

Earnings limit for dependant's addition TW RP -
C.P.A.S
whether could carry over
transitional protection he had had then
an IVB.



7/2/92

MJG/SH/9

Commissioner's File: CP/070/1989

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 2 May 1989 as that decision is not erroneous in law: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant a man born on 14 November 1917. The appeal is against the unanimous decision of a social security appeal tribunal dated 2 May 1989 which dismissed the claimant's appeal against a decision of the local adjudication officer issued on 7 July 1988 in the following terms,

"I have reviewed the decision of the adjudication officer awarding an increase of retirement pension [for the claimant's wife] from and including 9 November 1987 because the decision was erroneous in point of law. This was that the wrong earnings limit was applied when considering payability of the increase in respect of the claimant's wife.

My revised decision for the period from and including 9 November 1987 is as follows.

An increase of retirement pension is not payable for [the claimant's wife] from and including 9 November 1987. This is because she is engaged in employment from which her earnings are more than £31.45 (£32.95 from 11 April 1988) per week.

As a result an overpayment of retirement pension has been made from 9 November 1987 to 6 March 1988 (both dates included) amounting to £403.75. Because [the claimant] did

not misrepresent or fail to disclose a material fact this overpayment is not recoverable. Schedule of Overpayment: 9.11.87 to 6.3.88 = 17 weeks at £23.75 per week."

3. The appeal was the subject of two oral hearings before me. The first was on 9 June 1992 and the second was on 10 September 1992. At both those hearings the claimant was not present but was represented by Mrs M Cross of the local Citizens Advice Bureau. The adjudication officer was represented by Mr S M Cooper of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mrs Cross and to Mr Cooper for their considerable assistance to me at the two hearings.

4. The reason for the appeal from the adjudication officer's decision of 7 July 1988 (quoted above) was that the claimant considered that when he attained the age of 70 years on 14 November 1987, he should be able to 'carry over' to the retirement pension to which he became entitled as from his 70th birthday (instead of invalidity benefit which he had had before) the transitional protection as to his wife's earnings given by regulation 8(6) of the Social Security Benefit (Dependency) Regulations 1987, S.I. 1977 No. 343, reading as follows,

"Earnings rules for increases for adult dependents

8. (1) This paragraph applies in cases where an increase of benefit is claimed in respect of an adult dependent who is residing with the beneficiary and the increase is claimed under any of the following provisions of the [Social Security Act 1975] -

(a) section 45(2) (increase of Category A or C retirement pension or invalidity pension in respect of a wife);

(b)-(f)

(2) Where paragraph (1) applies there shall be no increase of benefit if, in the week ending last before any week in which the beneficiary is entitled to benefit under any provision specified in paragraph (1), the adult dependent has earnings which exceed the amount specified in sub-paragraph (1)(a) of Part 1 of Schedule 4 to the Act.

(3)-(5)

(6) Where on 14th September, 1985, a beneficiary was entitled to an increase of benefit for that day or for a period including that day under any of the provisions of the Act to which paragraph (1) or (3) applies the

provisions of the Act and of these regulations relating to the reduction of the rate of such increase on account of the earnings of the adult dependent in force on that day shall, if more favourable to the beneficiary, continue to apply after that day, to the exclusion of the provision of this regulation, until such time as the beneficiary first ceases to be entitled to that increase."

5. In the present case the claimant was entitled to invalidity benefit on 14 September 1985 and was also entitled to an increase of benefit for his wife despite her earnings because of the more generous earnings rules in force before 14 September 1985, i.e. a higher limit and a 'tapering' rule - replaced by the lower limit and the 'all or nothing' rule in section 13 of the Social Security Act 1985 and regulation 8(2) of the Dependency Regulations 1977). The claimant continued to receive an increase of invalidity benefit for his wife until his 70th birthday on 14 November 1987. Then, under section 15(1)(ii) of the Social Security Act 1975, he was no longer entitled to invalidity benefit and in fact he transferred to retirement pension. He was then held not to be entitled to an increase for his wife because of the amount of her earnings. (see para.2 above). The claimant contended that, although he then changed (compulsorily) from one benefit to another i.e. from invalidity benefit to retirement pension, he still remained "entitled to that increase" i.e. "an increase of benefit", within the meaning of those phrases in regulation 8(6) of the Dependency Regulations 1977. The social security appeal tribunal, giving detailed findings of fact and reasons for its decision, rejected that contention. For the reasons given below, I affirm their decision as being correct in law.

6. The oral hearing in this case was directed by a Deputy Commissioner on 21 November 1991 and in paragraph 2 of his direction he said,

"At the oral hearing the Commissioner will wish to hear legal argument on the following questions. The claimant was entitled to invalidity pension and to an increase of that benefit for his wife on 14 September 1985. Is it the case that, because the increase of Category A or C retirement pension and of invalidity pension for a wife is provided for by one sub-section (i.e. section 45(2) of the Social Security Act 1975), when the claimant ceased to be entitled to invalidity pension and immediately became entitled to retirement pension on reaching the age of 70, he did not cease to be entitled to 'that increase' and so was entitled to retain the benefit of the operation of regulation 8(6) of the Social Security (Dependency) Regulations 1977?"

7. Section 45 of the Social Security Act 1975 (now reproduced in section 83 of the Social Security Contributions and Benefits Act 1992) provides so far as relevant as follows,

"Pension increase (wife)

45. (1) This section applies to -
- (a) a Category A or Category C retirement pension;
 - (b) an invalidity pension.
- (2) Subject to the following provisions, the weekly rate of a pension to which this section applies, when payable to a man, shall be increased by the amount respectively specified in relation to the relevant pension in Schedule 4, Part IV, column (3) -
- (a) for any period during which the pensioner is residing with his wife; or
 - (b) for any period during which the pensioner is contributing to the maintenance of his wife at a weekly rate not less than that amount, and his wife does not have weekly earnings which exceed that amount.
- (2A) [Inserted by section 13(1) of the Social Security Act 1985] Regulations may provide that, for any period during which the pensioner is residing with his wife and his wife has earnings -
- (a) the increase of benefit under this section shall be subject to a reduction in respect of the wife's earnings; or
 - (b) there shall be no increase of benefit under this section." (My underlining)

8. At the hearing before me, Mrs Cross on behalf of the claimant argued that, as section 45(1) applies to both retirement pension and to invalidity pension, the increase for his wife which the claimant was receiving was one and the same increase whether it was an increase of retirement pension or an increase of invalidity pension. However, it should be noted from the words that I have underlined above that it is theoretically possible for there to be a different amount of increase for retirement pension and for invalidity pension, hence the words "respectively specified in relation to the relevant pension". As it happens, the rate of increase in Schedule 4, Part IV, column (3) is the same whether it is of retirement pension or invalidity pension but there is no reason why it has to be. Moreover, as Mr Cooper pointed out, section 45(1)(a) also refers to a Category C retirement pension, where the amount of the increase is lower.

9. In my judgment, it therefore follows that, where regulation 8(6) of the Dependency Regulations 1977 uses the words "a beneficiary was entitled to an increase of benefit", and then the words "entitled to that increase", the regulation is referring separately to an increase of invalidity benefit and to an increase of retirement pension, even though both are taken together in regulation 8(1)(a) of those Regulations. I am fortified in this view by the fact that, in a decision on file CP/068/1989 (set out in full in the Appendix to this decision), another Commissioner, after an oral hearing at which the same question appears to have been fully argued before him (save for one point - see below), came to the same conclusion. He concluded (paragraph 6 of his decision) that, "... the protection does not cross over from one benefit to another." I have given careful consideration to that decision, to the arguments that were adduced to the Commissioner, and to the Commissioner's rulings thereon. I agree with them.

10. That being so, I do not need to rule upon the detailed submission that was made by Mr Cooper as to what extent the decision on file CP/068/89 is 'binding' on me, having regard to the principles outlined by a Tribunal of Commissioners in R(I) 12/75 (paras. 16-22). My decision is given only after an independent consideration by me of all the questions involved and therefore the question of precedent does not arise.

11. It was however submitted to me by Mrs Cross on behalf of the claimant that there was one argument which was not adduced to the Commissioner who gave the decision on file CP/068/1989. That argument was as follows. Mrs Cross pointed out that, whereas section 45 of the Social Security Act 1975 relates to both retirement pension and invalidity pension in the case of a husband claiming an increase for his wife, in the converse situation of a wife claiming an increase for her husband the two pensions are dealt with by two separate sections of the 1975 Act, namely section 45A which deals with an increase for a husband of a wife's Category A retirement pension and section 47 of the 1975 Act which deals with an increase of a wife's invalidity pension for her husband. Mrs Cross argued therefore that, as the matter had been dealt with differently in the case of a wife claiming for her husband i.e. was dealt with in two separate sections, the presumption was that Parliament, when dealing with retirement pension and invalidity pension together in the one section, i.e. section 45 (husband claiming increase for wife), must have intended the increase to be one and indivisible.

12. There is some force in this submission, but Mr Cooper referred to the legislative history of sections 45A and 47 of the 1975 Act. All increases of benefit were dealt with in one section in the National Insurance Act 1946, namely section 24 (similarly in section 43 of the National Insurance Act 1965). They only subsequently became separated. Section 45A of the 1975 Act was only inserted in 1985 by section 13 of the Social Security Act 1985. He demonstrated that the different treatment of husbands and wives in relation to claiming increases for their

spouses is referable to historical or policy reasons, eg. the desire to remove the test of a pensioner's husband having to be "incapable of self-support" and the grant of an increase of retirement pension to a woman for her husband only if she had had earlier increases in other benefits (see section 45A(1)(a)).

13. I accept Mr. Cooper's submission that the different legislative methods of treating the two increases, for husband and wife respectively, is solely attributable to these historical and policy reasons and that the inference that Mrs Cross would draw from it does not therefore hold good. Moreover, the fact that section 45(2) as already pointed out above, uses the words "shall be increased by the amount respectively specified in relation to the relevant pension" again tends against the view put forward by Mrs Cross.

14. Consequently, for all the above reasons, I must dismiss this appeal. I have taken into account the claimant's representations that it seems to be a hardship that, on getting older and more ill, he should find his income from social security benefit decreased at the age of 70 years but, if there is thought to be hardship or anomaly, that is a matter for amendment of the legislation, since I have no doubt that as at present the legislation produces the result that I have indicated above.

(Signed) M.J. Goodman
Commissioner

(Date) 23 September 1992

APPENDIX (SEE PAGES 7 -11 below)