

Sickness Benefit - Appeal Against (EC)

- "Immense Burden" on the Day of CPAG
Treatment



47/93

MJG/SH/9

Commissioner's File: CS/219/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 6 March 1991 as that decision is erroneous in law and I set it aside. My decision is as follows:-

- (a) The decision of the adjudication officer awarding sickness benefit to the claimant for the inclusive period from 16 February 1990 to 30 August 1990 was properly reviewed because there was a relevant change of circumstances since that decision was given. That was that the claimant went to Portugal on 29 May 1990; Social Security Act 1975, section 104(1)(b);
- (b) The claimant is disqualified for receiving sickness benefit for the inclusive period from 30 May 1990 to 27 June 1990 and from 29 June 1990 to 28 July 1990 because throughout those periods he was absent from Great Britain (Social Security Act 1975, section 82(5)(a)) and he does not come within any of the cases in regulation 2(1)(b)-(d) of the Social Security Benefit (Persons Abroad) Regulations 1975, S.I. 1975, No. 563, nor within Article 22 of Regulation No. 1408/71 of the European Economic Communities;
- (c) The claimant is not entitled to sickness benefit for 28 June 1990 because although on that day his condition necessitated immediate benefits during the stay in the territory of another Member State i.e. Portugal (EEC Regulation No. 1408/71, Article 22, paragraph 1(a)) that day was the first of the first 3 days of a period of interruption of employment: Social Security Act 1975, section 14(3) and 17(1)(d).

2. This is an appeal by the adjudication officer against the unanimous decision of the social security appeal tribunal dated 6 March 1991, which was considering the appeal of the claimant (a man born on 16 April 1930) against the decision of the local adjudication officer issued on 29 June 1990. That decision had disqualified the claimant for receipt of sickness benefit for the inclusive period from 30 May 1990 to 28 July 1990 because he was absent from Great Britain. In so doing the adjudication officer had reviewed and revised an earlier award of sickness benefit to the claimant for the inclusive period from 16 February 1990 to 30 August 1990.

3. The tribunal allowed the claimant's appeal and awarded him sickness benefit for the entire time of absence abroad (in Portugal) i.e. from 30 May 1990 to 28 July 1990. They did this on the ground that there was applicable to the claimant the provision of Article 22.1.(a) of EEC Regulation No. 1408/71, he being "an employed person .. whose condition necessitates immediate benefits during a stay in the territory of another Member State". The tribunal appear to have accepted the submission of the adjudication officer that the claimant could not bring himself within any of the exemptions in regulation 2(1)(b)-(d) of the Social Security Benefit (Persons Abroad) Regulations 1975. It was not contended before me that any of those exemptions were applicable and I affirm that that is so.

4. The adjudication officer's appeal was the subject of an oral hearing before me on 26 January 1993, at which the adjudication officer was represented by Mr P Duffy of Counsel. The claimant (who was not present) was represented by Mr N Dyson of the claimant's Citizens Advice Bureau. I am indebted to Mr Duffy and to Mr Dyson for their assistance to me at the hearing. At the outset of the hearing, I dealt with the possibility that the adjudication officer's actual appeal was out of time but on being informed by Mr Duffy that the adjudication officer in question had stated positively that the written appeal had been posted in time, I accepted that statement and ruled that the appeal was therefore in time, although it appeared possibly not to have been received by the Office of Social Security Commissioners until a much later date (see Social Security Commissioners Procedure Regulations 1987, S.I. 1987 No. 214, regulations 7 and 30(3)). In any event, even if the written appeal had been despatched by any other means, I would have granted the necessary extension of time in this case, in view of its general importance (see Mehta v Home Secretary [1975] 2A11 E.R. 1984, C.A.).

5. The facts of the case are briefly these. On 16 February 1990 the claimant, an unemployed earner, sustained a road accident and sustained injury to his hip and lower back. He claimed sickness benefit and was awarded that benefit for the inclusive period from 16 February 1990 to 30 August 1990. On or about 27 April 1990 he notified the Department that he intended to go to Portugal answering on the relevant form "No" to the question, "Have you been treated, or will you be treated, by a doctor or other qualified person when abroad?". He then left for Portugal on 29 May 1990 and did not return to Great Britain until

29 July 1990. He explained in his letter of appeal to the tribunal, "My doctor recommended that I should spend time in water and subject my hip to the sun's rays which would be advantageous to my recovery. The Public Baths in Halifax are closed and my son in Portugal offered to care for me and provide the use of his pool.". He described his period in Portugal as "this convalescence".

6. He gave evidence to the tribunal that while in Portugal he had had to visit a hospital in that country. The tribunal made the following findings of fact about this,

"On 28 June 1990 [the claimant] suffered severe pain in right leg. He attended hospital in Portimao and received medical treatment. He was given 12 syringes and phials to inject himself and a prescription to obtain others. He obtained a number of repeat prescriptions before returning to England."

7. In his evidence to the tribunal the claimant said, "I was OK from 20 May 1990 to end of June 1990. One day towards end of June I was suddenly afflicted by a shooting pain in my right leg. I was taken to hospital in Portugal. It was an emergency department. I was in casualty for less than four hours. They gave me an injection and it cured all the pain. I never had any other treatment after that. The doctor said that if it happened again they would transport me back to UK. They gave me a prescription form and gave me some syringes - some capsules and agreed that my wife should inject me. I was given a prescription if I needed any more injections. I was given 12 injections to start with and a number of repeat prescriptions."

8. In his written appeal dated 29 July 1991, the adjudication officer draws attention to the appropriate provisions of Article 22 of EEC Regulation No. 1408/71 reading as follows,

" 1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits ... and:

- (a) whose condition necessitates immediate benefits during a stay in the territory of another Member State; or
- (b) who, having become entitled to benefit chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State; or
- (c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition.

shall be entitled:

- (i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent state;
- (ii) to cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent state."

9. It is clear that the only provision of paragraph 1 of Article 22 of which the claimant can take advantage is, paragraph (a) "whose condition necessitates immediate benefits during a stay in the territory of another Member State". There was no authorisation by the Secretary of State as regards the claimant under sub-paragraphs (b) and (c) of paragraph 1. It is also clear that what we are concerned with here are "cash benefits" under sub-paragraph (2) of paragraph 1 since sub-paragraph (1) referring to "benefits in kind", concerns eg. the actual hospital treatment and prescriptions which the claimant received in Portugal. 4

10. In his written appeal the adjudication officer then states,

"It is my submission, however, that the [social security appeal] tribunal erred in law in awarding benefit under Article 22 of Regulation 1408/71 for the whole period of the claimant's stay [in Portugal], that is, from 30.5.90 to 28.7.90. Although the tribunal have not specified upon which branch of Article 22 they rely, I submit that Article 22(1) [(b) and (c)] are not satisfied since the claimant neither changed his residence nor went to Portugal to receive treatment. It seems from their reference to the claimant's condition requiring treatment in Portugal that they had in mind Article 22(1)(a). However, that Article confers benefit only where the claimant's 'condition necessitates immediate benefits during a stay in another Member State'. Benefits in this context means medical treatment (R(S) 4/80). The claimant's condition did not necessitate medical treatment before 28.6.90. Accordingly, I submit, the conditions of Article 22(1)(a) were not satisfied before that date and the claimant cannot therefore benefit under the Article before that date. If the Commissioner accepts this submission there remains for consideration the period from 28 June 1990 to 28 July 1990.

It appears from the claimant's statement to the tribunal that the claimant attended hospital for treatment only on that one day 28.6.90. He was given a prescription form, some syringes and some capsules and it was agreed that his wife should inject him. In the context of 'being treated' in regulation 2(1)(b) of the Persons Abroad Regulations, Commissioners have held that it is necessary for the treatment to be administered by a suitably qualified person (R(S) 2/69, R(S) 1/65, R(S) 10/51 and R(S) 3/54) and that being attended by a spouse, even if a qualified doctor, is not 'being treated' (R(S) 2/69, R(S) 5/61). It is submitted that, similarly, in the context of Article 22(1)(a) the administering of injections by the claimant's wife, or as indicated in the tribunal's findings of fact by himself, does not constitute medical treatment so as to be 'immediate benefit'."

11. I should state at this point that I entirely accept what is said about the meaning of "immediate benefits" in Article 22.1(a) of the Regulation. The claimant only had "immediate benefits" on the day that he was in hospital (28 June 1990) and the subsequent days on which he took the prescribed medicaments were not days on which his condition necessitated immediate benefits. (see R(S) 4/80 and R(S) 6/81).

12. The adjudication officer's written appeal then continues,

"If the Commissioner agrees, his guidance is respectfully sought as to whether the need for medical treatment on one day is sufficient to confer entitlement under Article 22(1)(a) for, in the present case a further month or whether the benefit of the Article is limited to the period for which treatment is required. If the latter, no benefit would be payable for the day 28.6.90 because it is not part of the period of interruption of employment-sections 14(1)(b) and 17(1)(d) of the Social Security Act 1975 - and it would be my submission that the tribunal erred in law in awarding sickness benefit for any part of the claimant's absence."

13. Those submissions were reiterated by Mr Duffy at the hearing before me. He also drew attention to the fact that Article 10 of Regulation 1408/71 prohibiting reduction of benefit when a person resides in the territory of another Member State applies to "invalidity .. benefits" but these do not include sickness benefit.

14. The whole argument before me at the oral hearing was on the single question that, given that the claimant's condition necessitated immediate benefits within Article 22(1)(a) only on one day i.e. the day of his visit to hospital in Portugal on 28 June 1990, to what period of UK sickness benefit did that entitle him? Mr Duffy submitted that it entitled the claimant, in theory at least, to only one day's sickness benefit, but under the provisions of sections 14(1)(b) and 17(1)(d) of the Social Security Act 1975 (see also regulation 7(1)(c)(i) of the Social

Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, S.I. 1983, No. 1598) the claimant would not in fact be entitled to sickness benefit for that day because it would be the first day of a new period of interruption of employment.

15. Mr Dyson however argued that once the claimant had, so to speak, overcome the hurdle of compliance with Article 22(1)(a) of the Regulation, that meant that he thereby escaped, either altogether or certainly onwards from the day that he visited the hospital, the general disqualification for absence abroad (in section 82(5)(a) of the Social Security Act 1975 - now section 113(1)(a) of the Social Security Contributions and Benefit Act 1992). Both Mr Duffy and Mr Dyson agreed that there was no Commissioner's decision or other authority bearing on the point, nor does Article 22 in itself contain any direct indication on the point. So far as benefits in kind are concerned, there is a statement in Article 22(1)(i) that "the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent state". But as to "cash benefits", the only provision in Article 22(1)(ii) is that those benefits shall be "provided by the competent institution in accordance with the legislation which it administers." Neither of those provisions throw much light on this particular problem.

16. Mr Dyson cited paragraph 20116 in the Adjudication Officers' Guide (which does not of course constitute the law but is the view of the Chief Adjudication Officer as to what the law is). That passage reads as follows:-

"In deciding whether a claimant's condition necessitates immediate benefits, Commissioners have held that a person's condition does not necessitate cash benefits, but only benefits in kind, such as assistance from the local health service or a doctor. (R(S) 4/80; R(S) 6/81). Only a claimant who needs to make use of the medical services of another Member State in which he is temporarily resident or which he is visiting, can benefit from Article 22(1)(a) to obtain entitlement to [sickness benefit] in that State (R(S) 1/77; R(S) 2/77; R(S) 1/78). Article 22(1)(a) can however, assist a claimant in this way whether the incapacity .. period began before the claimant left GB to go to the other Member State or while the claimant was staying in the other Member State, and irrespective of the reason why the claimant left GB (R(S) 1/77; R(S) 2/77; R(S) 1/78; R(S) 4/80). If the claimant's condition necessitates immediate benefits, there is entitlement to [sickness benefit] for the whole period of incapacity in the other Member State .." (my underlining).

Mr Dyson cited this as indication that the view of the Adjudication Officers' Guide was that once the 'hurdle' had been overcome there was thereafter entitlement for the whole period of incapacity in the other Member State. What of course is meant by "incapacity" in this context is not entirely clear.

17. I have looked at the overall pattern of Article 22 of Regulation 1408/71, in the context of the general UK law as to disqualification or otherwise for receipt of benefits abroad. My conclusion is that Article 22(1)(a) has a limited application because there are other routes, either in the Article itself (sub-paragraphs 1(b) and (c)) or in regulation 2(1) of the Social Security Benefit (Persons Abroad) Regulations for a payment abroad of a more extended period of sickness benefit. I consider that what is intended by paragraph 1(a) of Article 22 of Regulation 1408/71 is that where a person's condition necessitates immediate benefits in kind when he is in the territory of another Member State he shall be entitled to those benefits for the period that his condition necessitates them and, for that period only, to cash benefits as well. I have considered all the reported Commissioners' decisions cited in paragraph 20116 of the Adjudication Officers Guide, and R(S) 2/69, (Appendix (Divisional Court), cited by Mr Duffy. In none of those cases was the present point taken, but I note that in R(S) 1/77 and R(S) 2/77 (which both concerned the same appeal), the claimant was ultimately allowed UK sickness benefit under Article 22.1(a), from the date when he first had to consult French doctors with a severe attack of neuritis to the end of his stay in France. However I also note (paragraph 5 of R(S) 1/77) that once he had consulted the French doctors (about a week after he had gone to France) a French doctor ordered blood tests and the claimant was certified by French doctors as incapable of work for the remainder of his period in France. The claimant's stay in France was indeed prolonged by his attack of illness. That therefore seems to have been a case where the period during which the claimant's condition necessitated immediate benefits" was not just for the one day on which he consulted the French doctor but for subsequent days as well including the taking of blood tests and a certification by French doctors of incapability of work.

18. There is nothing of that kind on the facts of this case. It is conceded that the only day on which the claimant's condition necessitated immediate benefits was the one day he went to the hospital in Portugal i.e. 28 June 1990. In my judgment it is only for that day therefore that potentially UK sickness benefit could be payable but it being a 'waiting day' he is not in fact entitled for that day either. It appears to me that any other construction of Article 22(1)(a) could have capricious results since a casual one day visit to a doctor abroad could thereafter give potentially unlimited entitlement to sickness benefit. I cannot think that that is what is meant by what I regard as the 'emergency' provisions of Article 22(1)(a). I

should add that I do not consider it appropriate to refer this case to the European Court, as requested by the claimant's representative.

(Signed) M.J. Goodman
Commissioner

(Date) 17 June 1993