

~~HMII~~
SDA

Period on training course can be part
of PIE so claimant could be continuously
entitled to HNCIP & ∴ be passed
into SDA

ATH/4/LS

Commissioner's File: CS/031/1986

C A O File: AO 4676/NV/85

Region: London South

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR NON-CONTRIBUTORY INVALIDITY PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Susan Marion Tatterton (Mrs)

Appeal Tribunal: Guildford

Case No: 64/6

[ORAL HEARING]

1. I allow this application by the claimant and I set aside my decision dated 24 November 1986. My decision, which I substitute for that dated 24 November 1986, is that the claimant is entitled to non-contributory invalidity pension for the inclusive period from 9 August 1984 to 28 November 1984.
2. In my decision of 24 November 1986 I held that the claimant was not entitled to non-contributory invalidity pension for that period. On 24 February 1987 the claimant's representative, Ms Penny Wood, solicitor and legal officer of the Child Poverty Action Group, gave notice of application for leave to appeal to the Court of Appeal on the ground that by my decision I had failed to give proper effect to regulation 13 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983. As that regulation had not been cited by either the claimant or the adjudication officer in their written submissions or in their oral submissions at the hearing on 18 August 1986, I directed an oral hearing of the application for leave to appeal to the Court of Appeal.
3. On 30 April 1987 I held an oral hearing. The claimant was present and was represented by Mr Drabble of Counsel, instructed by Ms Penny Wood, and the adjudication officer was represented by Mr Qureshi of the Solicitor's Office of the DHSS. Neither had been present at the oral hearing before me on 18 August 1986 (when in fact the claimant had appeared in person accompanied by her husband). I should like to record my gratitude to Mr Drabble and Mr Qureshi for their helpful submissions.
4. Mr Qureshi made it clear at the beginning of the hearing, that he would not, on behalf of the adjudication officer, oppose any appeal by the claimant, if leave to appeal were given, and in fact submitted that my decision of 24 November 1986 should be set aside. He referred to decision R(S) 6/83 and regulation 25 of the Social Security Commissioner's Procedure Regulations 1987. I pointed out that there was in fact no application in writing as required by regulation 25(2) of the Commissioner's Procedure Regulations 1987, and Mr Drabble thereupon applied for an extension of time to make such an application under regulation 25(2). I granted leave on condition that he gave notice in writing in accordance with the regulation. This he subsequently did and in that notice he has withdrawn the application for leave to appeal. The oral hearing, therefore, proceeded as an application to set aside my decision dated 24 November 1986.
5. Jurisdiction to set aside.

The Social Security Commissioner's Procedure Regulations 1987 came into force on 6 April 1987. Regulation 33(1), so far as is relevant, provides:

"...these regulations shall apply to proceedings before the Commissioners commenced before the date on which they come into operation as well as to proceedings commenced on or after that date."

In my judgment I have jurisdiction to set aside my decision under regulation 25(1) of those regulations which provides that I may set aside my decision "where it appears just to do so on the ground that...(c) the interests of justice so require".

If I were wrong in so deciding, I would, nevertheless, in my judgment, have power to do so by virtue of regulation 27(5) of those regulations and decision R(S) 6/83. Regulation 27(5) provides:

"Nothing in these regulations shall be construed as derogating from any inherent or other power which is exercisable apart from these regulations."

That regulation is in the same terms as regulation 11(4) of the Social Security (Adjudication) Regulations 1984 which in turn was in the same terms as regulation 4(4) of the Social Security (Correction and Setting Aside of Decisions) Regulations 1975. And in decision R(S) 6/83 the learned Commissioner set aside his own decision and directed an oral hearing of the appeal in that case; and at paragraph 5 of that decision he stated that Parliament had expressly, in regulation 4(4) of the 1975 Regulations, maintained to Commissioners their implied power to set aside a decision - an implied power whose existence was "demonstrated by a long and continuous practice on the part of the Commissioners".

6. Should I set aside the decision of 24 November 1986?

I have no doubt that the answer is yes. It will be recalled that I reached that decision with regret since I had every sympathy with the claimant (see paragraph 9 of that decision). And Mr Qureshi on behalf of the adjudication officer not only supports Mr Drabble's application, but as I have indicated was, very fairly, the instigator of it. Nevertheless, I must be satisfied that it is proper for me to do so. My decision of 24 November 1986 was that the claimant was not entitled to non-contributory invalidity pension for the inclusive period from 9 August 1984 to 28 November 1984. It is unnecessary for me to recite again the facts and the law which I set out in that decision. The point at issue was whether or not the claimant had proved that she had been incapable of work "for a period of not less than 196 consecutive days ending immediately before" any day on which she was incapable of work, as was required in order to entitle her to a non-contributory invalidity pension: section 36(1) of the Social Security Act 1975 (in the terms in which it stood at the date of her claim, 21 August 1984). I held that she had not proved that she was so incapable because she had from 29 May 1984 until 9 August 1984, undergone a training course under the Manpower Services Commission and payment of training allowance had been made to the claimant for her attendance at the course and, accordingly, the days between 29 May 1984 and 9 August 1984 were not to be treated as days of incapacity for work: regulation 7(1)(f) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983. I held, further, that since the period of training, during which she received payment of the training allowance, amounted to some 10 weeks and 2 days, she could not take advantage of section 17(1)(d) of the Social Security Act 1975. In other words, because the training course had lasted for more than 8 weeks, the period of incapacity for work which had existed up to 29 May 1984 and the period of incapacity for work which ensued after 9 August 1984 could not be joined together and treated as "one period of interruption of employment" within the meaning of section 17(1)(d). However, as I have already indicated, the ground of the application for leave to appeal and now the ground of the application to set aside my decision, was and is that I had failed to give proper effect to regulation 13 of the

Unemployment, Sickness and Invalidity Benefit Regulations 1983. That regulation provides:

- "(1) For the purpose of reckoning periods of interruption of employment, and for that purpose only, a person shall be deemed to be available to be employed in employed earner's employment on any day specified in paragraph (2) and any such day shall be treated as a day of unemployment.
- (2) The days specified for the purpose of paragraph (1) are -
 - (a) any day to which regulation 7(1)(f) (days when a person is attending a training course not to be treated as days of incapacity for work) applies;..."

Thus the days on which the claimant attended the training course were not to be treated as days of incapacity for work, but they were to be treated, for the purpose of reckoning periods of interruption of employment - and for that purpose only - as days of unemployment. A "day of interruption of employment" means a day which is a day of unemployment or of incapacity for work: section 17(1)(c) of the Social Security Act 1975. And section 17(1)(d) of that Act (as substituted by the Social Security (No.2) Act 1980 section 3(1)) provides that for the purposes of any provisions of that Act relating to unemployment benefit, sickness benefit or invalidity benefit -

"the following periods, namely -

- (i) any two days of unemployment, whether consecutive or not, within a period of 6 consecutive days,
- (ii) any four or more consecutive days of incapacity for work,

shall be treated as a period of interruption of employment, and any two such periods not separated by a period of more than 8 weeks ('week' for this purpose meaning any period of 7 days) shall be treated as one period of interruption of employment"

Thus, in relation to the claimant, the following pattern emerges:

- (i) the period from 6 February 1979 to 11 January 1982 and from 20 February 1982 to 29 May 1984 constituted one period of interruption of employment (by virtue of section 17(1)(d) of the Act of 1975) being a period of incapacity for work by reason of her disablement (within the meaning of section 17(1)(a)(ii) of that Act) and she was in receipt of non-contributory invalidity pension during that period;
- (ii) the period from 30 May 1984 to 9 August 1984 was one period of interruption of employment since it was to be treated as a period of unemployment by virtue of regulation 13(1) and (2)(a) of the Unemployment, Sickness and Invalidity Benefit Regulations;
- (iii) the period from 10 August 1984 to 28 November 1984 was one period of interruption of employment by reason of the claimant's incapacity for work by reason of her disablement: section 17(1)(a)(ii) of the Act of 1975.

It follows, therefore, that there was no break in the period of interruption of employment between 6 February 1979 and the date of her claim, 21 August 1984, and continuing down to 28 November 1984 (the last date for claiming non-contributory invalidity pension). It follows, further, that the decision of the adjudication officer issued on 20 November 1984 and the decision of the appeal tribunal dated 9 October 1985 were erroneous in law, and likewise my decision dated 24 November 1986. Accordingly, I set aside my decision dated 24 November 1986 and I set aside the decision of the appeal tribunal dated 9 October 1985.

7. Period of entitlement.

The claimant made her claim on 21 August 1984. That was not an original claim but was the first claim made by the claimant after she had become or again become incapable of work. Since her period of training under the Manpower Services Commission did not count as a period of incapacity for work she had again become incapable of work on 10 August 1984. The prescribed time for making her claim was therefore "6 days from the earliest day in respect of which the claim is made": regulation 14 of and schedule 1 paragraph 3(b), column (2), to the Social Security (Claims and Payments) Regulations 1979. As the claim was, therefore, out of time, the claimant was disqualified for receiving benefit "in respect of any day more than 6 days before the date on which the claim is made": paragraph 3(b), column (3). The claimant was not entitled, therefore, to non-contributory invalidity pension prior to 15 August 1984 (or the appropriate date which was no more than 6 days before the date of the claim i.e. 21 August 1984). The claimant could not, of course, claim non-contributory invalidity pension for any days in which she was undergoing the training under the Manpower Services Commission since those days did not count as days of incapacity for work (regulation 7(1)(f)) but only as days of unemployment for the purpose of reckoning periods of interruption of employment (regulation 13(1) and (2)(a)). Mr Drabble, however, submitted that there was good cause for the claimant's failure to make the claim before the date on which it was made and submitted that the time for making the claim should be extended to 21 August 1984 by virtue of regulation 14(2) of the Claims and Payments Regulations 1979. Accordingly, the claimant gave evidence at the oral hearing before me. As I stated in my decision of 24 November 1986 the claimant is most regrettably confined to a wheelchair, much of the time in a prone position, as a result of an operation. She told me that when she left the Manpower Services Commission course on 9 August she was in a prone position for the majority of the day and that was why she could not continue the course. She was then in bed for several days as a result of the physical exertion in packing up and leaving the course and was taking medication. She stated that in order to obtain the claim form it was necessary to drive by car to the local office and that she had to use her crutches to get from the house to the car. She did not realise that it was imperative to put in the claim so quickly. Mr Qureshi did not cross examine her and made what he called an open submission, pointing out that delay cannot be excused by ignorance of one's rights and that the claimant was an experienced claimant and must have been aware from her claims in the past that she had to claim in time; in the final analysis, he said, it was a question of reasonableness. The delay here was only some 6 days and I am quite satisfied that the mental and physical exhaustion suffered by the claimant at the time of packing up and leaving the course while at the same time looking after her family with 4 children constitute good cause for that delay in making the claim. Accordingly, I extend the time for making the claim to 21 August 1984 on the ground that there was, in my judgment, good cause for the delay. It follows that the claimant is entitled to non-contributory invalidity pension from 10 August 1984.

8. For those reasons, I allow this application and set aside my decision dated 24 November 1986. My decision is as set out in paragraph 1 above.

(Signed) A T Hoolahan
Commissioner

Date: 22 June 1987