(1) Role of adjudicating authorities (power to make decisions concerning contribution conditions: Adj auth to decide if which yr is relevant yr.
(2) When claimant claims late with good cause but cannot go back more than 12M (s165A) days nor incapacity for SB or IVB for earlier period e.: no continuous PIE.

MJG/RC/5

Commissioner's File: CS/83/1989

28/91

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Norah Scully (Mrs)

Appeal Tribunal: Manchester

Case No:

1. I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 11 January 1989 as that decision is not erroneous in law: Social Security Act 1975 section 101 (as amended).

2. This is an appeal to the Commissioner by the claimant, a married woman born on 5 June 1955. The appeal is against the unanimous decision of a social security appeal tribunal dated 11 January 1989 which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 10 August 1988 in the following terms,

> "[The claimant] is not entitled to sickness benefit from 27.3.86 to 19.6.87 (both dates included). This is because the claim was made on 20.6.88 (the date it was received) and no person is entitled to benefit for a period more than 12 months before the date of claim. Social Security Act 1975 sections 165A(1) and 165A(2)(b).
>
> [The claimant] is not entitled to sickness benefit from 20.6.87 to 15.9.88 (both dates included). This is because the earnings factor derived from contributions of a relevant class paid by or credited to her in the relevant year which ended on 5 April 1986 is less than 50 times the lower earnings limit for that year. (Social Security Act 1975 Schedule 3 paragraph 1(3))."

3. This appeal was the subject of two oral hearings before me. The first was in Liverpool on 24 July 1990 where the claimant was not present but was represented by her husband. The adjudication officer was represented by Mr N Butt of the Office of the Solicitor to the Departments of Health & Social Security. I adjourned that hearing because a question arose as to the impact upon this appeal of the Court of Appeal's decision in Scrivner v. Chief Adjudication Officer (3 November 1989 - Times Newspaper

Law Report of 7 November 1989, but otherwise unreported), in particular as to whether or not that decision had completely overruled the decision of a Tribunal of Commissioners in R(G) 1/82. I have ruled on that matter below (see paragraphs 14-26 ).

4. The case again came before me in London on 18 March 1991 at which the claimant was not present and neither was her husband (both of them being ill). The claimant was however represented by Mr Cassidy of the Social Services Department of Manchester Corporation. The adjudication officer was again represented by Mr N Butt. The Secretary of State was separately represented by Mr G Kent. I am indebted to all those persons for their assistance to me at the hearing.

5. The local adjudication officer's "summary of facts" to the social security appeal tribunal reads as follows,

> "[The claimant], an unemployed nursing auxiliary aged 33 made a claim for sickness benefit on self-certificate form SC1 dated 17.6.88. The SC1 was accompanied by a doctor's statement on form Med 3 dated 17.6.88 advising [the claimant] to refrain from work for 13 weeks and a doctor's special statement on form Med5 stating that the doctor had advised [the claimant] to refrain from work for 13 weeks and a doctor's special statement on form Med6 stating that the doctor had advised [the claimant] to refrain from work from 27.3.86 to 17.6.88. These documents were received at the local offices of the Department of Health and Social Security on 20.6.88. The cause of incapacity was stated to be depression and asthma.
>
> The records of the Department of Social Security show that [the claimant] was awarded and paid maternity allowance from 18.11.85 to 22.3.86.
>
> In the letter 17.6.88 which accompanied the claim for sickness benefit it was submitted that [the claimant] had good cause for her failure to make an earlier claim for the period from 27.3.86 as her state of health had prevented her from attending to benefit matters. It was further submitted that she had underlying entitlement to sickness benefit from 27.3.86 to 4.6.86 and underlying entitlement to invalidity benefit from 5.6.86 although the effect of section 165A of the Social Security Act [1975] was stated to preclude payment for any period before 17.6.87."

6. The local adjudication officer in fact decided that the claimant did have good cause for the failure to make an earlier claim for the period from 27 March 1986 because of detailed medical evidence as to the state of the claimant's health during that period. That matter was not challenged before the social security appeal tribunal. Having perused the documentary evidence on this point myself, I am satisfied that the local adjudication officer rightly decided that there was 'good cause' for the delay in making the claim in this case.

7. However, that did not mean an actual payment of sickness or invalidity benefit to the claimant. That was for two reasons. The first was that in so far as the claim was for any period more than 12 months before the date of claim (20 June 1988) payment was absolutely barred by section 165A (1) and (2) of the Social Security Act 1975 (as substituted with effect from 6 April 1987 by paragraph 87 of Schedule 10 to the Social Security Act, 1986) providing as follows,

> "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) [not relevant in this case]
>
> (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) [relates to widow's benefit - not relevant here]
>
> (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 12 months before that date."

That provision took the place of an earlier version of section 165A (introduced by section 17 of the Social Security Act 1985), which in turn replaced section 82(2) of the Social Security Act 1975 which contained a similar 12 months' bar but did not contain any reference to entitlement, simply using the phrase 'No sum shall be paid".

8. The second reason for non-payment concerned the period within the 12 months period before the claim ie from 20 June 1987 up to the date of claim on 20 June 1988. Although good cause for the delay had been shown by the claimant, nevertheless it was clear that the claimant had an insufficient contribution record for payment of sickness benefit for that period (unless it could be linked to an earlier period see below). That was reflected in detail in the latter part of the adjudication officer's decision (see paragraph 2 above).

9. The claimant however contends that the year ending on 5 April 1986 was the wrong "year" for ascertaining the claimant's contributions record. The claimant submits that there should be 'linking' of the period of incapacity due to sickness with the period of payment of maternity benefit (see the local adjudication officer's statement of facts to the tribunal cited in paragraph 5 above). That would depend on there being a single continuous "period of interruption of employment" from the start

of the payment of the maternity benefit on 18 November 1985 right through to the end of the relevant period of incapacity, namely 15 September 1988. If that contention were correct (which for the reasons set out below I have held it is not), then it is common ground again that the relevant contribution year would not be the year ended 5 April 1986 but the year ended 5 April 1984, in which the claimant had an adequate contributions record for the payment of benefit.

10. It is critical therefore to the determination of this appeal to ascertain whether in fact the contention that there was such a continuous period of interruption of employment is correct. That is because Schedule 3 to the Social Security Act 1975 (as in force at the date of claim) provides for the ascertainment of the relevant past year by the following provisions,

**SCHEDULE 3**
**CONTRIBUTION CONDITIONS FOR ENTITLEMENT TO BENEFIT**
**PART I**
**THE CONDITIONS**
**UNEMPLOYMENT AND SICKNESS BENEFIT**

**1(1) - (3) .....**
**(4) For the purposes of these conditions -**

**(a) 'the relevant time' is the day in respect of which benefit is claimed and**

(b) 'the relevant past year' is the last complete year before the beginning of the relevant benefit year; and

(c) 'the relevant benefit year' is the benefit year in which there falls the beginning of the period of interruption of employment which includes the relevant time." (my underlining).

The expression "period of interruption of employment" is not as such defined in the 1975 Act but the expression "day of interruption of employment" is defined by section 17(1)(c) of the 1975 Act as meaning "a day which is a day of unemployment or of incapacity for work".

11. Regulation 7(1)(c) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, S.I. 1983 No. 1598, as in force at the relevant dates provided,

"7(1) For the purposes of ... sickness and invalidity benefit -

(a)-(b).....

(c) A day shall not be treated as a day of incapacity for work if it is a day in respect of which a person is disqualified for receiving sickness benefit or invalidity benefit".

12. Since the period in issue in this case, that regulation has been substituted (as from 7 November 1988, by S.I. 1988 No.1674) to read as follows,

> "7(1)(c) A day shall not be treated as a day of incapacity for work in relation to a person if it is a day in respect of which that person -
>
> (i) is disqualified for receiving sickness or invalidity benefit; or
>
> (ii) has made a claim for sickness or invalidity benefit but not within the prescribed time and good cause for the delay is not shown; or
>
> (iv) has made a claim for sickness or invalidity benefit but not within the prescribed time and, whether or not the person has shown good cause for the delay, he is not entitled to benefit as a result of section 165A(2) of the Act; (my underlining).

3. However, the substituted regulation 7(1)(c)(iv) was not in force at the date of claim in this case (20 June 1988). The claimant points to the fact that regulation 7(1)(c) as then in force (see para.11 above) referred only to a person being 'disqualified' for receiving sickness or invalidity benefit and did not use the word "entitled", now used by section 165A(2) of the 1975 Act in relation to the absolute 12 months bar (see para.7 above). The claimant stresses that she was not disqualified but was disentitled to benefit for the period more than 12 months before the date of claim (under section 165A(2). Consequently, she contends that the days of disentitlement are nevertheless to be treated as days of incapacity, thus forming part of one continuous period of interruption of employment, back to the commencement of the maternity benefit period on 18 November 1985. I have rejected that contention (see paras.27-31 below).

14. I must first, however, deal with the major question which was argued at the second oral hearing before me, namely who is to decide this issue. Is to be the statutory adjudicating authorities namely the adjudication officer, social security appeal tribunal, and Social Security Commissioner or is the matter reserved for decision by the Secretary of State under section 93(1)(b) of the Social Security Act 1975 which provides as follows,

> "93(1)... Any of the following questions arising under this Act shall be determined by the Secretary of State -
>
> (a).....
>
> (b)... a question whether the contribution conditions for any benefit are satisfied, or otherwise relating to a person's contributions or his earnings factor;"

15. In reported Decision R(G) 1/82 a Tribunal of Commissioners

dealing with a not dissimilar problem held as follows (paragraphs 1 and 2 of the headnote to that case),

> "1. All matters specified in sub-paragraph (4) of paragraph 3 [the equivalent in this case of para.1(4) - see para. 10 above] of Part 1 of Schedule 3 to the 1975 Act ['the relevant time', 'the relevant past year' and 'the relevant benefit year'] are to be determined by the statutory authorities and not by the Secretary of State.
>
> 2. Where a question arises for determination by the Secretary of State the reference should be given in relation to a given tax year or years pre-determined by the statutory authority making the reference."

16. In that case the Tribunal of Commissioners was also concerned with a question of whether or not there was 'linking' of periods of interruption of employment. The factual problem there was whether or not the claimant had in fact made claims to benefit when she submitted medical statements or whether they were not true claims.

17. There is no doubt that if R(G) 1/82 were still fully applicable and not affected by the Court of Appeal's decision in the Scrivner case (see para.3 above), it would result in the approach taken by the local adjudication officer and the social security appeal tribunal in this case being correct in law. There was no dispute as to whether the claimant had or had not sufficient contributions etc. in the relevant years. The only question was which was the 'relevant past year'? Was it the year ending on 5 April 1984 or the year ending on 5 April 1986? To determine that question there had to be decided the correct length of the period of interruption of employment.

18. However in the Scrivener case, the Court of Appeal made certain observations about R(G) 1/82, which I must consider in detail. The Scrivner case concerned in essence the question whether or not, in regard to a claim for unemployment benefit, a claimant could contend that contributions by him to the Belgian insurance scheme whilst he was living in Belgium (which scheme covers unemployment benefit) could count as contributions under the British system. That gave rise to difficult issues including questions of the law of the European Economic Communities. The claimant in the Scrivner case contended before the Court of Appeal that the right person to decide such a question was not the Social Security Commissioner (from whom appeal had made) but was the Secretary of State.

19. The principal judgment on this point was given by Dillon L.J. After setting out the provisions of part 1 of Schedule 3 to the Social Security Act 1975 dealing with the contribution conditions for unemployment benefit and sickness benefit (set out in paragraph 10 above) and also setting out the relevant provisions of sections 93 and 94 of the Social Security Act 1975 ( for the provision of section 93 see paragraph 14 above; section 94 deals with rights of appeal etc.), the learned Lord Justice

said as follows (pages 6 and 7 of the transcript),

> "The appellant says that the question whether contributions to other Member States of the E.E.C. rank as contributions for the purpose of satisfying the contribution conditions for unemployment benefit in this country is quintessentially a question reserved to the Secretary of State by section 93(1)(b). One may test that by looking at the Commissioner's decision, the relevant part of which reads as follows:
>
> > 'My decision is:
> >
> > (a)...
> >
> > (b) that unemployment benefit is not payable from 7 May 1983 to 2 August 1983 (both dates inclusive) because the earnings factor derived from contributions of a relevant class paid by or credited to the claimant in the relevant year which ended on 5 April 1982 is less than 25 times the lower earning limit for that year.'
>
> One may compare that with the wording of section 93(1)(b): 'a question whether the contribution conditions for any benefit are satisfied, or otherwise relating to a person's contributions or his earnings factor'. One may look also to the two conditions as set out in Part 1 of Schedule 3, being set out, as they are, as the contribution conditions and referring as they do, and as I have read, to the earnings factor.
>
> For my part I see no answer to the appellant's point on this procedural issue. [The Commissioner] felt bound, and may indeed have been bound, by earlier decisions of Social Security Commissioners, and particularly a decision of a Tribunal of Commissioners - Mr Hilary Magnus, Mr Edwards-Jones and Mr Goodman - in Case R(G) 1/82, where the view was taken that it was much more suitable that issues of law be decided by the statutory authorities, that is to say, the adjudication officer, the appeal tribunal and the commissioner, rather than by the Secretary of State. The function of the Secretary of State, under section 93, was accordingly relegated to providing the figures when the law had been determined. For my part I cannot accept that in the face of the plain wording of the section. It follows, in my judgment, that we must allow this appeal and remit the case to the Secretary of State to follow the correct procedure."

20. At page 13 of the transcript of the Scrivner decision, Staughton L.J. said,

> "For the reasons given by Dillon L.J. I agree that the question whether Mr Scrivner has made sufficient contributions to entitle him to unemployment benefit here

is one for the Secretary of State to decide. Consequently it was not one for the adjudication officer, or on appeal from him for the Social Security Appeal Tribunal, or on appeal from that Tribunal for the Social Security Commissioner. It is somewhat surprising that Mr Scrivner should prefer the decision of the Secretary of State to that afforded by the elaborate system of Tribunals." (My underlining).

21. At page 15 of the transcript, Mann L.J. said,

"The question in this appeal is whether it is right to take into account for the purposes of unemployment benefit contributions paid by the claimant in other Member States of the E.E.C. In my judgment, like that of my Lords, this is a question solely for the Secretary of State. It appears to me to be a question falling squarely within section 93(1)(b) of the Social Security Act 1975, which I remind myself provides:

> '93(1) Subject to this Part of this Act, any of the following questions arising under this Act shall be determined by the Secretary of State.'

Amongst the following questions is - '(b) ..., a question whether the contribution conditions for any benefit are satisfied, or otherwise relating to a person's contributions or his earnings factor.'

It follows from that, that the Commissioner and those subordinate to him have no jurisdiction to entertain this matter, and on that decisive (as it seems to me) ground, the appeal must be allowed."

22. Mr Butt on behalf of the adjudication officer submitted that those judgments in the Court of Appeal were confined to the issue with which the Court of Appeal were concerned, namely whether or not Belgian contributions could constitute British contributions, under U.K. and E.E.C. law. Mr Kent for the Secretary of State submitted that the breadth of the language in the case and particularly the words of Dillon L.J. showed that the whole of the Tribunal of Commissioners' decision in R(G) 1/82 had been overruled. Consequently in the present appeal, for example, Mr. Kent contended that the question whether or not there was one entire period of interruption of employment i.e. whether the use of the word 'entitled' in section 165A of the Social Security Act 1975 was the equivalent of 'disqualified' in regulation 7(1)(c) of the above cited Unemployment Sickness and Invalidity Benefit Regulations, was entirely for the Secretary of State to determine. Mr Kent also drew attention to the fact that at the end of the transcript of the Scrivner case the exchanges between Mr Popplewell, Counsel for the adjudication officer, and the members of the Court of Appeal indicated that Mr Popplewell considered that the decision in the Scrivner, case was, to quote Mr. Popplewell, "quite wide-ranging in consequences."

23. As one of the members of the Tribunal of Commissioners in R(G) 1/82, I am aware of the detailed matters which the Tribunal was deciding in a fairly lengthy decision. The actual ratio decidendi of the Tribunal in R(G) 1/82 was as stated in paragraph 1 of the headnote (cited in paragraph 15 above), in particular the definition in paragraph 1(4)(c) of 'the relevant benefit year' as being 'the benefit year in which there falls the beginning of the period of interruption of employment which includes the relevant time". The question of what was in fact "the beginning of the period of interruption of employment" was held to be a question for decision by the statutory authorities and not by the Secretary of State. The decision of the Tribunal of Commissioners in R(G) 1/82 went no further than that.

24. It is however true that at paragraph 12 of R(G) 1/82 the Tribunal of Commissioners said,

> "In considering the intendment of section 93(1)(b) of the 1975 Act we think it material to take into consideration also that amongst the important administrative functions of the Department of Health & Social Security for which the Secretary of State is ultimately responsible is the maintenance of proper records of the contributions made by and in respect of individual contributors to the National Insurance Fund, so that ascertainment as to whether a particular contributor has or has not established a prescribed level of contributions in a stipulated period is clearly a question of particular suitability to be determined by the Secretary of State, and will not in most cases give to the character of controversies of law or fact for the resolution of which any elaborate machinery of adjudication is required."

25. In my judgment, those general remarks of the Tribunal of Commissioners in paragraph 12 of R(G) 1/82 were not essential to their decision, which was dealing with the construction of paragraph 1(4) of Schedule 3 to the 1975 Act and its relation to the remainder of the legislation. The general remarks in paragraph 12 of R(G) 1/82 appear to have been the subject of disapproval by Dillon L.J. in his judgment quoted in paragraph 19 above. In my view when Dillon L.J. said, 'for my part I cannot accept that in the face of the plain wording of the section', the word 'that' referred to what he described as the relegation by R(G) 1/82 of the function of the Secretary of State to "providing the figures when the law had been determined". Certainly the tribunal in R(G) 1/82 did not intend to go as far as that and in so far as their remarks in paragraph 12 might suggest that, they are in my judgment obiter to the decision.

26. I am fortified in this view by the fact that Staughton L.J. and Mann L.J. speak of'sufficient contributions to entitle him to unemployment benefit' (per Staughton L.J. at page 13 of the transcript) and to 'take into account for the purposes of unemployment benefit contributions paid by the claimant in other Member States of the E.E.C.' (Transcript page 15, per Mann L.J.).

27. Moreover in the Scrivner case, the Court of Appeal were not dealing with the type of case that the Tribunal of Commissioners had to deal with in R(G) 1/82, nor that I have to deal with in this case. The question whether or not Belgian contributions can count as U.K. contributions comes clearly within section 93(1)(b) of the 1975 Act as being "a question whether the contribution conditions for any benefit are satisfied, or otherwise relating to a person's contributions or his earnings factor.". For that purpose, no reference has to be made to sub paragraph (4) of paragraph 1 of Schedule 3 to the 1975 Act. Although I do not accede to Mr Butt's suggestion that the Court of Appeal's decision in the Scrivner case is confined to the facts of that case or similar facts, nevertheless I do not think that that decision covers the type of factual situation involved in R(G) 1/82 and in the present appeal. It is perhaps not without significance that to decide the question in this case, one has to interpret and apply the decision of a Tribunal of Commissioners, namely CS/174/49 (KL) - see below.

28. It follows that it is for me as Social Security Commissioner to decided the issue on which the claimant has brought her appeal, namely whether or not the days before the 12 months cut-off period imposed by section 165A(2) of the 1975 Act are 'days of incapacity' so as to constitute a continuing 'period of interruption of employment' within the meaning of section 17 of the Social Security Act 1975. I note that regulation 7(1)(c) of the 1973 regulations was amended in 1988 so as to make the point explicit (see paragraph 11 and 12 above) but I have to consider the law in force at the relevant date i.e. the date of claim on 20 June 1988. At that time the only word used was "disqualified". In my view, there are distinct legal differences between the words "disqualified" and "disentitled". Cf. Insurance Officer v. McCaffrey [1984] 1 W.L.R. 1353, H.L. Were the matter free from authority binding upon me, I would have considerable doubts whether regulation 7(1)(c) could be extended to cover a case of disentitlement as distinct from disqualification. Indeed, although Mr Butt contended on behalf of the adjudication officer that it did, Mr Cassidy on behalf of the claimant and Mr Kent on behalf of the Secretary of State contended that it did not.

29. However, I do not consider that I need to go into detail on the point because in my view I am bound by the decision of a Tribunal of Commissioners on the subject in reported decision CS/174/49 (KL). I am of course absolutely bound to follow the decision of a Tribunal of Commissioners (see the decision of a Tribunal in R(I)12/75, paragraph 21). It matters not if any of the members of that Tribunal were at that time described as Deputy Commissioners (I mention that point in deference to an argument to the contrary on behalf of the claimant). Nor does it matter that the decision is an old one if in fact the legal principle in it is still applicable. In fact the Tribunal of Commissioners in CS/174/49(KL) were considering a regulation (regulation 6(1)(c) of the National Insurance (Unemployment and Sickness Benefit) Regulations 1948, S.I. 1948 No.1277) which contained the same wording as regulation 7(1)(c) of the 1983

regulations, in the form applicable in this case (see paragraph 11 above).

30. The Tribunal stated (paragraph 4 of CS/174/49(KL),

> "Section 28(1) of the Act provides that it shall be a condition of any person's right to any benefit that he makes a claim therefor in the prescribed manner and Section 28(2) provides that regulations may provide for disqualifying a person for the receipt of any benefit if he fails to make a claim within the prescribed time. It will be observed that Regulation 6(1)(c) of the Unemployment and Sickness Benefit Regulations only applies to days in respect of which a person is disqualified for receiving benefit. Disqualification is imposed only for making a late claim. The penalty for failing to make any claim is apparently disentitlement, not disqualification. Nevertheless, we think that Regulation 6(1)(c) of the Unemployment and Sickness Benefit Regulations must be read as applicable to days for which a claimant is disentitled to benefit as well as to those for which he is disqualified for receiving benefit."

31. In my view, that ruling is directly in point and forms part of the ratio decidendi of that decision. The fact that that decision was concerned with a failure to make an appropriate claim and with the invalidity at that date of a prospective claim does not in my view alter the matter, contrary to submissions made on behalf of the claimant. In both CS/174/49(KL) and the present case what I am concerned with is a statutory disentitlement imposed in relation to a given claim. I must therefore follow the decision of the Tribunal of Commissioners in this case.

32. It follows that the days prior to the 12 months cut-off period are therefore not to be regarded as days of incapacity because regulation 7(2)(c) of the 1983 Regulations applies to them. The result is that there is no continuity of a period of interruption of employment between the end of the maternity benefit period on 22 March 1986 and the beginning thereafter of the period for which incapacity through illness was claimed. Consequently the social security appeal tribunal arrived at the correct conclusion and there was no need for a reference to the Secretary of State on the question of contributions that insufficient contributions. It was undisputed that insufficient contributions had been paid in the relevant year ending on 5 April 1986. The adjudication officer and the tribunal were correct to express their decision in that manner. Section 103(3) of the Social Security Act 1975 and regulation 21(1) of the Social Security (Adjudication) Regulations 1986 enable the statutory authorities to proceed on an assumption of the number

of contributions in a given 'year' where it is clear there is no dispute about the matter and it would be pointless to refer it to the Secretary of State.

(Signed) M.J. Goodman
**Commissioner**

(Date) **25 April 1991**