.30) to which he was not entitled.

10. The question then arises whether the claimant must repay the said sum of £116.50. The matter is governed by section 119(1) and (2) of the Social Security Act 1975. Section 119(1) requires repayment to the Secretary of State of any benefit which was paid under an insurance officer's decision to the extent that it would not have been payable if the decision on appeal had been given in the first instance but section 119(2) gives a limited defence to a claimant to the requirement for repayment. Section 119(2) so far as material provides:

"119 - (2) A decision given on appeal or review shall not require repayment of benefit paid in pursuance of the original decision in any case where it is shown to the satisfaction of the person ... determining the appeal ... 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".

11. The onus is thus placed upon the claimant to satisfy me that he or any person (eg his wife) acting for him, throughout used due care and diligence to avoid overpayment. The claimant states in this connection that he did not realise that there was an earnings rule for retirement pension purposes and that earnings in excess of a given amount could either reduce or extinguish the amount of pension, until he received an intimation to that effect from the Department on 8 January 1980, when he promptly reported the fact of his earnings to the Department's local office. However the records of the Department relating to the claimant have been produced and form BF404 clearly shows that with the first giro order for 2 weeks retirement pension of £39 sent to the claimant on 1 November 1979 there was also sent to him a copy of form BR426. That form makes it abundantly clear that retirement pension is subject to reduction or extinguishment for earnings and warns a claimant not to cash a girocheque for payment if his earnings should exceed an amount specified in the form. The claimant's earnings were well in excess of that amount.

Decision C.P.1/82

12. The claimant has throughout denied (and as recently as his statement of 18 December 1981) that he received form BR426 in November 1979 or indeed at any other time. However that particular matter was the subject of very careful investigation by the local tribunal at its hearing on 9 April 1980 when the claimant did not attend but evidence was given on his behalf by his wife. The tribunal made the following findings of fact, "On balance of probabilities the claimant did not discharge the onus of proof that he had used due care and diligence to avoid overpayment. The failure to receive 2 separate forms was not accepted". I take it that that reference is a reference to (among others) form BR426. It is clear to me from the record of the proceedings on form LT3 that the matter was the subject of a detailed investigation by the local tribunal whose decision was unanimous on the point. I see nothing in the evidence or submissions before me to cause me to disturb that finding of fact. I consider that, either by receipt of form BR426 or in some other manner e.g. common knowledge or the receipt (admittedly some considerable period earlier) of Departmental literature referring to the earnings rule, that the claimant was aware of the fact that his earnings even from temporary employment should have been declared, but he did not declare them. As a result I must find that he has not satisfied me that in the obtaining and receipt of the benefit for the period from 6 December 1979 to 9 January 1980 he throughout used due care and diligence to avoid overpayment with the result that my decision on appeal "shall require repayment to the Secretary of State" (1975 Act section 119(1) the sum of £116.50 benefit paid to the claimant to which he was not entitled. In coming to this conclusion I have given very careful consideration to all the evidence and I have not lost sight of the fact that the onus of proof on the claimant to satisfy me of due care and diligence requires him only to prove the matter on a balance of probabilities and not to demonstrate it beyond all reasonable doubt.

(Signed) M J Goodman
Commissioner

Date: 8 February 1982

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