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Commissioner's File: CS/051/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows:-

- (a) the decision dated 23 January 1991 of the social security appeal tribunal is a nullity as the tribunal had no jurisdiction;
- (b) I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 31 July 1990 as that decision is not erroneous in law; Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner brought by the claimant when he was still alive. Unfortunately he died on 4 October 1993 but the appeal to the Commissioner has been continued by the claimant's widow acting under an Appointment by the Secretary of State dated 2 February 1994, which of course has retrospective effect (see R(SB) 5/90).

3. The appeal was the subject of an oral hearing before me on 14 December 1993 at which the claimant was represented by Mr C Martin of Manchester City Council Welfare Rights Service. The adjudication officer was represented by Miss J Smith of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mr Martin and to Miss Smith for their assistance to me at the hearing.

4. The appeal was originally brought against a decision of the social security appeal tribunal dated 23 January 1991. That tribunal was rehearing the claimant's appeal after an earlier

decision of a social security appeal tribunal (dated 31 July 1990) had been set aside by another social security appeal tribunal in a setting aside determination dated 26 November 1990. However after submissions by the parties on the point, in response to a Nominated Officer's Direction, I issued a Direction on 26 July 1993, paragraphs 1 and 2 of which read as follows,

"This case has been referred to me. I confirm that the tribunal's setting aside decision of 26 November 1990 is invalid, with the result that the tribunal's decision of 23 January 1991 is a nullity and the tribunal's decision of 31 July 1990 stands (R(SB) 4/90). However, I am prepared to regularise the situation by now granting to the claimant leave to appeal against the tribunal's decision of 31 July 1990. I therefore grant such leave out of time, there being special reasons for so doing."

5. I need not go into detail in this matter, suffice to say that it was clear to me that the tribunal setting-aside decision of 26 November 1990 was erroneous. The reason given for the setting aside was, "It is in the interests of justice that the appellant should be told the reasons why he has lost his appeal. It is therefore just to set the decision aside. Regulation 11(1)(c) [Social Security (Adjudication) Regulations 1986]". It is quite clear from Commissioners' decisions R(S) 3/89; R(U) 3/89 and R(SB) 4/90 that an alleged failure to give sufficient reasons for a decision is not a ground for setting aside nor can it be subsumed under the head "in the interests of justice" (reg.11(1)(c)). This is a clear case where the setting aside was incorrect, with the result that the subsequent tribunal of 23 January 1991 had no jurisdiction and the only extant tribunal decision is the earlier decision of the social security appeal tribunal of 31 July 1990.

6. In fact both the tribunal decisions were to the same effect, namely to disallow the claimant's appeal against a decision of the local adjudication officer issued on 22 January 1990 in the following terms,

"Sickness benefit is payable to [the claimant] at the weekly rate of £41.80 from 18.1.90 to 28.7.90 (both dates included). This is because that is the rate proportionate to the rate of category A retirement pension to which [the claimant] would be entitled if [the claimant] had not made an election to be treated as not entitled to retirement pension ... Social Security Act 1975, section 14(6)."

7. The circumstances in which this decision came to be given are as follows. The deceased claimant was born on 1 October 1920. He therefore attained pensionable age of 65 years on 1 October 1985. He claimed and was awarded retirement pension. However on 15 January 1990 (some nine and a half months before he attained the age of 70 years on 1 October 1990) he gave notice on form BR432 of "Application to cancel retirement" (for details see below). He at the same time made a claim on form SC1

(also dated 15 January 1990) for invalidity benefit, As a result of that claim, he was awarded sickness benefit by the adjudication officer's decision of 22 January 1990 set out in paragraph 6 above. The claimant's appeal was in substance against being awarded only sickness benefit and not invalidity benefit. Mr Martin explained at the hearing before me that the only reason the claimant had given notice of cancellation of retirement and had reclaimed invalidity benefit was because by this time he also wished to claim Income Support. If he could receive an award of invalidity benefit, he would then be able to claim the "Higher pensioner premium" under paragraphs 10 and 12 of Schedule 2 to the Income Support (General) Regulations 1987, S.I. 1987 No. 1967. In the circumstances of his case an award of invalidity benefit would have been the only 'passport' to the higher pensioner premium. An award of sickness benefit would not suffice.

8. In fact the claimant had been ill for some time. He had received sickness benefit from 12 April 1966 to 22 September 1971. From 23 September 1991 (when invalidity benefit was first introduced) he received invalidity benefit continuously up to 5 October 1985. On reaching the age of 65 on 1 October 1985 he made a claim for retirement pension, was accepted as retired from 7 October 1985, and retirement pension was awarded to him from that latter date.

9. Consequently his contention before the social security appeal tribunal was that, being already entitled to invalidity benefit when he was awarded retirement pension on 7 October 1985, he should once more be able to resume entitlement to invalidity benefit when he cancelled his retirement on 15 January 1990. He contended that he should not be required to go through a further period of entitlement to sickness benefit for 168 days before once more being awarded invalidity benefit (see section 15(1) of the Social Security Act 1975 now re-enacted in section 33(1) of the Social Security Contributions and Benefits Act 1992 - "the 1992 Act").

10. This contention was based on the provisions of section 30(3) of the Social Security Act 1975 (the version in force at that time - for the original version see para.16 below), now re-enacted in section 54(1) of the 1992 Act. Section 30(3) of the 1975 Act reads as follows,

" 30. (1)-(2)

(3) Regulations may provide that in the case of a person of any prescribed description who -

(a) has become entitled to a retirement pension (whether Category A or Category B) but is, in the case of a woman, under the age of 65 or, in the case of a man, under the age of 70; and

(b) elects in such manner and in accordance with such conditions as may be prescribed that the regulations shall apply in his case,

this Part of this Act shall have effect as if that person had not become entitled to such a retirement pension;." (my underlining).

11. Mr Martin repeated before me the argument that had been made to the two social security appeal tribunals namely that that provision put the claimant, once he had given his notice of the retirement, back to the position that he was in immediately before he first claimed retirement pension and was awarded it i.e. entitled to invalidity pension. It was therefore argued that he should continue to receive invalidity pension and that he was not required to go back to 'square one' and show a further period of 168 days entitlement to sickness benefit.

12. The difficulty about that contention is that section 15(1) of the 1975 Act (now section 33(1) of the 1992 Act) conferring entitlement to invalidity pension makes as an absolute condition of entitlement to invalidity pension that "in respect of any period of interruption of employment a person has been entitled to sickness benefit for 168 days". As soon as the claimant was awarded retirement pension he ceased to be "entitled to sickness benefit". That is because a person over pensionable age cannot be entitled to either sickness or invalidity benefit unless his entitlement to retirement pension has been deferred or he has made an election to de-retire under section 30(3) of the 1975 Act (see section 14(2)(b) and section 15(2)(b) of the 1975 Act - now sections 31(1)(b) and 33(1)(b) of the 1992 Act). Moreover, the period of interruption of employment ceased when the claimant started to receive retirement pension because by claiming retirement pension the claimant must be deemed to have withdrawn his ongoing claim for invalidity benefit in so far as it had not already been the subject of an award. The subsequent claim for sickness/invalidity benefit made on 15 January 1990 would not suffice for this purpose because for any period of more than 12 months before the date of claim the days could not be regarded as days of incapacity - see the provision to that effect of regulation 7(1)(c)(iv) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, S.I. 1983 No. 1598.

13. Recognising that this might well be the position (though he did not at the hearing before me concede that point) Mr Martin nevertheless contended that the provision of section 30(3) of the Social Security Act 1975 as in force at that time, set out in paragraph 10 above, so to speak 'over-ruled' or made unnecessary the requirement of 168 days' entitlement to sickness benefit in any given period of interruption of employment. He stressed in particular that section 30(3) of the 1975 Act stated that where

a notice of election to 'de-retire' had been given, "this Part of this Act shall have effect as if that person had not become entitled to such a retirement pension .." (my underlining). Mr Martin stressed the past tense "had" and contended that that meant that the claimant in this case was put in such a position as if he had never in fact been entitled to retirement pension. That would then mean, he said, that the claimant had a continuing entitlement to invalidity benefit as from 7 October 1985 (subject of course to set-off for retirement pension actually paid) and there was no need for him to complete any further period of 168 days entitlement to sickness benefit.

14. However, Miss Smith drew attention to regulation 2 of the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, S.I. 1979 No. 642 (as amended), the relevant parts of which provide as follows,

"Election to be treated as not having retired

2. (1) Subject to the provisions of these Regulations, where any person:-
 - (a) has become entitled to either a Category A or a Category B retirement pension but is, in the case of a woman, under the age of 65 or, in the case of a man, under the age of 70; and
 - (b) elects that this regulation shall apply in his case, the Act shall have effect as if that person had not become entitled as aforesaid.
- (2)
- (3) Notice of election for the purpose of this regulation shall be given to the Secretary of State in writing on the form approved by him for the purpose, or in such other manner, being in writing, as he may accept as sufficient in the circumstances of any particular case or classes of case; and if any such notice is sent by post, it shall be deemed to have been given on the day it was posted.
- (4) ... an election shall take effect -
 - (a) where the notice does not specify a date as the date of the person's election, on the date on which the notice is given; or

- (b) where the notice specifies the date as the date of the person's election being not earlier than the date on which the notice is given and not later than the expiration of 28 days after that date, on the date so specified."

15. Miss Smith stressed that that regulation did not allow the retrospective operation of a notice of de-retirement and contended that section 30(3) of the 1975 Act could not have the 'retrospective' effect that Mr Martin contended for it. Both Mr Martin and Miss Smith indicated that there were no previous Commissioners' decisions, reported or otherwise, dealing with this particular point. Neither of them were able to give any precise reason as to why both regulation 2(1) of the 1979 Regulations and section 30(3) of the 1975 Act used the expression the "Act shall have effect as if that person had not become entitled to such a retirement pension". They pointed out that the Act could have in fact used some such words as, "Once the notice of de-retirement has been served, thereafter the person serving it shall not be entitled to retirement pension."

16. However since the hearing, I have made some researches into the legislative history of this matter. The equivalent of section 30(3) of the 1975 Act (which was of course itself a consolidating Act) was first enacted by section 1 of the National Insurance Act 1957. Section 1 of the 1957 Act was re-enacted in virtually identical terms in the original section 30(3) of the 1975 Act as follows,

" 30. (3) Regulations may provide that in the case of a person of any prescribed description who -

- (a) has retired from regular employment or has otherwise become entitled to a pension (whether Category A or Category B) but is, in the case of a woman, under the age of 65 or, in the case of a man, under the age of 70; and
- (b) elects in such manner and in accordance with such conditions as may be prescribed that the regulation shall apply in his case,

this Part of this Act shall have effect as if that person had not retired or become entitled to such a retirement pension; ..." (my underlining).

17. The words which I have underlined above were amended by the Social Security Act 1989 as from 1 October 1989 in connection with the abolition by the 1989 Act of the earnings rule and of the need for retirement to be shown as a condition of entitlement to retirement pension. As a result Schedule 9 to the Social Security Act 1989 repealed in s.30(3) of the 1975 Act the words

"retired from regular employment or has otherwise" and the words "retired or" leaving section 30(3) in the form set out in paragraph 10 above. When this legislative history is considered it then becomes apparent why section 30(3) uses the past tense of the verb "had not become entitled to such a retirement pension". It refers (inter alia) to the original phrase in section 30(3)(a) "has otherwise become entitled to a retirement pension", i.e. presumably in the case of a married woman relying on her husband's contributions. All that was therefore meant is that a person's notice of de-retirement meant that he should be treated as not having retired at all and the reference to entitlement merely followed on from that. That being so, there is clearly no intention in section 30(3) of the 1975 Act, even after amendment by the 1989 Act, to effect any degree of retrospection so far as actual entitlement to retirement pension already paid was concerned, a result which in any event would accord with commonsense.

18. Consequently I must reject Mr Martin's submission and I hold that the statutory requirement of 168 days' entitlement to sickness benefit in any one period of interruption of employment before invalidity benefit can be paid is not in any way overridden by section 30(3) of the 1975 Act. The result is that the social security appeal tribunal in this case, though they did not investigate the legislative history as I have done, did in fact come to a correct conclusion and I have therefore upheld their decision as being not erroneous in law. Their reasoning was adequate in the light of the submissions made to them.

(Signed) M.J. Goodman
Commissioner

(Date) 17 February 1994