

Reconsideration Success Benefit Claim CPAG
Byron 2 cases + 12 months



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JMe/1/MD

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Commissioner's File: CS/162/1991

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR SUPPLEMENTARY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Gloucester social security appeal tribunal dated 15 January 1991 is erroneous in point of law, for the reasons given below, and I set it aside. I consider it expedient to make further findings of fact and to give the decision in the claimant's case, which is set out in paragraph 2 (Social Security Administration Act 1992, section 23(7)(a)(ii)).

2. My decision is that the adjudication officer's decision disallowing sickness benefit from 21 February 1983 to an unknown date (which is to be treated as a decision disallowing all subsequent claims for sickness benefit up to that covering 28 August 1990) falls to be reviewed on the ground of a relevant change of circumstances (Social Security Act 1975, section 104(1)(b)). My revised decision on review is that sickness benefit followed by invalidity benefit is payable to the claimant from 5 April 1983 to 28 August 1990 (both dates included) because from 5 April 1983 he satisfies all the conditions for payment of those benefits including (by virtue of section 50A of the Social Security Act 1975) the contribution conditions. Payment of benefit under this revised decision is not precluded by regulation 65(1) of the Social Security (Adjudication) Regulations 1986 because the claimant has proved that there was continuous good cause from 5 April 1983 to the date of application for review (16 October 1989) for the delay in making the application and he falls within regulation 65(3)(b) of those Regulations. Any non-contributory invalidity pension or severe disablement allowance already paid to the claimant for the period from 5 April 1983 to 28 August 1990 (both dates included) is to be offset against the amounts of sickness benefit and invalidity benefit awarded by this decision (Social Security (Overlapping Benefits) Regulations 1974, regulation 4 and Social Security (Payments on account, Overpayments and Recovery) Regulations

1988, regulation 5). I leave it to the adjudication officer to calculate the amount of net arrears of benefit payable to the claimant. If there is any dispute as to the result of that calculation the matter is to be returned to the Commissioner for further decision.

The background

3. On 3 March 1983 the claimant submitted a claim for sickness benefit on form SC1. He was at that time self-employed. The claim was disallowed from 21 February 1983 because he had not paid or been credited with sufficient national insurance contributions in the tax year 1981-1982. He continued to submit medical evidence to the Department and on 9 August 1983 submitted a claim for non-contributory invalidity pension on form BF400. Pension was awarded from 5 September 1983 and continued in payment, succeeded by severe disablement allowance, until 28 August 1990.

4. On 16 October 1989 the claimant telephoned the Department to state that he considered that he should have been entitled to invalidity benefit because his incapacity for work was a result of an industrial accident. He had discovered the legal provision relating to this point on reading a Penguin Guide to the Law. Following investigation, it was accepted by the adjudication officer that the claimant had suffered an industrial accident on 19 November 1971 and that the resulting loss of faculty had materially contributed to his incapacity for work. The claimant's incapacity for work from 21 February 1983 onwards appears never to have been in doubt.

5. The adjudication officer then apparently awarded invalidity benefit from 29 August 1990 onwards and on 25 September 1990 issued the decision set out on the first page of the AT2 submission to the appeal tribunal. That decision was in essence that the decision disallowing sickness benefit from and including 21 February 1983 was reviewed on the ground of relevant change of circumstances (the claim that the incapacity was due to an industrial accident) and that sickness benefit was from 5 April 1983 not disallowed for the original reasons, but that the claimant was not entitled to sickness or invalidity benefit from 5 April 1983 to 15 October 1988 because that period was more than 12 months before the date of his claim (Social Security Act 1975, Section 165A(1)).

6. The claimant appealed. He attended the hearing before the appeal tribunal on 15 January 1991 and was represented by Mrs Ritchings of the Citizens Advice Bureau. The written submission on behalf of the adjudication officer supported the decision of 25 September 1990 and the same view was, as far as one can tell from the chairman's note of evidence, put forward by the presenting officer at the hearing.

The appeal tribunal's decision

7. The appeal tribunal dismissed the claimant's appeal and decided that he was not entitled to sickness or invalidity benefit from 5 April 1983 to 15 October 1988. In its reasons,

it recorded that there was no automatic review of existing decisions on the introduction of section 50A of the Social Security Act 1975, so that the only procedure open to the claimant was to submit a fresh claim, which, because of ignorance of his rights, he did not do until 1989.

8. The claimant applied for leave to appeal to the Commissioner, which was initially refused by the appeal tribunal chairman, but granted by a Commissioner on 23 July 1991.

Was the appeal tribunal's decision erroneous in point of law?

9. Plainly it was. The adjudication officer now concerned with the appeal in the submission dated 23 September 1991 supports the claimant's appeal on the basis that the appeal tribunal failed to state adequate reasons for its decision. I would agree that even if the adjudication officer's approach had been correct, the appeal tribunal failed to give adequate reasons why it adopted the same approach. However, that approach was fundamentally flawed in that it confused the review and revision of a previous decision or decisions with a claim for benefit for a period earlier than the date of the claim. As a result, the appeal tribunal's decision rests on an incoherent legal basis and is erroneous in point of law for that reason. Therefore, the decision dated 15 January 1991 must be set aside.

The Commissioner's further powers

10. The next question is whether I should refer the case to another appeal tribunal with directions for its determination or make further findings of fact (since on any basis those of the appeal tribunal of 15 January 1991 were inadequate) and give the decision on the claimant's case myself. There have already been two directions by a nominated officer requesting further submissions from the adjudication officer. On the view which I have formed of the complex legal issues raised by this case, the crucial period so far as the facts are concerned is that from 21 February 1983 to 5 September 1983. Virtually all the documents with dates prior to 23 September 1985 have been destroyed under normal procedures (see the Secretary of State's certificate dated 2 November 1990: page T31 in the papers before me). All that appears to survive is the non-contributory invalidity pension claim of 9 August 1983 and a clarifying letter. Therefore, an appeal tribunal would be in no better position than I am in dealing with the facts in the crucial period. So far as later periods are concerned, either the essential facts are not in dispute or the questions to be resolved are primarily ones of law. Therefore, I have decided that the expedient course is for me to make the necessary further findings of fact and to give the decision on the claimant's case.

The Commissioner's decision on the case

11. I adopt paragraphs 3 to 5 above as findings of fact, setting out the basic history of the claim. In addition, I accept two matters which appear not to be in dispute. The first is that the claimant has since 21 February 1983 been incapable of work which he could reasonably be expected to do and has remained incapable at least until 28 August 1990. Such a finding is implicit in the

award of non-contributory invalidity pension (NCIP) from 5 September 1983. The second is that the claimant had good cause for the delay in making his application of 16 October 1989. This was conceded by the adjudication officer in paragraph 5 of box 6 of the written submission on form AT2. In view of the technical nature of the change brought about by the implementation of section 50A of the Social Security Act 1975, I am content to accept that a reasonable person in the claimant's position would not have realised that there was any potential entitlement to inquire about and that there was good cause, without any further discussion of the principles involved.

12. It is convenient to deal with other matters as far as possible chronologically. The start is the claim for sickness benefit on 3 March 1983. It is clear from the document at page T3 that the claimant submitted a doctor's statement of incapacity with the form SC1. At the time regulation 11(1) of the Social Security (Claims and Payments) Regulations 1979 provided -

- (1) Subject to the following paragraphs, where a medical certificate has been issued in respect of the person named therein ("the claimant") -
 - (a) a claim for sickness benefit, invalidity or injury benefit or non-contributory invalidity pension based on the medical certificate shall, unless in any case the Secretary of State otherwise directs, be treated as if made by the claimant for the period specified in that certificate;
 - (b) on any such claim the benefit may be awarded for the whole or part of that period after the date of claim but not exceeding 13 weeks or such shorter periods as the Secretary of State may in a particular case direct;
 - (c) if on any such claim the benefit is awarded for part only of the period in respect of which the claim is treated as if made, further decisions in accordance with paragraph (1)(b) awarding such benefit may be given on the same claim."

By virtue of paragraph (6)(a) a medical certificate included a doctor's statement in the prescribed form. The doctor's certificate submitted with the claim in this case does not survive. It may be that there is some Departmental record of the period it covered, but I do not propose to delay further to make inquiries. Since the first surviving statement on form Med 3 dated 23 September 1985, was for four weeks and appears to be part of a settled pattern, I find that it is most probable that the first statement was for four weeks, and so were the statements that the claimant continued to submit up to and beyond the NCIP claim.

13. In accordance with regulation 11(1) the first claim was for

four weeks from 21 February 1983 and the adjudication officer's disallowance was for four weeks. That conclusion is in line with the principles set out in many Commissioners' decisions, in particular R(S)5/80 and R(S)14/81. The disallowance appears to have been on the ground that the contribution condition in paragraph 1(3) of Schedule 3 to the Social Security Act 1975 was not satisfied. In those circumstances, regulation 11(3) of the Social Security (Claims and Payments) Regulations 1979 applied -

"(3) Where a claim for sickness benefit is disallowed on the grounds that -

- (a) the contribution condition in paragraph 1(2) of Schedule 3 to the Act is not satisfied; or
- (b) although that contribution condition is satisfied, neither the contribution condition in paragraph 1(3) of the said Schedule 3 nor the requirements of regulations made under section 33(2) (partial satisfaction of contribution conditions) are satisfied;

the decision disallowing the claim shall, subject to the provisions of section 104 (review of decisions), be treated as a decision disallowing any further claim within the meaning of paragraph 3(c) of column (1) of Schedule 1 to these regulations by that person for that benefit until the grounds for the original disallowance have ceased to exist."

Regulation 11(3) is mandatory, so that in this case the adjudication officer's decision disallowing sickness benefit from 21 February 1983 operated as a disallowance of continuation claims for sickness benefit.

14. It is accepted that the claimant submitted further doctor's statements. On the reverse of the side filled in by the doctor on form Med 3 is a form to be signed by the claimant. The note to the patient says "To continue a claim for State benefit fill in Parts A and C of the form overleaf ... To start your claim for State benefit you must use form SC1 (Rev)." Part C contains some declarations and the words "I claim benefit". On all the surviving Med 3s the claimant, or someone on his behalf, has signed Part C. I find that he did so also on all the Med 3s which have been destroyed. The result is the claimant claimed sickness benefit for the period specified in the doctor's statement, at least until the NCIP claim was made, when each Med 3 was submitted. Each claim was disallowed by virtue of the decision disallowing sickness benefit from 21 February 1983 and the operation of regulation 11(3) of the Social Security (Claims and Payments) Regulations 1979.

15. Did that situation alter when the NCIP claim was made and NCIP was awarded from 5 September 1983? Regulation 11(1) of the Social Security (Claims and Payments) Regulations 1979 applied to NCIP, so that each Med 3 would operate as a claim for NCIP for the period specified in the doctor's statement. Does that mean

that once NCIP was awarded, the words "I claim benefit" were restricted to the particular benefit awarded on the last claim? In my judgment, the wide and unqualified words do not carry that restricted meaning. They are capable of meaning in effect, "I claim any state benefit based on incapacity for work" and in my view that is the natural reading of the words. There is nothing to indicate that the claim is to be restricted to one benefit only. In this case I conclude that after 5 September 1983 the claims made on Med 3 constituted claims for both sickness benefit and NCIP (succeeded by severe disablement allowance). My conclusion is consistent with paragraph 4 of the submission dated 29 July 1992 by the adjudication officer now concerned with the appeal. That reads -

"In the adjudication officer's summary of facts (page 35) he refers to the claim for Sickness Benefit made on 3.3.83. The claimant was disallowed sickness benefit but continued to submit medical evidence up to and beyond 9.8.1983, the date of his claim for Non-contributory Invalidity Benefit. I submit therefore that the question of entitlement to Sickness Benefit had already been decided by the adjudication officer and that the disallowance continued to apply to subsequent continuation claims made on medical statements."

The claims for NCIP and severe disablement allowance were allowed. The claims for sickness benefit continued to be disallowed as explained at the end of paragraph 14.

16. That remained the position until the claimant made his application of 16 October 1989, and for some time afterwards while investigations proceeded. By this time the doctor was issuing six months statements. I consider that the application must be treated as an application for review of the decision disallowing sickness benefit from 23 February 1983 in its effect on later claims for sickness benefit. Since I have held that claims for sickness benefit had been made continuously throughout the period under consideration there can be no question of treating the application as a late claim for that period. The question is therefore whether a ground for review under section 104 of the Social Security Act 1975 has been proved.

17. There is no suggestion that the decision was incorrect when it was made, or that it was made in ignorance of or under a mistake as to a material fact. A change in legislation may be a relevant change of circumstances within section 104(1)(b) of the Social Security Act 1975 (R(A)4/81). I conclude that the amendment of the Social Security Act 1975 on 5 April 1983 to include section 50A was a relevant change of circumstances. Section 50A(1) (now section 102(1) of the Social Security Contributions and Benefits Act 1992) provides -

"(1) In any case where -

- (a) an employed earner is incapable of work as a result of a personal injury of a kind mentioned in section 50(1) of this Act; and
- (b) the contribution conditions are not satisfied in respect of him;

those conditions shall be taken to be satisfied for the purposes of paragraph (a) or, as the case may be, (b) of section 14(2) of this Act as that paragraph applies in relation to sickness benefit."

When that provision first came into force it was thought not to be relevant to the claimant because the adjudication officer had no evidence that the claimant's incapacity was a result of personal injury caused by an industrial accident. I now find, based on the document at page T28 of the papers and in agreement with the adjudication officer's present view, that the claimant's incapacity for work has continuously since 21 February 1983 been a result of personal injury caused by an industrial accident. Thus the causal connection required by section 50A(1)(a) is present.

18. The one doubt about the relevance of the introduction of section 50A in the claimant's case stems from the use of the words "employed earner" in section 50A(1)(a). As was pointed out in paragraph 3 of box 6 of the adjudication officer's written submission on form AT2, the claimant was self-employed immediately before his incapacity for work began in February 1983. He does not appear to have been in employment since. Although the adjudication officer has not expressly considered the point, and must have determined that the claimant fell within section 50A in order to award sickness and invalidity benefit from 17 October 1988 onwards, I must consider the proper scope of section 50A(1)(a). For the purposes of the Social Security Act 1975 "employed earner" has, unless the context otherwise requires, the meaning given in section 2 (section 168(1) and Schedule 20). That meaning is "a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E." Plainly the claimant at no time during his incapacity has come within that definition. There is nothing in the context to suggest a different meaning; quite the reverse. Section 50A must be construed as part of Chapter IV of the Social Security Act 1975 on benefits for industrial injuries. It comes immediately after section 50, subsection (1) of which provides -

"(1) Subject to the provisions of this Act, industrial injuries benefit shall be payable where an employed earner suffers personal injury caused after 4th July 1948 by accident arising out of and in the course of his employment, being employed

earner's employment."

In section 50(1) the words "employed earner" clearly have the meaning provided in section 2 and they must have the same meaning in section 50A(1). However, the close connection of those two provisions shows, in my judgment, that section 50A(1) applies to a person who was an employed earner at the date of the personal injury which is a cause of his incapacity. In other words, if the personal injury was suffered in circumstances falling within section 50(1), it can be used to bring section 50A(1) into operation regardless of the person's employment status at the date that the incapacity starts or during that incapacity. If the result was otherwise, section 50A(1) would have hardly any impact, for the great majority of those who need its assistance will have ceased to be gainfully employed at the date of their claim precisely because of their incapacity for work. In the present case it is accepted that the claimant was an employed earner when he suffered the personal injury by accident on 19 November 1971. Therefore, section 50A(1) may operate in his case, and the fact that he was self employed immediately before his incapacity started does not prevent the introduction of section 50A being a relevant change of circumstances.

19. The adjudication officer's decision disallowing sickness benefit from 21 February 1983, in its application to subsequent claims for sickness benefit, therefore falls to be reviewed with effect from 5 April 1983 under section 104(1)(b) of the Social Security Act 1975. The application of review powers to the forward disallowances required by regulation 11(3) of the Social Security (Claims and Payments) Regulations 1979 is not entirely clear, but I am satisfied that having found that there is a ground of review, I have power to give the revised decision which is then proper on each of the subsequent claims. The only obstacle to entitlement to and payment of sickness benefit, followed by invalidity benefit, was the claimant's failure to satisfy the contribution conditions. Section 50A(1) of the Social Security Act 1975 now requires him to be taken to have satisfied those conditions, from 5 April 1983. The revised decision on each succeeding claim for sickness benefit (which I do not need to identify separately) is to the effect that sickness benefit, followed by invalidity benefit as appropriate, is payable to the claimant from 5 April 1983. The award ends on 28 August 1990 because the claim from 29 August 1990 has already been adjudicated on separately.

20. I must, however, consider whether there is any bar to a revised decision on review making benefit payable for the whole of that period. The relevant provision is regulation 65 of the Social Security (Adjudication) Regulations 1986. By virtue of paragraph (1)(b) such a decision in the case of sickness and invalidity benefit may not have effect earlier than a date two weeks before the date of the application for review. There is an exception to that rule under paragraph (2) where a claimant proves -

"(a) that on a date earlier than the date on which the

application for review was made, he was (apart from satisfying the condition of making a claim for it) entitled to benefit; and

- (b) that throughout the period between the earlier date and the date on which the application for review was made, there was good cause for delay in making the application."

Here the claimant has satisfied both of sub-paragraphs (a) and (b). I have concluded that he was entitled to benefit from 5 April 1983 and good cause for delay has been accepted.

21. However, the exception in paragraph (2) is subject to paragraphs (3) and (4). Paragraph (4) provides that where review is on the ground of change of circumstances the review is not to have effect before the date of the change of circumstances. No such effect is in issue in the present case. Paragraph (3) provided at the date of the application for review -

"(3) Subject to regulation 72, no sum on account of benefit shall, in a case to which paragraph (2) applies, be paid to any person in respect of any part of the period referred to in sub-paragraph (b) of that paragraph earlier than 12 months before the date on which the application for review was made, so however that the foregoing provisions of this paragraph shall not apply to -

- (a) any case where it is certified in the decision on review that the original decision was revised by reason only of one or more of the following:-

(i) a matter specified in section 93(1)(b) of the 1975 Act (contributions and earnings factor); or

(ii) a matter relating to the number of days in respect of which the claimant has been entitled or deemed to be entitled to sickness benefit; or

(iii) a determination in review by the Attendance Allowance Board;

- (b) the review of a decision disallowing a claim for sickness benefit, invalidity benefit, severe disablement allowance or unemployment benefit in so far as it is a decision which, under the provisions of regulations made under section 51(1)(f) of the 1986 Act, has been treated as a decision disallowing a further claim for any of those benefits."

Paragraph (3) applies a prima facie limit of 12 months before the date of the application for review, but the claimant's circumstances fall within sub-paragraph (b) The review in this case is of a decision imposing a forward disallowance. Section 51(1)(f) of the Social Security Act 1986 permits regulations to be made providing for "the disallowance on any ground of a person's claim for a benefit to which this section applies to be treated as a disallowance of any further claim by that person for that benefit until the grounds of the original disallowance have ceased to exist." Regulation 11(3) of the Social Security (Claims and Payments) Regulations 1979, under which the forward disallowance in this case was made, was not made under section 51(1)(f) of the 1986 Act. It was made under section 79(3)(d) of the Social Security Act 1975, which was in substantially the same terms as section 51(1)(f) of the 1986 Act. The 1986 Act, in Schedule 11, repealed section 79(3)(d) of the 1975 Act along with the rest of section 79 and re-enacted it with some modification in section 51(1)(f). The repeal of section 79 was not operative until 11 April 1988 (Social Security Act 1986 (Commencement No.7) Order 1987). Section 51 of the 1986 Act was brought into force on 6 April 1987 with the exception of the purpose of applying section 51(1)(a) to (5) to benefits under the 1975 Act and child benefit (Social Security Act 1986 (Commencement No.4) Order 1986). Thus section 79(3)(d) of the 1975 Act continued to apply to benefits under the 1975 Act until its repeal, and the full bringing into force of section 51 of the 1986 Act, on 11 April 1988 under the No.7 Commencement Order. The Social Security (Adjudication) Regulations 1986 came into force on 6 April 1987. At that date, although regulation 65(3)(b) refers to section 51(1)(f) of the 1986 Act, all the benefits to which it applied were payable under the 1975 Act. There were no regulations made under section 51(1)(f) of the 1986 Act which authorised forward disallowances. In those circumstances in order to give some purpose to the initial inclusion of sub-paragraph (b) in regulation 65(3) of the Social Security (Adjudication) Regulations 1986, the sub-paragraph must be construed as applying to the review of forward disallowances authorised by regulations made under legislative provisions in substantially the same terms as section 51(1)(f) of the 1986 Act. Section 79(3)(d) of the 1975 Act clearly comes into that category. I conclude that where, as in this case, a forward disallowance is imposed under regulation 11(3) of the Social Security (Claims and Payments) Regulations 1979 (which was not revoked until 11 April 1988: Social Security (Claims and Payments) Regulations 1987, Schedule 10) the review of the decisions affected by that disallowance falls within regulation 65(3)(b) of the Social Security (Adjudication) Regulations 1986. The upshot is that neither the two week limit of regulation 65(1)(b) nor the 12 month limit of regulation 65(3) applies, so that there is nothing to restrict the payment of benefit as the result of my revised decision.

22. Consequently, I do not need to consider regulation 72 of the Social Security (Adjudication) Regulations 1986 or the questions of treating the NCIP claim of 9 August 1983 as a claim in the alternative for sickness benefit or of the operation of regulation 65(3)(a)(i) of the Social Security (Adjudication)

Regulations 1986, the subject of written submissions by the adjudication officer now concerned with the appeal at the direction of a nominated officer.

23. By virtue of regulation 5(5) of the Social Security (Overlapping Benefits) Regulations 1979, since a contributory benefit has become payable to the claimant from 5 April 1983 to 28 August 1990, the non-contributory benefit must be adjusted, so that NCIP and severe disablement allowance is not payable for that period. The effect is that the sickness benefit and invalidity benefit is payable in lieu of the NCIP and severe disablement allowance. Under regulation 5(2), Case 2, of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, any sums actually paid in NCIP and severe disablement allowance in that period (which of course is not recoverable from the claimant) must be offset against arrears of sickness and invalidity benefit payable for that period as a result of my decision. I leave the calculation of the amounts to the adjudication officer with the proviso that if there is any dispute as to the result of that calculation the matter is to be returned to the Commissioner for further decision. Account must also of course be taken of the sickness and invalidity benefit paid (subject to an offset) for the period from 17 October 1988 to 28 August 1990 under the adjudication officer's decision dated 25 September 1990 (which is now replaced by my decision). The practical result is that arrears for the period from 5 April 1983 to 16 October 1988 will become payable, subject to the offset, as a result of my decision.

Conclusion

24. The claimant's appeal is allowed, and my decision on the case is as set out in paragraph 2 above.

(Signed) J. Mesher
Deputy Commissioner

(Date) 26 April 1993