Invalidity benefit – increase for dependent children – whether SB is contributed by claimant or by an outside agency to maintenance of children.

TOC/2/LM

Commissioner's File: CS/130/87

Region: Midlands

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR INVALIDITY BENEFIT

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: Peter Graham Beck

Appeal Tribunal: West Bromwich

Case No: 6/2

[ORAL HEARING]

1. This claimant's appeal succeeds. Our decision is that increase of invalidity benefit is payable from 7 October 1985 to 5 April 1986 and from 24 May 1986 to 23 March 1987 (all dates included). The claimant and the adjudication officer are to be at liberty to apply in the event of dispute in carrying out the terms of this decision.

2. The Chief Commissioner directed that this appeal be taken by a Tribunal of Commissioners and it was the subject of an oral hearing before us on 23 and 24 January 1989. Mr Parke of the Solicitor's Office of the Department of Social Security represented the adjudication officer and Mr Mark Rowland, instructed by the Treasury Solicitor, appeared as amicus to the Commissioners. The claimant neither appeared nor was represented at the actual hearing of the appeal. The Sandwell Citizens Advice Bureaux, who act for him, decided that it was unnecessary for them to present oral argument before us.

3. This is a claimant's appeal against the decision of the West Bromwich social security appeal tribunal given on 9 February 1987 which confirmed a decision of the adjudication officer, issued on 15 January 1986, that an increase of invalidity benefit was not payable in respect of James and Louise because the claimant was not entitled to child benefit for them and could not be treated as so entitled. The appeal to us is on both fact and law and is by way of rehearing.

4. The issue in this appeal is whether the claimant satisfies the conditions relating to maintenance in regulation 2(1) of the Social Security Benefit (Dependency) Regulations 1977. The answer to that question depends on whether supplementary benefit is to be treated as a contribution by the member of the family who receives it, or as a contribution from an outside agency. It is only when that issue has been resolved that it can be decided whether or not the claimant is to be treated as if he were entitled to child benefit.

5. Section 41 of the Social Security Act 1975 provides for increases of benefit in respect of beneficiary's dependent children. Invalidity benefit is one of the benefits to which the additions apply. It is payable where the beneficiary is entitled to child benefit in respect of a child or children. Regulation 4A of the Social Security Benefit (Dependency) Regulations 1977 however provides for circumstances in which a person, who is not entitled to child benefit, is to be treated as if he were so entitled for the purpose of section 41. The material part of the regulation reads as follows:

"4A(1) For the purposes of ..... section 41 ... (increase of benefit in respect of dependent children and female persons having care of dependent children) a person shall be treated as if he were entitled to child benefit in respect of a child for any period throughout which -

(a) child benefit has been awarded to a parent of that child with whom that child is living and with whom that person is residing and either -

i the child is being wholly or mainly maintained by that person; or

ii that person is also a parent of the child; or

(b) ....."

One of the circumstances in which a person, who is not entitled to child benefit, is to be treated as if he were so entitled depends upon the child being wholly or mainly maintained by that person, and regulation 2 of the same regulations provides for what a claimant must do in order to establish that he is so maintaining a child. Regulation 2(1) is material to the case before us and it reads as follows

"2.-(1) Subject to paragraph (2), a beneficiary shall not for the purposes of the Act be deemed to be wholly or mainly maintaining another person unless the beneficiary -

(a) when unemployed, or incapable of work, or, as the case may be, retired from regular employment, contributes towards the maintenance of that person an amount not less than the amount of increase of benefit received in respect of that person; and

(b) when in employment, or not incapable of work, or, as the case may be, not so retired (except in a case where the dependency did not arise until after that time) contributed more than half of the actual cost of maintenance of that person."

6. The claimant was born in 1946. He lives with a lady to whom he is not married. She is a widow. There is nothing on the case papers to show when this cohabitation commenced, but it existed for some considerable time prior to his making the claim for the increase in respect of James and Louise. James and Louise, the children of the lady and her deceased husband, reside with the claimant and the lady, as does a younger child of their own union. The claimant last worked in 1980. He has had a long history of illness and has been in receipt of supplementary benefit and invalidity benefit at various periods since 3 June 1977. During the periods when he did not receive these benefits he was in receipt of unemployment benefit or supplementary benefit. In October 1985 he was certified to be incapable of work for twelve months. He claimed invalidity benefit on 7 October 1985. He completed a form claiming an increase in respect of the lady and the three children on 26 October 1985, and this was received by the Department of Health and Social Security on 29 October 1985. Prior to 7 October 1985 the claimant was not working and was in receipt of supplementary benefit because his entitlement to unemployment benefit was exhausted. He received £65.40 by way of supplementary benefit of which £15.00 was in respect of James and Louise. The family income consisted of this and the child benefit paid to the lady in respect of the children. The claimant contributed all his benefit towards the support of the family less an amount of approximately £3.00 a week, which he used to buy cigarettes. After 7 October 1985, when he was in receipt of invalidity benefit, he was receiving £69.95.

7. The claim for an increase of invalidity benefit in respect of James and Louise was referred to the adjudication officer who disallowed the claim on 10 January 1986. His decision was issued to the claimant on 15 January 1986. The adjudication officer decided

that benefit was not payable for James and Louise from 7 October 1985 to 5 April 1986, because the claimant was not entitled to child benefit for them and could not be treated, as so entitled because the children were living with a parent who had been awarded child benefit in respect of them, who resided with the claimant and the claimant was not wholly or mainly maintaining the children. The claimant appealed, and also the adjudication officer then referred to the tribunal for decision the question of whether an increase of invalidity benefit was payable for the children for the period 24 May 1986 to 23 March 1987.

8. The tribunal heard both the appeal and the reference on 9 February 1987. The claimant was not present, and the members of the tribunal accepted the accuracy of the summary of facts placed before them by the adjudication officer. The tribunal found that the children were residing with the claimant and that he had only to show that he was wholly or mainly maintaining them in order to be treated as entitled to child benefit. They referred to regulation 2(1) of the Social Security Benefit (Dependency) Regulations, and stated that the claimant had to show that during the period before he became incapable of work he was contributing more than half the actual cost of maintaining the children, and they further stated that he also had to satisfy the further test of continuing to contribute at least the amount of increase of benefit received in respect of them. The members of the tribunal had regard to R(S) 12/83, and referred to the passage therein where the Commissioner relied on R(I) 1/57 as authority for the proposition that the family fund method of assessing the contribution of one person to the maintenance of another should apply unless there were wholly exceptional circumstances. They also had regard to what was said in the same decision as to non-contributory benefits, and supplementary benefit in particular, namely that it must be regarded as being contributed by outsiders. They found as fact that prior to receiving invalidity benefit the claimant was in receipt of supplementary benefit until 7 October 1985, and concluded that he could therefore not satisfy regulation 2(1). The tribunal dealt with the question referred to them by stating that, although there was a gap in certification of invalidity, the periods were linked together by the linking rule because the gap did not exceed eight weeks. They found that the second period was joined to the first one, with the result that an increase in benefit could not be paid for James and Louise during the period referred to them.

9. Mr Parke accepts that the family had two sources of income only and that the greater part thereof was the supplementary benefit received by the claimant. He argues that such supplementary benefit is not a contribution from the claimant to the family income, but is provided by an outside agency. He concedes that if supplementary benefit is not to be regarded as being provided by an outside agency, then the claimant must succeed; if however it is to be attributed to the State the appeal fails. He says that in cases where there is a large family, it may be necessary to make the calculations which form part of the family fund test, but in a case such as the instant one, where the greater maintenance comes from an outside agency, it is unnecessary so to do. He says that the family fund test is one of long standing and that it is beneficial in its application but he accepts that some of the stages in the test may require alteration in the light of modern conditions. Mr Rowland, in a helpful submission, dealt with the history of the family fund test in great depth, and drew our attention to the case law by which the test evolved. He argues that the case before us was not really a family fund case and he points to the fact that the income of the family consisted only of two varieties of benefit. He submits that two issues arise on the application of regulation 2(1). First what date does a tribunal look at in order to ascertain when the beneficiary is to be deemed to be wholly or mainly maintaining another person, and second who is to be regarded as maintaining such a person where the beneficiary is in receipt of supplementary benefit.

10. It is common case that child benefit had been awarded for James and Louise to the lady with whom the claimant was residing and that he is not the parent of either of those children. Consequently it is necessary that we should be satisfied that the children were wholly or mainly maintained by him, if he is to come within regulation 4A(1)(a) and to be treated as if he is entitled to child benefit. James and Louise were undoubtedly being

wholly or mainly maintained by the claimant out of his supplementary benefit unless either of the conditions specified in regulation 2(1) were not satisfied. It was held in decision CS/58/49 (KL) that where a person was incapable of work but received no increase for the dependant he satisfied sub paragraph (a). The Commissioner in R(S) 12/83 discussed this decision in the following paragraph

> "It was held in Decision CS 58/49 (KL) (paragraph 6) that a person who was incapable of work and received no increase for the dependant in question satisfied sub-paragraph (a) seemingly because there would be nothing to contribute. But it was held also (see paragraph 7) that as the regulation is in the "shall not.....unless" form and not a "shall.....if" form it was not to be inferred from it that a person who complied with sub-paragraph (a) automatically fell to be regarded as wholly or mainly maintaining that person. He still has to establish affirmatively that he can be regarded as wholly or mainly maintaining that person, that is to say that he was contributing more than half the cost of the maintenance. I have, therefore, in this case to ascertain whether on the application of the family fund test the claimant here was at the material time contributing more than half the cost of the maintenance of J, A and B."

Applying that test to the case before us the claimant satisfied regulation 2(1)(a) because he did not have an increase of benefit to contribute on 7 October 1985, as at that time he was not in receipt of invalidity benefit. There was no increase of benefit received in respect of either James or Louise. However the claimant has to establish that he satisfies the test under paragraph (b).

11. The question arises as to what period we must have regard to when we consider whether the claimant satisfied regulation 2(1)(b). We have borne in mind the part of Mr Rowland's address which dealt with this question, but we are satisfied that the crucial date for determination is the period immediately prior to the claimant becoming incapable of work. It is that happening which gave rise to the claim for an increase for James and Louise. Consequently we looked to the time immediately before the claimant became incapable of work and not to the period when he was last in employment as Mr Rowland would have us do.

12. We now turn to the test to be applied when making a finding whether or not the claimant had contributed more than half of the actual cost of the maintenance of James and Louise and thereby satisfies the condition specified in regulation 2(1)(b). This brings us to the family fund test. The question of whether one person maintains another, or partially maintains him, is a question of fact; and always has been, both for the purposes of the Workmen's Compensation Acts in their day and for that of social security legislation later. However where a family is supported by money contributed by its different members, and indeed from other sources, this issue of fact can become complicated. The courts and later the umpires and Commissioners developed a body of case law establishing a set of tests as an aid to calculating individual dependency in such cases. The tests were first propounded by the judges when deciding dependency issues under the Workmen's Compensation Acts. Later they were adopted by the umpires for the purposes of the Unemployment Insurance Acts and by the Commissioners after the coming into force of the National Insurance Acts. The family fund principles are recognised and used by the statutory adjudicating authorities when considering maintenance questions arising under the Social Security Act 1975. We do not find it necessary to deal with the massive bulk of authority which established the family fund test, suffice it to say that it has been considered to be settled law for a very long time, and that the family fund method of assessing the contribution of one person to the maintenance of another is to be used except where there are wholly exceptional circumstances. In our judgment the question of fact before us is to be dealt with by applying the family fund principle, and we in no way seek to assail the concept. However it is true to say that some of the tests making up the whole are out moded and need to take account of social conditions at the end of the twentieth century; for example the test which

was developed in the first half of this century that each member of the household aged fourteen or over counts as one unit and each member aged less counts as one half unit. However that is not a matter which requires decision in the case before us.

13. The members of the household in the present case were the claimant, the lady and the three children. The weekly income of the household was the money coming from the claimant and the child benefit received by the wife. As we have said earlier the case turns on whether the claimant's income is to be attributed to him or is to be regarded as contributed by an outside agency. The question of how to treat non-contributory benefits has been considered in a number of decisions. R(S) 22/52 was an early case. It was decided by a single Commissioner. A claimant had been in hospital for two years and there was no prospect of his discharge within a further six months and his wife was being maintained by his sickness benefit, her own earnings and a national assistance grant. It was contended on behalf of the claimant that the national assistance grant should be treated as a contribution by him to his wife's maintenance. It was held that the grant was a contribution by someone outside the family, and that an agency outside the family had contributed towards the wife's maintenance and this could not be treated as a contribution by the husband. A different iew was taken by a Tribunal of Commissioners in R(I) 1/57. The main point in that case oncerned the allocation of a constant attendance allowance, and the case was decided on the basis that this allowance should be treated as a contribution to the fund by the recipient of the allowance. However the claimant's mother was in receipt of national assistance and the tribunal stated as follows in paragraph 21 of the decision:

> "21. Though for the reasons above stated the matter does not now arise, we think it desirable to add that, in our view, the 8s 6d a week granted by the National Assistance Board to the grandmother (the claimant's mother) should be regarded as part of her contribution to the family fund, since she allowed it to be used in that fund, and that it is not right to regard it as not contributed by any member of the family. We feel unable to agree with the reasoning of Decision C.S.I. 14/54 (not reported). The reasoning of that decision should, therefore, be regarded as overruled, though the conclusion reached in the decision was, in our view, correct."

This passage was considered by the Commissioner in R(S) 2/85, who held that, for the purpose of the family fund test, supplementary benefit falls to be treated as a contribution from an outside agency, and he declined to follow it on the ground that it was obiter and the Tribunal of Commissioners had made no comment at all upon R(S) 22/52. It may be that what was said in that passage was obiter dicta in the sense that it was not necessary for the determination of that case. However we would regard what was said as strong persuasive authority in that it was the dicta of three experienced Commissioners, [Sir David Davies, Sir Archibald Safford and Mr Shewan] who were giving guidance on what was a live issue in many cases at that time.

14. In R(I) 8/65 the facts were that the claimant lived with her five children, three of whom were wage earners and two of whom were at school. She was in receipt of a national assistance payment for herself and the two children at school. One of the wage earning children received a fatal injury in an industrial accident, and in order to determine whether, under the family fund principle, the deceased had been maintaining the claimant to a substantial extent, it was necessary to decide how the national assistance payment should be dealt with. It was held by the Commissioner that part of the national assistance payment must be regarded as a contribution by the claimant to the family fund. The question was dealt with by the Commissioner in paragraph 11 of the decision when he said as follows:

> "I have decided to accept the submission of the insurance officer that a part of the national assistance payment of £5 11s 0d should be regarded as an additional contribution by the claimant to the family fund. Clearly a part of the £5 11s 0d was being paid for the maintenance of the claimant and must in my view be taken into consideration when deciding the issue of whether the claimant was being maintained

by the deceased to a substantial extent. It may well be that the claimant put the £5 11s 0d into the common fund consisting of her own earnings, and the contributions made by the wage earning children, and used the total amount for the upkeep of the household without specifically ear-marking any particular portion for herself. The fact remains, however, that she was obtaining national assistance for her own maintenance and she was entitled to use it for that purpose. A portion of the £5 11s 0d must therefore be regarded as a contribution by her to the family fund."

The Commissioner in R(S) 2/85 had regard to what was said there but did not follow it because no reference had been made to R(S) 22/52. In decision number CI/266/50 a payment from the National Assistance Board was regarded as a contribution to the family fund for the purpose of calculation. Two recent cases have been cited to us, R(S) 12/83 and R(S) 2/85. The facts in the earlier of these cases were that the claimant lived with a woman W and her four children, of whom he was the father only of the youngest. He claimed an increase of benefit for all of the children, but his claim was disallowed in respect of the three eldest on the ground that he was not wholly or mainly maintaining them as required by regulation 6(1)(a) of the Social Security Benefit (Dependency) Regulations. The insurance officer reached this decision on the basis that child benefit, which was payable to W for all of the children, should be treated for the purpose of the family fund test as ear-marked for the children in respect of whom it was paid. The Commissioner held that child benefit should not be treated for purposes of the family fund test as ear-marked for the children in respect of whom it is paid; a proposition with which we agree. He considered the history of the family fund and set out in paragraph 10 of the decision a useful summary of the series of steps or stages in the test. In the course of the decision the Commissioner expressed a view as to non-contributory benefits. He stated as follows

"Contributory benefits are regarded as provided by the person whose contributions gave title to the benefit (see Decision C.P. 96/50 (KL)) where it was held that a pension payable to a wife on her husband's contributions was to be regarded as contributed to the family fund by her husband. The position of non-contributory benefits and supplementary benefit and the like is more complex. I think it right to say that prima facie such benefits must be regarded as being contributed by outsiders, but there are exceptions to this."

That passage was of course obiter dicta.

15. The strongest support for the view expressed by Mr Parke is to be drawn from R(S) 2/85. The facts in that case were that the claimant lived with a woman and her three children. He was not the father of any of these children but sought an increase of benefit on the ground that he was maintaining them. Prior to his incapacity for work he was unemployed but having exhausted his unemployment benefit was in receipt of supplementary benefit. It was held by the Commissioner that where a household is being maintained wholly by supplementary benefit a person cannot be said to be maintaining that household simply by virtue of the fact that he is the person to whom the supplementary benefit is payable as head of the assessment unit. The Commissioner said at paragraph 7:

"The principles are not, as I have already indicated, susceptible of much elaboration. They are largely a matter of first impression. There is a calvinistic rigour about the identification of the contributors to the family fund. A man is not to reap what he has not sown. Supplementary benefit is a gratuitous harvest. I cannot usefully carry this limb of the argument any further."

And at paragraph 12 he said as follows

"I come back to what I said in paragraph 7 above. The matter is very much one of first impression. Whatever approach may or may not be right when one is considering the position of a member of the household other than the person who is alleged to have

been "wholly or mainly" maintaining someone else, I cannot see how, where a household is being maintained wholly by supplementary benefit, a person can be said to be maintaining that household, or any member thereof, simply by virtue of the fact that he (or she) is the person to whom the supplementary benefit is payable. The house is being maintained by the State. The concept of maintenance must import that the person or persons being maintained will suffer financial detriment if the maintaining party disappears from the scene. There is no such detriment if all that happens is that someone else becomes "head" of the relevant assessment unit - and the computation of the supplementary benefit is adjusted accordingly. I am firmly of the view that, for the purposes of the family fund test, supplementary benefit falls to be treated as a contribution from an outside agency."

For the reasons, which we have indicated earlier in paragraph 13, we prefer the principle of law which was stated in paragraph 21 of R(I) 1/57 to that enunciated in R(S) 22/52, and in this respect we differ from the learned Commissioner. It must also be borne in mind that the case where we have to apply the law relates to a payment of supplementary benefit, as did the case before the Commissioner, and not to a payment granted by way of national assistance. The family fund test is not a rigid test, it is a method of dealing with fact where a family lives as a community, and must take account of the changes in the nature of the benefit from which a contribution is made. In our judgment it was necessary for the Commissioner in R(S) 2/85 to contrast the grant under national assistance with the payment made by way of supplementary benefit. The Supplementary Benefit Act 1966 provided for a right to benefit in the circumstances set out in the Act. Likewise in the Supplementary Benefit Act 1976 section 1 provided for a right to supplementary benefit and it was under this Act that the claimant was paid supplementary benefit. We emphasise that there is a right. A claimant is paid the benefit, it is true that additions are paid in respect of other members of the assessment unit, but there is nothing in the Act or the regulations made thereunder to give a right to such additions to the members of the assessment unit; the right is vested in the claimant, his decision to devote the amount to their maintenance is voluntary. Again there is nothing in the Act which would allow of the recovery of expenditure on supplementary benefits from a person such as the present claimant. He is not a person who has a liability to maintain the lady and James and Louise under section 17 of the Supplementary Benefit Act 1976; and even if he were, the situation envisaged by section 18(1) of the Act does not apply. In these circumstances it seems to us that supplementary benefit is to be attributed to a recipient and is to be regarded as being contributed by him, where in fact he does contribute the amount of his supplementary benefit to the upkeep of the family, as happened in the instant case. This is the point upon

which the instant case turns, and on the basis of our conclusion as to the nature of supplementary benefit we are satisfied on the facts that the claimant contributed more than half of the actual cost of the maintenance of James and Louise.

(Signed) V G H Hallett
Commissioner

(Signed) J G Mitchell
Commissioner

(Signed) J J Skinner
Commissioner

Date: 14 February 1989