

JBP/6/MD

Commissioner's File: CS/100/88

Region: North Western

**SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR NON-CONTRIBUTORY INVALIDITY PENSION
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name:

Appeal Tribunal: Cleveland

Case No: 148/1515

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal ("the tribunal") dated 16 March 1988 is erroneous in law and is set aside. In place of the said decision I give my own decision that the claimant is entitled to severe disablement allowance from 2 April 1985 to 27 November 1985 (both dates included).

2. This is an appeal brought by the claimant with the leave of another Commissioner (leave having been refused by the tribunal chairman) against the above-mentioned decision of the tribunal which upheld the decision of the local adjudication officer issued on 22 October 1987. The latter decision was as follows:-

"The claimant is not entitled to housewife's non-contributory invalidity pension from 3.6.84 to 28.11.84 (both dates included). This is because her claim was made on 2.4.86 and no person is entitled to benefit in respect of any period more than 12 months before the date of claim. The law used to make this decision - Social Security Act 1975 sec.165A(3).

The claimant is not entitled to severe disablement allowance from 29.11.84 to 1.4.85 (both dates included). This is because the claim was made on 2.4.86 and no person is entitled to benefit in respect of any period more than 12 months before the date of claim. The law used to make this decision - Social Security Act 1975 sec.165(A)(3).

The claimant is not entitled to severe disablement allowance from 2.4.85 to 27.11.85 (both dates included) because she was born on or before 29 November and is not yet aged 50 years.

(Health and Social Security Act 1984 sec.27 and Schedule and Part II of the Health and Social Security Act 1984 (Commencement No.1) Order 1984 Article 3)."

3. I heard the appeal at an oral hearing requested by the claimant who attended and was represented by Ms F. Watson of the County of Cleveland Welfare Rights Service. The Adjudication Officer was represented by Mr. I. Sundborg of the office of the Chief Adjudication Officer. I am indebted to both representatives for their clear and able submission on an issue which, in her application for an oral hearing, Ms Watson described as

"of significant complexity". I agree with her view of the issue.

4. The claimant made a claim for severe disablement allowance ("SDA") which was accepted as having been made on 2 April 1986. As the claim was made outside the time limit prescribed in regulations it was initially decided by the adjudication officer that the claimant was not entitled to SDA from 28 November 1985 to 1 April 1986 but that decision was later over-ruled by an appeal tribunal who decided that she had had good cause for the delay in making her claim from 12 June 1984 and that she was entitled to SDA. The appeal tribunal also asked the Department to determine the precise entitlement of the claimant to SDA or any "kindred payment". Following the decision arrears were paid for the period 28 November 1985 to 28 February 1986. The significance of the date 28 November 1985 is that that was the date on which the amendment to the Social Security Act 1975, which replaced housewife's non-contributory invalidity pension ("HNCIP") with SDA, came into force in relation to persons in the present claimant's age group. I do not know the significance of the date 28 February 1986. In the course of correspondence between the claimant's representative and the local office of the Department of Health and Social Security it appears to have become accepted that the date should have been 1 April 1986. The claimant then appealed, seeking backdating of her claim for SDA to 2 April 1985.

5. Before I proceed further with the present case I think it will be helpful to set out the relevant provisions of the Social Security Act 1975 and Regulations. Section 165A of the Act, as far as relevant, provides 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 -

(i) in the prescribed manner, and

(ii) subject to subsection (2) below, within the prescribed time; or

(b) the virtue of a provision of Chapter VI of Part II of this Act or of regulations made under such a provision he is treated as making a claim for it.

(2) Regulations shall provide for extending, subject to prescribed conditions, the time within which a claim may be made in cases where it is not made within the prescribed time but good cause is shown for the delay.

(3) Notwithstanding any regulation made under this section, no person shall be entitled -

(a) to a maternity grant

(b) to a death grant.....

(c) to any other benefit (except disablement benefit, reduced earnings allowance or industrial death benefit) in respect of any period more than 12 months before the date on which the claim is made."

Regulation 14 of the Social Security (Claims and Payments) Regulations 1979 as in force at the date of the claim, so far as relevant, provides as follows:-

"14. - (1) Subject to the provisions of Schedule 2 to these regulations the prescribed time for claiming any benefit in column (1) of Schedule 1 to these regulations shall be

the appropriate time specified opposite that benefit in column (2) of that Schedule.

- (2) If in any case the claimant proves that there was good cause for the failure to make the claim before the date on which it was made, the prescribed time for making the claim shall (subject to the provisions of section 165A(3)) be extended to the date on which the claim is made:

Provided that.....

- (3) It in any case the claimant proves that -
- (a) on a date earlier than the date in which the claim was made, apart from satisfying the condition of making a claim, he was entitled to that benefit: and
 - (b) throughout the period between the earlier date and the date on which the claim was made there was good cause for delay in making such claim:

He shall not (subject to the provisions of section 165A(3)) be disentitled under section 165A(1) to any benefit to which he would have been entitled if the claim had been made on the said earlier date:-

Provided that....."

Regulation 6 of the Social Security (Severe Disablement Allowance Regulations 1984 provides:-

"6. A person who was previously been entitled to a severe disablement allowance for any day shall be entitled to such an allowance on the relevant day notwithstanding that he does not satisfy -

- (a) in the case of a person who on the earlier day satisfied the condition specified in section 36(2) of the Act, the conditions specified in subsection (2)(b) of that section; or
- (b) in the case of a person who in an earlier day satisfied the conditions specified in section 36(3) of the Act, the conditions specified in subsection (3)(b) of that section, if the relevant day and the earlier day fall within the same period of interruption of employment and if he satisfies the other requirements for entitlement to such an allowance."

[the conditions referred to in (a) and (b) above relate to capacity for work and disablement and to the period during which such incapacity or disablement has existed. The "other requirements for entitlement" mentioned above are not relevant to the present case.]

Regulation 20 of the same regulations, so are as relevant for the present purpose, provides:-

"20 -(1) ...

- (2) If in the case of any person a day and an earlier day for which he was entitled to a non-contributory invalidity pension fall within a single period of interruption of employment -
- (a) for the purposes of section 36 of the Act [which provides for SDA] he shall be deemed to be disabled on the day first mentioned whether or not he is suffering from such loss of faculty as is specified in subsection (5) of that

section; and

- (b) the condition of section 79(1) of the Act (benefit must be duly claimed) shall be deemed to be satisfied for the purposes of his right to a severe disablement allowance for the day first mentioned if, but for the passing of the 1984 Act, that condition would have been satisfied for the purposes of his right to a non-contributory invalidity pension for that day.
- (3)
- (4) A person who was entitled to a non-contributory invalidity pension for any day before 29th November 1984 shall be treated for the purposes of regulation 6 as having been entitled to a severe disablement allowance for that day."

6. The tribunal upheld the adjudication officer's decision and on the present appeal Ms Watson submits that they erred in law in failing to give an adequate statement of the reasons for their decision and in particular failing to deal with certain specific submissions made by her in putting the claimant's case before them. I do not consider it necessary to go into details of Ms Watson's criticisms of the tribunal decision because I have decided that the decision was wrong in law as regards the conclusion reached. However, I should like to add that, although the tribunal did fail to deal with certain points, they in general dealt very thoroughly with what is an extremely complex case.

7. I turn now to the case as put by Ms Watson. She argued that since 30 April 1984 the claimant has been incapacitated and disabled to an extent which would have satisfied the relevant conditions of entitlement to HNCIP. That is not disputed on behalf of the adjudication officer. She then went on to argue that since an earlier tribunal found that the claimant had good cause since 12 June 1984 for her delay in claiming SDA or "any kindred payment" that good cause still applied at the date of her present claim. Her next step was to submit that, as the claimant had good cause at the date of her present claim, that claim could be "treated as being made 12 months earlier than it was actually made i.e. March 1985". In support of that submission she relied upon regulation 14 but the submission does not follow the words of the regulation which, unlike regulation 5(2) of the Supplementary Benefit (Claims and Payments) Regulations, does not expressly refer to treating a claim as having been made on a date other than the date on which it was actually made. However, it seems to me that the application of regulation 14(3) does call for an appraisal of the entitlement of the claimant on any date, from which good cause has been shown, within the 12 months preceding the actual date of claim and that the position is thus in that respect the same as it would have been if there had been an express provision allowing the claim to be treated as made on such earlier date. Taking the earliest possible such date, that is 2 April 1985, Ms Watson submitted that at that date section 165A had not been enacted and that the law as explained by the House of Lords in INSURANCE OFFICER (APPELLANT) v McCAFFREY (A.P.) (RESPONDENT) (NORTHERN IRELAND) was therefore still applicable. The effect of the McCAFFREY decision was that the making of a claim was not essential to entitlement. On that basis, the claimant was entitled to HNCIP on 28 November 1984 (the last day for which HNCIP could be awarded). Having been entitled on that date she then, by virtue of the transitional provisions of the Severe Disablement Allowance Regulations (set out in paragraph 5 above) immediately thereafter became entitled to SDA and remained so entitled for as long as her period of interruption of employment continued although, in the absence of such earlier entitlement to HNCIP, SDA would not have been available to a person in her age group until November 1985. Thus, concluded Ms Watson, the claimant was entitled to SDA on 2 April 1985 and entitled to arrears from 2 April 1985 to 27 November 1985.

8. In answer to the above submission Mr. Sundborg argued that there was no justification for, in effect, treating the claim made on 2 April 1986 as having been made on 2 April 1985 and then considering entitlement as it would have been on the latter date. He argued that

the claimant's pre-McCaffrey entitlement should not be taken into account and that the appropriate conclusion as to the claimant's entitlement on 2 April 1985 was that, as SDA did not exist for a person in the claimant's age group at that date, she could not be regarded as entitled to it as that date.

9. In reply to Mr. Sundborg's submission Ms Watson submitted that acceptance of his view would amount to giving section 165A a retrospective effect which it did not have and had been held not to have in paragraph 14 of Decision R(S) 1/86. I agree with that submission and with her submission as mentioned in paragraph 7 above and I therefore must reject Mr. Sundborg's submission.

10. It follows that I must set the tribunal aside as erroneous in law. It is therefore open to me either to remit the case for re-determination by a differently constituted tribunal or, as I can do so without making any further findings of fact, to give the decision that the tribunal should have given.

11. For the foregoing reasons the appeal is allowed and my decision is as set forth in paragraph 1 above.

(Signed) J.N.B. Penny
Commissioner

Date: 17 April 1989