

WES  
Claim for SDA - S165A did not have retrospective effect so  
prior to 2/9/85 should be based on McCaffery.

NOTE S165A further amended on 13 July 1994  
to make it retrospective.

DSS undecided as yet  
whether to appeal.



RFMH/SH/26

Commissioner's File: CS/049/1989

Region: Midlands

SOCIAL SECURITY ACTS 1975 TO 1986  
CLAIM FOR SEVERE DISABLEMENT ALLOWANCE  
DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 16 November 1988 is erroneous in point of law and accordingly I set it aside. However, as I consider it expedient to give the decision the tribunal should have given, I further decide that the claimant is entitled to a severe disablement allowance for 1 May 1988 because he has attained pensionable age and can be treated as entitled to such an allowance immediately before attaining that age.
2. This is the adjudication officer's appeal against the decision of the social security appeal tribunal given on 16 November 1988 reversing the adjudication officer's decision issued on 8 June 1988, leave having been granted by the tribunal chairman. At the oral hearing of the appeal held before me, the adjudication officer was represented by Mr I Sundborg from the Chief Adjudication Officer's Office. The claimant did not attend but he was represented by his wife. I am grateful to them both for their helpful and detailed submissions.
3. The facts are not in dispute. The claimant was born on 22 May 1912. He is disabled following damage to his spine as a child. On 23 May 1988 he made a claim for a severe disablement allowance. The adjudication officer decided that the claimant was not entitled to a severe disablement allowance for 1 May 1988 on the grounds that he had attained pensionable age and was not entitled and could not be treated as entitled to such an allowance immediately before attaining that age. The claimant complained that he had not claimed non-contributory invalidity pension when it was introduced as he had been advised that it would be deducted from the amount of supplementary benefit in payment to him.
4. The records of the Department of Health and Social Security show that the claimant had been in receipt of supplementary benefit for several years. When non-contributory invalidity pension was introduced on 20 November 1975, a campaign was launched within the Department to identify potential recipients from supplementary benefit records and to invite them to make a claim for the new benefit. The relevant "take-on" form was issued by the Supplementary Benefits Department on 21 July 1975 and forms inviting the claimant to claim were issued on 8 August 1975. The claimant did not make a claim. His supplementary benefit continued in payment until the introduction of income support on 11 April 1988.

5. A letter was sent to the claimant on 28 June 1988 explaining the position. However, the claimant was not satisfied with the reasons given and appealed against the adjudication officer's decision to the tribunal. The hearing of the appeal before the tribunal on 2 September 1988 was adjourned to enable the adjudication officer to reconsider his decision in the light of the House of Lords judgment in Insurance Officer v. McCaffrey (AP) (Northern Ireland) given on 22 November 1984. The tribunal also requested the claimant to submit relevant medical evidence in support of his claim. In a further written submission to the tribunal, the adjudication officer submitted that the claimant was not assisted by the McCaffrey judgment because with effect from 2 September 1985 section 165A(1) was inserted into the Social Security Act 1975 ("the Act"). In the event the tribunal on 16 November 1988 allowed the appeal. The findings of fact read:-

- "1. [The claimant] was born on 22.5.12. He reached retirement age (70) in 1982 and pension age 65 on 22.5.77.
2. [The claimant] has suffered considerable disability since childhood and has been incapable of work since 1965 because of the disability.
3. In 1975 during a "take-up" campaign a visit was made by the local office to invite [the claimant] to apply for SDA.
4. The information given to [the claimant] during the visit led him to mistakenly believe he would be financially worse off by some £2-£3 per week if awarded SDA.
5. Between 1975 and 1988 despite [the claimant's wife's] considerable experience as a CAB worker nothing had led [the claimant] to believe there might be any advantage for him to claim SDA.
6. [The claimant] first claimed SDA on 19.5.88.
7. On the evidence available to the tribunal [the claimant's] medical condition was such that he would have been entitled to SDA at any time since 1975 and in particular on 21.5.77 the day before his 65th birthday and the preceding 196 days.
8. At no time has [the claimant] left Great Britain."

The reasons for decision, so far as relevant to the present appeal, read:-

"1-2. ...

3. On the evidence available to the tribunal [the claimant] would have been entitled to SDA immediately prior to his 65th birthday and his condition has only become worse since that date.

4. The provisions of the acts and regulations set out in box 2 of the original form AT2 have been applied."

6. Section 36 of the Act provides, so far as relevant to the present appeal:-

"36. (1) Subject to the provisions of this section, a person shall be entitled to a severe disablement allowance for any day ("the relevant day") if he satisfies -

- (a) the condition specified in sub-section (2) below; or
- (b) the conditions specified in sub-section (3) below.

- (2) ...
- (3) The conditions mentioned in sub-section (1)(b) above are that -
- (a) on the relevant day he is both incapable of work and disabled; and
  - (b) he has been both incapable of work and disabled for a period of not less than 196 consecutive days ending immediately before the relevant day.
- (4) A person shall not be entitled to a severe disablement allowance if -
- (a)-(c) ...
  - (d) he has attained pensionable age and was not entitled to a severe disablement allowance immediately before he attained it and is not treated by regulations as having been so entitled immediately before he attained it.
- (a) ...
- (5) A person is disabled for the purpose of this section if he suffers from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 80 per cent.
- (6) ...
- (7) Regulations -
- (a) may direct that persons who -
    - (i) have attained retiring age; and
    - (ii) were entitled to a severe disablement allowance immediately before they attained it,
 shall continue to be so entitled notwithstanding that they do not satisfy the conditions specified in sub-section (2) or (3) above;
  - (b)-(d) ...
- (8) In this section -
- "..
- "retiring age" means in the case of a man, 70, and, in the case of a woman, 65."
- Pensionable age is defined in section 27(1)(a) of the Act as "in the case of a man, the age of 65".

7. Regulation 4 of the Social Security (Severe Disablement Allowance) Regulations 1984 ("the Regulations") provides:-

"A person who has attained pensionable age shall for the purposes of section 36(4)(d) of the Act be treated as having been entitled to a severe disablement allowance immediately before attaining that age if immediately before attaining it -

- (a) he would have satisfied the conditions for entitlement to that allowance or to a non-contributory invalidity pension but for the provisions of the Social Security (Overlapping Benefits) Regulations 1979, or
- (b) he was entitled to a non-contributory invalidity pension.

8. Regulation 5 of the Regulations provides:-

"A person who -

- (a) has attained retiring age; and
- (b) was entitled to a severe disablement allowance immediately before he attained that age,

shall continue to be so entitled notwithstanding that he does not satisfy the conditions specified in sub-section (2) or (3) of section 36 of the Act if he satisfies the other requirements for entitlement to such an allowance."

9. Section 165A of the Act provides:-

- "165A. - (1) Except in such cases as may be prescribed, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied -
- (a) he makes a claim for it in the prescribed manner and within the prescribed time; or
  - (b) by virtue of regulations made under section 51 of the Social Security Act 1986 he is treated as making a claim for it.
- (2) Where under sub-section (1) above a person is required to make a claim or to be treated as making a claim for a benefit in order to be entitled to it -
- (a) if the benefit is a widow's payment, she shall not be entitled to it in respect of a death occurring more than twelve months before the date on which the claim is made or treated as made; and
  - (b) if the benefit is any other benefit, except disablement benefit or reduced earnings allowance, the person shall not be entitled to it in respect of any period more than twelve months before that date."

10. The question at issue is whether the claimant is caught by section 36(4)(d) of the Act. Mr Sundborg referred me to regulation 4 of the Regulations and rightly submitted that in order to succeed in his claim for severe disablement allowance, the claimant was first required to establish that he had title to non-contributory invalidity pension on 21 May 1977, the day before he attained pensionable age. He stated that the claimant was not assisted by regulation 4(a) as there was no evidence to indicate that the Social Security (Overlapping

Benefits) Regulations 1979 had been applied at any time. As a result in order to succeed the claimant had to show he satisfied the conditions of regulation 4(b). He submitted that the effect of the judgment in the McCaffrey case was to make it possible for a person to be entitled to a benefit without having made a claim. However, with effect from 2 September 1985, section 165A was inserted into the Act by section 17 of the Social Security Act 1985, which reversed the effects of the said judgment. He submitted that the claimant was unable to establish title to non-contributory invalidity pension on 21 May 1977 because it was not in dispute that he had not made a valid claim. He argued that the McCaffrey judgment had effect only up to and including 1 September 1985. Thereafter it was superseded by section 165A of the Act and the claim made on 19 May 1988 was bound by the provisions of section 165A.

11. Mrs Cartwright submitted that the claimant was not caught by section 36(4)(d) of the Act. Her argument was as follows - section 165A of the Act did not have retrospective effect; accordingly "entitlement" for the purposes of regulation 4 of the Regulations made pursuant to section 36(7) of the Act was to be determined by reference to the law immediately before the claimant attained pensionable age; the tribunal found as fact that the claimant's medical condition was such that he would have been entitled to benefit on that date and the preceding 196 days and this was not in dispute; the word "entitlement" in regulation 4 of the Regulations fell to be interpreted in accordance with the McCaffrey judgment; as a result the claimant was entitled to non-contributory invalidity pension immediately before attaining pensionable age as the making of a claim was not essential to entitlement.

12. I accept Mrs Cartwright's submission and reject Mr Sundborg's submission. Section 165A does not have retrospective effect (see Decision R(S) 1/86 paragraph 14). The claimant attained pensionable age prior to 2 September 1985 and as a result, it not being in dispute that he otherwise satisfied the conditions relating to the benefit, he was entitled to non-contributory invalidity pension as at 21 May 1977 in accordance with the interpretation given to that word in the McCaffrey judgment. It follows that as the claimant satisfied the conditions of regulation 4(b) of the Regulations he was not excluded by section 4(d) of the Act.

13. Regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 provides that every tribunal chairman shall record a statement of the reasons for the tribunal's decision and of their findings on material questions of fact. In the present case, although the relevant form AT3 was completed in detail and with care, nevertheless the decision is inadequate because it is difficult to understand how the relevant law was applied to the facts. The tribunal failed to explain the basis for their conclusion that the claimant was entitled to severe disablement allowance from the date of claim because he "would have been entitled to SDA immediately prior to his 65th birthday". As a result the decision was erroneous in law. However, as I consider it expedient to give the decision the tribunal should have given, I give the decision set out in paragraph 1. (section 101(5)(a)(i) of the Act.) I should add for completeness that the claimant accepted the tribunal's decision that "there are no good grounds for backdating the payment" prior to the date of claim.

14. The adjudication officer's appeal is allowed, although I give the decision in the claimants' favour set out in paragraph 1.

(Signed) R.F.M. Heggs

Commissioner

Date: 27 June 1989