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VGHH/1/LM

Commissioner's File: CP/046/90

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

Decision

1. This adjudication officer's appeal fails. My decision is that the decision of the social security appeal tribunal dated 19 September 1990 is not erroneous in law.

Representation

2. I held an oral hearing of this appeal. Neither the claimant, nor his appointee were present. The adjudication officer was represented by Mr M. Jenking-Rees of the Solicitor's Office, Departments of Health and Social Security.

Nature of the appeal

3. This is an adjudication officer's appeal against the decision dated 19 September 1990 of a social security appeal tribunal that retirement pension amounting to £1,883.10 for the period 28 December 1987 to 27 November 1988 is payable to the claimant.

4. The basis of the appeal is that on the true construction of regulation 38 of the Social Security (Claims and Payments) Regulations 1987, as amended with effect from 8 October 1989, the claimant has lost the right to pension for that period because payment had not been obtained within 12 months and there was no provision for extending the 12 months for good cause as no instruments of payment had been issued.

The relevant law

5. Regulation 22 of the Social Security (Claims and Payments) Regulations 1979 provided that the right to payment of benefit was lost where payment was not obtained within 12 months from the date when the right to payment was treated as having arisen - unless good cause was shown. Regulation 22 was replaced

from 11 April 1988 by regulation 38 of the Social Security (Claims and Payments) Regulations 1987 - but regulation 38 had no provision for good cause until regulation 38(2A) reintroduced it. That provision came into effect on 9 October 1989.

6. Regulation 38, as amended from 9 October 1989, now provides as follows:

Extinguishment of right to payment of sums by way of benefit where payment is not obtained within the prescribed period

38.-(1) Subject to paragraph (2A), the right to payment of any sum by way of benefit shall be extinguished where payment of that sum is not obtained within the period of 12 months from the date on which the right is to be treated as having arisen; and for the purposes of this regulation the right shall be treated as having arisen -

(a) in relation to any such sum contained in an instrument of payment which has been given or sent to the person to whom it is payable, or to a place approved by the Secretary of State for collection by him (whether or not received or collected as the case may be) -

(i) on the date of the said instrument of payment, or

(ii) if a further instrument of payment has been so given or sent as a replacement, on the date of the last such instrument of payment;

(b) in relation to any such sum to which sub-paragraph (a) does not apply, where notice is given (whether orally or in writing) or is sent that the sum contained in the notice is available for collection on the date of the notice or, if more than one such notice is given or sent, the date of the first such notice;

(c) in relation to any such sum to which neither (a) nor (b) applies, on such date as the Secretary of State determines.

(2) The giving or sending of an instrument of payment under paragraph 1(a), or of a notice under paragraph (1)(b), shall be effective for the purposes of that paragraph, even where the sum contained in that instrument, or notice, is more or less than the sum which the person concerned has the right to receive.

(2A) Where a question arises whether the right to payment of any sum by way of benefit has been extinguished by the operation of this regulation and the adjudicating

authority is satisfied that -

- (a) the Secretary of State has first received written notice requesting payment of that sum after the expiration of 12 months; and
- (b) from a day within that period of 12 months and continuing until the day the written notice was given, there was good cause for not giving the notice; and
- (c) the instrument of payment, which has been sent or given to the person to whom it is payable, has been produced to the Secretary of State; and
- (d) the Secretary of State has certified that no further instrument has been issued as a replacement.

the period of 12 months shall be extended to the date on which the adjudicating authority decides that question, and this regulation shall accordingly apply as though the right to payment had arisen on that date.

(3) For the purposes of paragraph (1) the date of an instrument of payment is the date of issue of that instrument or, if the instrument specifies a date which is the earliest date on which payment can be obtained on the instrument and which is later than the date of issue, that date.

(4) This regulation shall apply to a person authorised or appointed to act on behalf of a beneficiary as it applies to a beneficiary.

(5) This regulation shall not apply to the right to a single payment of any industrial injuries gratuity or in satisfaction of a person's right to graduated retirement benefit.

Background

7. The matter arises in this way. The claimant attained UK pension age of 65 on 22 February 1985 and was awarded retirement pension.

8. On 27 April 1988 the Department of Social Security wrote to the Social Welfare Services Office in Dublin in the Republic of Ireland asking whether the claimant was deceased and received a reply dated 20 May 1988 (stamped as received on 31 May 1988) that he was still residing with Miss D [who is his sister and appointee] at Oliver Plunkett Street, Bandin, County Cork (where, indeed, he still resides). But the claimant had failed to complete "Life Certificates" which the Overseas Branch of the Department of Health and Social Security asserted (in a letter of 30 June 1988 addressed to Miss D) were required

by United Kingdom Social Security Regulations. Payment of benefit was stated in that letter to have been "suspended for security reasons in December 1987".

9. It was not until 19 December 1989 that the claimant's sister replied specifically stating that the claimant was alive and well. The reason for this was that the claimant suffers from a depressive illness (a fact confirmed by medical evidence) and intercepted letters to her. There is no doubt, and it has never been disputed, that if this were a question whether the claimant had good cause for a late claim the answer is "Yes".

The adjudication officer's decision

10. An adjudication officer on 10 February 1990, issued the following decision:

"ADJUDICATION OFFICER'S DECISION

Retirement pension amounting to £1883.10 for the period from 28 December 1987 to 27 November 1988 (both dates included) cannot be paid. This is because payment was not obtained within 12 months from the date that Mr D had the right to be paid.

The right to be paid is treated as arising on the dates specified in the attached schedule, the dates that the Secretary of State has decided that the right to be paid arose.

THE LAW USED TO MAKE THIS DECISION

Social Security (Claims and Payments) Regulations 1987, regulation 38(1).

See the Schedule attached."

The attached schedule states:

"In accordance with regulation 38(1)(c) of the Social Security (Claims and Payments) Regulations 1987, the Secretary of State has determined that the claimants right to payment of retirement pension for the period commencing 28 December 1987, shall be treated as arising on the date specified in the schedule below:-

PERIOD	AMOUNT	DATE ON WHICH RIGHT TO PENSION AROSE
28.12.87 to 24. 1.88	£151.08	19. 1.88
25. 1.88 to 21. 2.88	£151.08	16. 2.88
22. 2.88 to 20. 3.88	£151.08	15. 3.88
21. 3.88 to 17. 4.88	£152.66	12. 4.88

18. 4.88 to 15. 5.88	£157.40	10. 5.88
16. 5.88 to 12. 6.88	£157.40	7. 6.88
13. 6.88 to 10. 7.88	£157.40	5. 7.88
11. 7.88 to 7. 8.88	£157.40	2. 8.88
8. 8.88 to 4. 9.88	£157.40	26. 8.88
5. 9.88 to 2.10.88	£157.40	27. 9.88
3.10.88 to 30.10.88	£157.40	25.10.88
31.10.88 to 27.11.88	£157.40	21.11.88

The right to payment for each period is treated as having arisen on the date on which each relevant instrument of payment would have been issued."

The claimant appealed against this decision. His letter (dated 5 March 1990) states:

"I wish to appeal against the decision of the adjudication Officers, because I was and still am in very poor health. Due to depressive illness since 1987 I am attending the Doctor I have sent on a Doctors Certificate, to, the Dept, of Health and Social Security, Longbenton on the 9th Feb 1990, and I hope, you will understand why I was incapable of looking after my affairs. B P D.

This portion of the letter was written by my brother Daniel P D who did not inform me that his pension was not being paid in to his Bank a/c. This was directly due to his illness if I had known I would have, let you know, we are living at home and we kept him free - so you will understand what a shock I got when I find out his pension was suspended. I would be very thankful to the Adjudication Officers if they could help us out considering the circumstances. We never saw your letters as he kept them himself - he didnt seem to realise what he was doing aparently when he kept the one addressed to me.

Would be grateful for an early reply my thanks."

The appeal tribunal's decision

11. The appeal tribunal heard the appeal on 19 September 1990. The chairman's note records that the presenting officer outlined the evidence and submissions in the appeal documents and that the appellant could not attend as he was resident in the Republic of Ireland.

12. The appeal tribunal's unanimous decision was:
"Retirement Pension amounting to £1,883.10 for the period

28.12.87 to 27.11.88 is payable to the appellant."

13. Their recorded findings of fact were:

"1. The appellant attained UK pension age of 65 on 22.2.85 and was awarded Retirement Pension.

2. He resided in the Republic of Ireland.

3. In September 1987 form CF(N)698 was issued to the appellant to confirm that no change of circumstances had occurred.

4. No reply having been received, a second form was sent in November 1987 but again that met with no response.

5. Payment of pension was suspended from 28.12.87.

6. Having confirmed that the authorities of the Irish Republic that the appellant was still residing with his sister at the last known address held by the Department, further letters were sent to the appellant's sister on 30.6.88, 10.8.88 and 22.9.88 but no reply was received from the appellant's sister until 19.12.89.

7. She explained that the appellant had taken no action on the letters addressed to him and had intercepted those addressed to her.

8. The appellant suffers from a depressive illness.

9. The Adjudication Officer decided that Retirement Pension was not payable for the period 28.12.87 to 27.11.88 (both dates included) because payment for that period was not obtained within 12 months from the date of the right to payment arising.

10. The Secretary of State has certified that the right to pension arose on various dates beginning on 19.1.88 and ending on 21.11.88 (see document 2)."

14. In giving reasons for their decision the tribunal summarised regulation 38(1) of the 1987 Regulations and set out the whole of paragraph (2A) of that regulation, which was introduced by amendment. Their reasons continued as follows:

"The effect of this provision is that the right to payment is not extinguished if the beneficiary is able to satisfy the conditions of paragraph (2A). It may be as well to set out very briefly the history of this provision. Regulation 22 of the Social Security (Claims and Payments) Regulations 1979 was drafted in virtually identical terms to Regulation 38 (2A) of the 1987 Regulations, but with one very important difference.

Sub-paragraphs (c) and (d) of the later provision were not

present in the earlier Regulations. The 1979 Regulations were repealed and replaced by the Social Security (Claims and Payments) Regulations 1987 with effect from 11 April 1988. The provision regarding extinguishment of entitlement to payment was now to be found in Regulation 38, but with no saving for "good cause". However, "good cause" was reintroduced when paragraph (2A) was inserted into Regulation 38 by virtue of Regulation 7(3) of SI 1989/1686 as from 9 October 1989.

The Adjudication Officer's written submission makes no reference to Regulation 38(2A) and had our decision not been favourable to the appellant to the extent that it gives him everything for which he is asking, we would have held that the rules of natural justice required that a further submission be prepared citing that provision to enable the appellant, or those acting for him, to comment on its applicability. In the light of our decision, however, we do not feel it necessary to take that course. The Presenting Officer accepts that sub-paragraph (a) of Regulation 38(2A) is satisfied in that the Secretary of State first received written notice requesting the payment of the sum in question after the expiration of 12 months. The Presenting Officer also accepts, very properly in our view, that the appellant is able to show "good cause" for not giving notice requesting the payment throughout the relevant period. The appellant can clearly show good cause for his failure to give the requisite notices on his own account by virtue of the fact that he was suffering from a depressive illness (see R(S) 3/63). If there was any failure on the part of the appellant's sister to show good cause then that cannot be attributed to the appellant as there was no formal appointment of her to act on his behalf (see R(SB) 17/83 at paragraph 3).

At first sight, however, it would appear that the appellant cannot possibly satisfy all of the conditions of Regulation 38(2A) because sub-paragraphs (c) and (d) presuppose that an instrument of payment has been given or sent to the beneficiary. It is axiomatic that words in a statutory provision must be given their ordinary and natural meaning. It seems to us, however, on a closer scrutiny of Regulation 38(2A) that it is as a whole capable of bearing 2 alternative meanings. The first is that indicated above, ie that in order to satisfy the provisions a beneficiary must satisfy all 4 conditions. On that reading it is prerequisite that an instrument of payment should have been sent. The alternative interpretation is that only a person to whom an instrument has been sent must satisfy sub-paragraphs (c) and (d).

We cannot find any reason for a distinction being drawn between on the one hand a beneficiary to whom an instrument has been sent and one to whom no such instrument has been sent other than the avoidance of duplication of payments. Sub-paragraphs (c) and (d) would appear to be designed to

ensure that either an instrument of payment which has been sent is returned to the Secretary of State without having been encashed and that steps are taken to ensure that no further instrument of payment has been issued."

The adjudication officer's appeal

15. The adjudication officer appealed against this decision on the ground that the application of paragraph (2A) is confined to those cases where an instrument of payment has been given or sent and has subsequently been produced to the Secretary of State.

Was the decision of the appeal tribunal erroneous in law?

16. Two questions arise. First, is it correct to apply (as the tribunal did) the law in force from 9 October 1989 to benefits which were due to be paid at an earlier date? The period in issue is 28 December 1987 to 27 November 1988. I am now satisfied that Mr Jenking-Rees' submission on this question is right and that the answer to this question is "Yes", for the following reasons. Until the Secretary of State determined the dates on which the right to pension during that period were to be treated as arising, no question of extinguishing the right to payment could arise, since it could not be predicated when the 12 month period referred to in regulation 38 started to run in respect of the payments. The Secretary of State's determination, which is undated, and the adjudication officer's decision extinguishing the right to payment (also undated) are set out in a letter to the claimant dated 10 February 1990 and were obviously both given in 1990. Both are expressed to be made under regulation 38(1). Clearly, the right to payment was extinguished, or purported to be extinguished, under regulation 38. At the time when this happened paragraph 2A of that regulation was in force (commencement 9 October 1989). The opening words of that paragraph show that it applies "Where a question arises whether the right to payment of any sum by way of this benefit has been extinguished by the operation of this regulation" . Since the question arose as a result of the Secretary of State's determination of the dates when the right to payment were to be treated as arising i.e. after 9 October 1989, the provisions of regulation 2A must apply to all the payments made during the period in issue.

17. The second question is whether the claimant has satisfied the conditions of regulation (2A). It is not in dispute that paragraph (a) and (b) of those conditions are satisfied, namely that the Secretary of State received written notice requesting payment and that there was continuing good cause in terms of sub-paragraph (b). The sole dispute, and ground of appeal, is that paragraph (2A) does not apply because conditions (c) and (d) have not been satisfied by the claimant.

18. Conditions (c) and (d) require the adjudicating authority to be satisfied that

"(c) the instrument of payment, which has been sent or given

to the person to whom it is payable, has been produced to the Secretary of State; and

- (d) the Secretary of State has certified that no further instrument has been issued as a replacement."

Mr Jenking-Rees argues that since no instrument of payment has been produced to the Secretary of State and no certificate has been given by him as to no further instrument having been issued as a replacement, the claimant has not satisfied the conditions of paragraph (2A). In his submission those conditions can only be satisfied where an instrument of payment has been given or sent to the person to whom it is payable. In other words, that "good cause" is only available to defeat the 12 month time limit where paragraph (a) of regulation 38(1) is in point and that there can be no good cause extension where paragraph (b) (notice that sum available for collection) or (c) (deemed date for right to payment) is in point.

19. I disagree. Paragraph (c) of regulation 38(2A) imposes the condition of production to the Secretary of State of the instrument of payment which has been given or sent to the person for whom it is payable. A pre-condition of its application is that the Secretary of State shall have sent or given the instrument of payment. If he has not given or sent any instrument of payment in respect of the period in issue (which is the present case) the condition does not apply at all. It is quite impossible to disregard the clear words which stipulate production of the "instrument of payment which has been given or sent". It does not apply at all to instruments of payment which have not been given or sent. It follows that neither paragraph (c) nor paragraph (d), which is dependent on paragraph (c), of regulation 38(2A) applies to any case falling within sub-paragraph (c) (nor, indeed, to sub-paragraph (b), of regulation 38(1)). The decision of the appeal tribunal was accordingly quite correct and is not erroneous in law.

Concluding remarks

20. (1) It was submitted to me by Mr Jenking-Rees that the construction I have adopted means that someone with good cause who has lost or through mental illness destroyed an instrument of payment would be excluded. That may, or may not, be so. It does not require to be decided now. But it is certainly not a reason for requiring a claimant with good cause to be excluded when he has never been sent an instrument of payment at all.

(2) A further submission was that there would be an onus in cases where a claimant claims that he has not received an instrument of payment for the Secretary of State

"to go through old records to establish that an instrument had been sent. In other words a claimant would always succeed in getting an extension unless that Secretary of State could prove an instrument of payment had not been sent whereupon the claimant would fail even though he could

prove that he had not cashed it with good reason."

This argument is quite unsustainable. In a case where paragraph (c) of regulation 38(1) above is in point (the instant case), the Secretary of State can only apply that paragraph if no instrument of payment has been issued. So the Secretary of State must check this before applying the paragraph at all. (The position is similar in the case of paragraph (b)). Even if that were not so, there is a well settled and inexpensive procedure for dealing with claimants who say that they never received or have lost an instrument of payment. It has been operated without difficulty for many years: see decision R(IS) 7/91 at paragraphs 17 and 19.

(3) The purpose of sub-paragraphs (c) and (d) of regulation 38(2A) is clear. It is to prevent a claimant being paid twice over, by obtaining a second instrument of payment. There is no reason for it to apply if no instrument of payment has ever been issued. In the result, good cause is available, in effect, for everyone, or almost everyone, who could have shown good cause under regulation 22. The omission of a good cause provision in the original regulation 38 has effectively been rectified.

(4) My decision is set out in paragraph 1.

(Signed) V G H Hallett
Commissioner

Date: 29 October 1992