SDA — You Only Refund the Disablement Where You Have Added the All Disablement

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Commissioner's File: CS/073/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR SEVERE DISABLEMENT ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Ann Charity Harrop (Mrs)

Appeal Tribunal: Stockport

Case No: 61605237

[ORAL HEARING]

1. I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 16 December 1991 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 married woman born on 21 June 1945. The appeal is against the unanimous decision of the social security appeal tribunal dated 16 December 1991 which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 16 October 1989 in the following terms,

> "I have reviewed the decision of the Adjudication Officer disallowing Severe Disablement Allowance from 24.10.87 to 11.4.92 (both dates included). The decision was based on a decision by the Medical Board [dated 9 December 1987] and that decision has been revised [by a decision of a medical appeal tribunal dated 31 August 1989 - see below]. The revised decision is that [the claimant] is not entitled to a severe disablement allowance from 24.10.87 to 11.4.92 (both dates included). This is because the assessed extent of her disablement is less than 80%. Therefore [the claimant] is not disabled for the purposes of severe disablement allowance ... Social Security Act 1975, section 36(3) and (5) and Schedule 8. Social Security Act 1975, section 104(1)(c)."

3. On my direction the appeal was the subject of an oral hearing before me on 28 January 1994 at which the claimant was not present but was represented by Mr J Lyons of her local Welfare Rights Unit. The adjudication officer was represented by Ms J Smith of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mr Lyons and to Ms Smith for their assistance to me at the hearing.

4. The facts of this case are these. On 24 October 1987 the claimant made a claim for Severe Disablement Allowance. An Adjudicating Medical Authority on 9 December 1987 decided that the claimant was 20% disabled for the purposes of severe disablement allowance. That resulted in a disallowance of the benefit by the adjudication officer because of the requirement that the assessed disablement must not be less than 80% (Social Security Act 1975, s.36(5): Social Security Contributions and Benefits Act 1992, s.68(6)). The claimant then appealed from the adjudicating medical authority's 20% assessment to a medical appeal tribunal. On 31 August 1989 the medical appeal tribunal gave their decision in the following terms,

> "The decision of the Adjudicating Medical Authority is not confirmed. The extent of the disablement is to be assessed at sixty per cent for the period from 10 April 1987 to 11 April 1992.
>
> Reasons for decision:
>
> We considered all the scheduled evidence and heard oral evidence from the Claimant and her husband. We examined the claimant and on the basis of our examination and [medical reports] we assess her disablement as follows:-
>
> " 1. Angina 25%
>
> 2. Depressive anxiety 20%
>
> 3. Osteoarthritis 5%
>
> 4. Obesity 5%
>
> 5. Varicose veins 5%."

The total of 60% is of course simply a total of the percentages in items 1 to 5 in the tribunal's reasons.

5. The claimant appealed to a Social Security Commissioner against that decision of the medical appeal tribunal and on 22 April 1991 the Chief Commissioner held the medical appeal tribunal's decision (of 31 August 1989) to be erroneous in law, for want of sufficient reasons. He referred the case back to another medical appeal tribunal. A further medical appeal tribunal gave a decision dated 4 January 1993, the terms of which are not directly relevant to this appeal.

6. As well as appealing to the Commissioner against the medical

appeal tribunal's decision of 31 August 1989, the claimant also appealed to a social security appeal tribunal against the review decision of the local adjudication officer set out in paragraph 2 above which had of course been given in consequence of the medical appeal tribunal's decision of 31 August 1989.

7. There were some problems about whether or not the social security appeal tribunal had jurisdiction to consider the type of appeal that the claimant wished to bring namely to assert that the medical appeal tribunal should have rounded each of the 5% assessments up to 10% and the 25% assessment up to 30% thus giving a total of 80%, not 60% (see further below). However ultimately the matter was permitted to go forward to the social security appeal tribunal (I deal with the question of jurisdiction below) who rejected the claimant's contention and gave the following reasons for their decision to dismiss the claimant's appeal,

> "The tribunal considered that although the AO's decision was based on facts found by the medical authorities the final assessment of entitlement was his [i.e. the adjudication officer's] decision and the tribunal therefore had jurisdiction. The regulations gave no precise guidance on the manner in which rounding up of percentages should operate. In the community at large when rounding up of percentages takes place it is applied to the global sum and not its individual components - e.g. salary calculations. They of course should therefore be followed."

8. Although the tribunal did not give detailed reasons for that conclusion, I consider that their decision was in fact correct on the interpretation of the legislation (set out below) and I do not consider that the tribunal, with the materials before it, could give more reasons that it did (see R(SB) 5/81). I have therefore held that its decision is not erroneous in law. Even if I had found the decision to be erroneous for want of detailed reasons, I would myself still have given the same decision as the tribunal, for the reasons I give below.

9. I deal first with the question whether the tribunal was right in assuming jurisdiction over this matter. At the hearing before me on 28 January 1994 Ms. Smith contended that the tribunal in fact had no jurisdiction because they had purported to decide a "disablement question" within section 108 of the Social Security Act 1975, now section 45 of the Social Security Administration Act 1992, which latter section (so far as relevant) provides as follows,

> "<u>Disablement questions</u>
>
> 45. (1) In relation to industrial injuries benefit and severe disablement allowance, the 'disablement question' are questions -
>
> (a) in relation to industrial injuries benefit, whether the relevant

accident has resulted in a loss of faculty;

(b) in relation to both benefits, at what degree the extent of disablement resulting from the loss of faculty is to be assessed, and what period is to be taken into account by the assessment;

but questions relating to the aggregation of percentages of disablement resulting from different accidents are not disablement questions (and accordingly fall to be determined by an adjudication officer).

(2) Subject to and in accordance with regulations, the disablement question shall be referred to and determined -

(a) by an adjudicating medical practitioner; or

(b) by two or more adjudicating medical practitioners; or

(c) by a medical appeal tribunal; or

(d) <u>in such cases relating to severe disablement allowance as may be prescribed, by an adjudication officer</u>." (My underlining).

10. It will be seen that in relation to industrial injuries benefit it is expressly provided by section 45(1) that "questions relating to the aggregation of percentages of disablement resulting from different accidents are not disablement questions (and accordingly fall to be determined by an adjudication officer)" but there is no corresponding provision in relation to aggregation of percentages of disablement to arrive at the total of 80% disablement required as a 'passport' to severe disablement allowance (see below).

11. So far as severe disablement allowance is concerned the words I have underlined in section 45(2)(d) of the 1992 Act refer in fact to regulation 10 of the Social Security (Severe Disablement Allowance) Regulations 1984, S.I. 1984, No. 1303, which so far as relevant provides as follows,

"<u>Adjudication</u>

10. (1) For the purposes of section 68(6) (extent of disablement) of the [Social Security Contributions and Benefits Act 1992], the evidence required that on any day a person suffers or suffered from loss of physical or mental faculty such that the

assessed extent of the resulting disablement amounts or amounted to not less than 80% shall consist of -

(a)-(gg) .....

(h) evidence that the extent of his disablement on that day has been assessed for the purposes of [section 68 of the Social Security Contributions and Benefits Act 1992 relating to severe disablement allowance] as not less than 80%; or

(i) such other evidence as satisfies an adjudicating medical authority that he so suffers or suffered.

(2) For the purposes of sub-paragraphs (a) to (h) of paragraph (1) an official record of the Department of Health and Social Security of any fact specified in those sub-paragraphs shall be sufficient evidence of that fact.

.....

(3) The disablement questions in relation to severe disablement allowance shall be referred to and determined by an adjudication officer in any case where the Department of Health and Social Security has an official record as specified in paragraph (2)."

12. That means therefore that if at the time the adjudication officer gave his review decision on 16 October 1989 (set out in paragraph 2 above) the Department of Health and Social Security had "an official record" (regulation 10(3)), then the question of whether or not the medical appeal tribunal's decision of 31 August 1989 was "evidence that the extent of [the claimant's] disablement ... has been assessed ... as not less than 80%" (regulation 10(1)(h)) was for the adjudication officer and therefore rightly on appeal to the social security appeal tribunal. Regulation 10(2) defines "an official record" as being a record "of any fact specified in those sub-paragraphs" i.e. sub-paragraphs (a)-(i) of regulation 10(1). On one view, of course, the medical appeal tribunal's decision of 31 August 1989 could be said not to be such evidence because it stated the disablement to be 60% not 80%. However, in my view, the adjudication officer would be entitled to look at the contents of the medical appeal tribunal's decision to decide whether or not it was in fact "evidence" that the extent of the disablement of the claimant was not less than 80%. To decide this for himself he would have to work out whether the medical appeal tribunal had applied the correct principles in aggregating the various percentages in their award. Although the question is not

free from difficulty, I ultimately come to the conclusion that such 'working-out' was a function of the adjudication officer and therefore subsequently of the social security appeal tribunal and the Commissioner. Consequently I hold the tribunal was correct in deciding that it had jurisdiction to deal with the matter and was not in fact purporting to decide a disablement question under section 45 of the Social Security Administration Act 1992.

13. A subsidiary point as to jurisdiction arose out of a matter which I raised in a direction dated 11 August 1993, reading as follows,

> " (a) By the date the social security appeal tribunal gave its decision i.e. 16 December 1991, the decision of the medical appeal tribunal (of 31 August 1989) had been set aside by the Chief Commissioner's decision of 22 April 1991. Was it not therefore the position that the SSAT had no valid evidence of the extent of the claimant's disablement within regulation 10(1)(h) and 10(2) and (3) of the Social Security (Severe Disablement Allowance) Regulations 1984, (S.I. 1984, No. 1303)? If so, what should the SSAT's decision have been?"

14. In response to that, by a written submission dated 9 September 1993, the adjudication officer now concerned submitted,

> "At the date of the tribunal hearing (16.12.91) the decision of the medical appeal tribunal had been set aside and there was therefore no question for the tribunal to consider. It is my submission that the tribunal should not have given any decision but stated that there was no question before them to decide. The claimant should have been advised to await the decision of the further medical appeal tribunal and then if necessary appeal again."

15. In reply in written observations dated 12 January 1994, Mr Lyons stated,

> "Firstly, it is contended that, where a late appeal is admitted for hearing, the case should be considered as matters stood at the date at which the original decision was given, not as at the date on which the appeal was eventually heard. Secondly, the appeal to the SSAT was not directly against the decision of the MAT of 31.8.89, but was against an Adjudication Officer's decision dated 16.10.89. This was, technically, a decision to review (but not revise) an earlier decision refusing to award SDA. It was given in consequence of the MAT's decision but was not part of that decision. Therefore, although the MAT's decision had been set aside by the Chief Commissioner on 22.4.91, the AO's decision against which the appeal was made had not been revised, replaced or set aside in itself. It still existed as the latest decision on the issue of entitlement to SDA. In setting aside the MAT's decision, the Chief Commissioner

had no power to interfere with medical findings: his decision was confined to the process by which the tribunal reached and recorded their decision. The AO's decision of 16.10.89, which continued in existence, has no meaning unless the MAT's view of the medical questions is admitted as evidence which informed the AO's decision."

16. Having given careful consideration to this matter, I have come to the conclusion that the adjudication officer's submission on this point must be rejected and that Mr Lyons' submission is correct. There was still an extant adjudication officer's decision before the social security appeal tribunal at its hearing on 16 December 1991. The tribunal was entitled under regulation 10(1)(h) of the Severe Disablement Allowance Regulations 1984 to look at the evidence that prompted the adjudication officer to give that decision. There was no suggestion that the adjudication officer was immediately going to review or revise his decision - he would not in fact do so until a subsequent medical appeal tribunal dealt with the matter. I conclude therefore that the social security appeal tribunal were correct to go ahead and consider the question of whether or not the medical appeal tribunal of 31 August 1989 had been right in the way that it had aggregated the separate percentages of its assessment.

17. That leads me finally to the point on which this appeal was originally made, namely did the medical appeal tribunal of 21 August 1989 correctly total its individual percentages of disablement (see paragraph 4 above) to arrive at 60% or should it have rounded up all figures that were a multiple of 5% to the nearest 10% thereby giving them a total aggregate of 80% (see paragraphs 4 and 7 above)?. In my judgment the medical appeal tribunal adopted the correct approach in <u>not</u> so doing and correctly totalled the assessments to arrive at 60%. My reasons for so holding are as follows.

18. The provisions as to "rounding up" were contained in paragraph 5A of Schedule 8 to the Social Security Act 1975 but are now re-enacted in paragraph 5 of Schedule 6 to the Social Security Contributions and Benefits Act 1992. The relevant provisions of Schedule 6 to the 1992 Act read as follows:-

"SCHEDULE 6

ASSESSMENT OF EXTENT OF DISABLEMENT

<u>General provisions as to method of assessment</u>

(1) For the purposes of [section 68 of the 1982 Act relating to severe disablement allowance] the extent of disablement shall be assessed by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty in accordance with the following general principles -

(a) except as provided in paragraph (b) to (d)

below, the disabilities to be taken into account shall be all disabilities so incurred (whether or not involving loss of earning power or additional expense) to which the claimant may be expected, having regard to his physical and mental condition at the date of the assessment, to be subject during the period taken into account by the assessment as compared with a person of the same age and sex whose physical and mental condition is normal;

(b) [not relevant]

(c) the assessment shall be made without reference to the particular circumstances of the claimant other than age, sex and physical and mental conditions;

(d) the disabilities resulting from such loss of faculty as may be prescribed shall be taken as amounting to 100% disablement and other disabilities shall be assessed accordingly.

(2) .....

(3) .....

Severe disablement allowance

(4) (1) In the case of an assessment of any person's disablement for the purposes of section 68 [of the 1992 Act relating to severe disablement allowance], the period to be taken into account for any such assessment shall be the period during which that person has suffered and may be expected to continue to suffer from the relevant loss of faculty.....

(2) .....

5. (1) An assessment of any person's disablement for the purposes of section 68 above shall state the degree of disablement in the form of a percentage and shall specify the period taken into account by the assessment.

(2) For the purposes of any such assessment -

(a) a percentage which is not a whole number shall be rounded to the nearest whole number or, if it falls equally near 2 whole numbers, shall be rounded up to the higher; and

(b) a percentage between 5 and 100 which is

not a multiple of 10 shall be treated, if it is a multiple of 5, as being the next higher percentage which is a multiple of 10 and, in any other case, as being the nearest percentage which is a multiple of 10.

(3) If on the assessment the person's disablement is found to be less than 5%, that degree of disablement shall for the purposes of section 68 above be disregarded and, accordingly, the assessment shall state that he is not disabled." (My underlining).

19. Those provisions, in so far as they relate to severe disablement allowance, are made with reference to section 68(6) of the 1992 Act (formerly section 36(5) of the 1975 Act), which reads as follows,

" 68. (6) A person is disabled for the purposes of this section [relating to severe disablement allowance] if he suffers from loss of physical or mental faculty such that the extent of the resulting disablement assessed in accordance with Schedule 6 to this Act amounts to not less than 80%." (My underlining.)

20. The reference in section 68(6) of the 1992 Act is to the 80% being the extent of the resulting disablement ie the disablement that relates to the overall "loss of physical or mental faculty" of the claimant. That means, in my judgment, that it is only when the global or overall assessment of all the elements that lead to loss of physical or mental faculty on the part of the claimant has been assessed that any rounding-up is done under paragraph 5(2) of Schedule 6 to the 1992 Act. Moreover, it should be noted that, under paragraph 4 of Schedule 6, only one period of entitlement is envisaged and in the present case the medical appeal tribunal did not specify different periods of disablement for the different conditions that they found the claimant had, even though those conditions were different from one another. The conclusion that the legislation does in fact provide for no rounding-up until the global sum is arrived at also accords in my view with commonsense because for example in this case to accede to the contention made on behalf of the claimant would mean that a 60% assessment would be greatly increased to 80%. There could be even greater proportionate increases in other cases. Such a matter ought not to depend on whether or not the medical authority had 'split' into detail its overall assessment of loss of faculty.

21. At the hearing before me, Ms. Smith drew attention to the provisions of section 103(3) and (4) of the Social Security Contributions and Benefits Act 1992 relating to industrial disablement pension (formerly section 57(1A)-(1C) of the Social Security Act 1975).

22. Section 103 of the 1992 Act provides so far as relevant as follows,

> "Disablement pension [For industrial accidents etc]
>
> 103. (1) Subject to the provisions of this section, an employed earner shall be entitled to disablement pension if he suffers as the result of the relevant accident from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 14% ...
>
> (2) In the determination of the extent of an employed earner's disablement for the purposes of this section there may be added to the percentage of the disablement resulting from the relevant accident the assessed percentage of any present disablement of his -
>
> (a) which resulted from any other accident ... arising out of and in the course of his employment, being employed earner's employment, and
>
> (b) in respect of which a disablement gratuity was not paid to him after a final assessment of his disablement,
>
> (as well as any percentage which may be so added in accordance with regulations ...).
>
> (3) Subject to subsection (4) below, where the assessment of disablement is a percentage between 20 and 100 which is not a multiple of 10, it shall be treated -
>
> (a) if it is a multiple of 5, as being the next higher percentage which is a multiple of 10, and
>
> (b) if it is not a multiple of 5, as being the nearest percentage which is a multiple of 10,
>
> .....
>
> (4) Where subsection (2) above applies, subsection (3) above [rounding-up] shall have effect in relation to the aggregate percentage and not in relation to any percentage forming part of the aggregate." (My underlining.)

23. There is therefore in subsection (4) of section 103 of the 1992 Act relating to industrial disablement pension, not severe

disablement allowance, an express provision which makes it clear that only the global sum is to be rounded up under the 5 to 10 per cent rule. Mr Lyons argued that, as there was no such statutory provision in relation to severe disablement allowance, that was an indication that each element of an assessment of severe disablement allowance must be rounded up and not merely the global sum. I do not think that that contention is right. The reason why there is that provision in subsection (4) of section 103 of the 1992 Act is that these provisions (originally section 57(1A)-(1C) of the 1975 Act) were in fact inserted by the Social Security Act 1986 at the time that that Act brought in a new rule that an assessment disablement of less than 14% would normally no longer be the subject of payment of a disablement gratuity. That being so, it was natural to provide that, where there could be aggregation of disablement resulting from two or more accidents, it was not possible to carry out, so to speak, a double rounding-up. There is no need for such provision in the case of severe disablement allowance, where the question of aggregation of an uncompensated accident does not arise. No doubt it would have been helpful if a provision equivalent to that of section 103(4) had been made in paragraph 5 of Schedule 6 to the 1992 Act dealing with severe disablement allowance, but its absence does not in my view alter the general construction of that paragraph as I have explained above.

24. Consequently, I conclude that the social security appeal tribunal did in fact arrive at the correct conclusion in interpreting the evidence before it from the medical appeal tribunal as producing 60% disablement and not 80% disablement. I ought perhaps to add that as far as I can see the same rule would apply in cases of 'split' assessments of disablement for industrial injuries purposes. The special rule in section 103(4) applies only to cases of aggregating disablement from two different accidents. It should be noted that section 103(1) of the 1992 Act uses the word "resulting" in exactly the same way as, in relation to severe disablement allowance, section 68(6) uses the word "resulting". I have indicated in paragraph 20 above the importance that I attach to the word "resulting" in arriving at my conclusion that the rounding-up from 5 to 10 per cent must take place only after the global sum has been arrived at and there must be no rounding-up of any individual elements of a global sum.

(Signed) M.J. Goodman
Commissioner

(Date) 7 March 1994