

MJG/SH/10

103 - Dependant's Increase - Dependent
And Trade Dispute Disentitlement
Recovery of Her Entitlement to
103 - Error on Transitional
Protection



CPAG

57/93

Commissioner's File: CS/252/1991

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 13 May 1991 as that decision is not erroneous in law: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant, a man born on 27 January 1927. The appeal is against the majority decision of a social security appeal tribunal dated 13 May 1991, as follows,

"On review there is no entitlement to an increase of invalidity benefit for [the claimant's wife] for 4.7.89, 11.7.89, 18.7.89, 20.7.89. This is because she would be disqualified for receiving unemployment benefit if she otherwise had entitlement to it because she had withdrawn her labour in furtherance of a trade dispute. As a result of this an increase in invalidity pension is not payable for her from and including 5.7.89. This is because her weekly earnings are more than £34.70 and no increase is payable. As a result an overpayment of invalidity benefit has been made amounting to £564.29. On 4.7.89, or as soon as practicable after, [the claimant] failed to disclose the material fact that [his wife] was involved in a trade dispute. Accordingly invalidity benefit of £238.61 from 4.7.89 to 22.10.89 is recoverable from [the claimant]. An overpayment of invalidity benefit has been made from 23.10.89 to 3.3.90 (inclusive) amounting to £325.68. Because [the claimant] did not misrepresent or fail to disclose a material fact .. this overpayment is not

recoverable."

3. On my direction the appeal was the subject of an oral hearing before me on 22 March 1993. The claimant was not present but was represented by Mrs P Walker. The adjudication officer was represented by Mr S M Cooper of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mrs Walker and to Mr Cooper for their assistance to me at the hearing.

4. The hearing was concluded by a direction by me dated 22 March 1993 in the following terms,

"The hearing today is adjourned to enable the adjudication officer to make a written submission on the point raised at the hearing by me, namely can it be said that a 'one day strike' loses entitlement to a week's increase for wife of invalidity benefit - see Social Security Benefit (Dependency) Regulations 1977 and sections 45 and 49A of the Social Security Act 1975. That submission should also indicate any relevant case-law on the meaning of the word 'otherwise'."

5. As a result of that direction I have received written submissions dated 26 April 1993 by the adjudication officer and written observations in reply on behalf of the claimant dated 7 June 1993 which merely state, "no further observations in reply." Both parties have indicated that they did not wish a resumption of the oral hearing. As I consider I am now in a position to give a decision on the papers without such a resumption, I proceed to do so.

6. The findings of fact of the tribunal adequately set the position out as follows,

"The claimant has been in receipt of invalidity benefit for himself with an increase for his wife since 19.4.82. [The claimant's wife] works for the local Authority [at a library] and is paid every calendar month. Her wages from before 4.7.89 to 26.2.90 exceeded £60 per month gross and exceeded £57 per month nett. The claimant had the benefit of the tapered earnings rule in respect of his wife in respect of which the limit [was] £34.70 per week. Prior to May 1989 the claimant was paid his own invalidity benefit by order book and his wife's increase was paid separately by giro. On 22.5.89 the Department wrote to the Claimant stating that as his wife's earnings seemed to be static he no longer needed to forward pay slips every month and they issued one order book to include the increase. The letter also said 'I have enclosed Form BR356A which I ask you to retain in case your wife's earnings alter from £262-93. If the earnings do change in any way please return your order book together with BR356A and your wife's new wage slip.' .. in November 1988 the Claimant's card shows that a Form BF228 was issued to the claimant. This advised the claimant ... to advise the Department if anyone for whom he was

claiming an increase was involved in a trade dispute. On 4.7.89 NALGO called a strike and [the claimant's wife] was involved in a strike on 11 July, 18 July and 20 July 1989. It is accepted by all parties that she lost her employment due to a stoppage of work through a trade dispute at her place of employment. The Claimant did not notify that his wife had been involved in a trade dispute. When his wife's wages increased in October 1989 he completed the Form BR356A and sent it in to the Department, and enclosed his order book. It was noticed that wages slips for [the claimant's wife] referred to a trade dispute and it was subsequently determined that she had been involved in that as shown above. The claimant's order book for invalidity benefit itself advises him to tell the Department of changes, and again refers to Form BF228. [The claimant's wife] has always paid reduced rate national insurance contributions and has no entitlement to unemployment benefit because of this. After her 60th birthday in any event she ceased paying any national insurance contributions at all, after her 60th birthday in January 1987. It is accepted by all parties today that the Adjudication Officer had grounds under section 104 of the Social Security Act 1975 for reviewing his original decision to award an increase of invalidity benefit in view of the fact that there had been a change of circumstances i.e. that [the claimant's wife] was involved in a trade dispute."

7. The tribunal held that those facts caused the loss of the transitional protection for a "tapered" increase, to be found in regulation 8(6) of the Social Security Benefit (Dependency) Regulations 1977, S.I. 1977, No. 343, reading as follows,

"Earnings rules for increases for adult dependants

8. (1) This paragraph applies in cases where an increase of benefit is claimed in respect of an adult dependant who is residing with the beneficiary and the increase is claimed under any of the following provisions of the Act -

(a) section 45(2) (increase of ...
invalidity pension in respect of a
wife);

.....

(2) Where paragraph (1) applies there shall be no increase of benefit if, in the week ending last before any week in which the beneficiary is entitled to benefit under any provisions specified in paragraph (1), the adult dependant has earnings which exceed the amount specified in sub-paragraph (1)(a) of Part I of Schedule 4 to the Act. [as the claimant's wife earnings did].

.....

- (6) Where on 14 September 1985, a beneficiary was entitled to an increase for that day or for a period including that day under any of the provisions of the Act to which paragraph (1) .. applies the provisions of the Act and of these Regulations relating to the reduction of the rate of such increase on account of the earnings of the adult dependant in force on that day shall, if more favourable to the beneficiary, continue to apply after that day, to the exclusion of the provisions of this regulation, until such time as the beneficiary first ceases to be entitled to that increase." (My underlining).

8. The reason why it was said that, on the claimant's wife taking part in a series of one day strikes, the claimant had ceased "to be entitled to [the] increase" for his wife was because of the provisions of section 49A of the Social Security Act 1975 (now section 87 of the Social Security Contributions and Benefits Act 1992). The section in force at the time was section 49A of the 1975 Act. It was added by section 44(2) of the Social Security Act 1986 and read as follows,

"Effect of trade disputes on entitlement to increases

49A. A beneficiary shall not be entitled -

- (a) to an increase in any benefit under sections 44 to 48 above; or
- (b) to an increase in benefit for an adult dependant by virtue of regulations under section 49 above,

if the person in respect of whom he would be entitled to the increase -

- (i) is disqualified under section 19 above for receiving unemployment benefit; or
- (ii) would be so disqualified if he were otherwise entitled to that benefit."

9. The disqualification under section 19 of the 1975 Act (now section 27 of the Social Security Contributions and Benefits Act 1992) is of course the well-known disqualification for participating etc in a trade dispute. The disqualification is for "receiving unemployment benefit for any day during the stoppage" (section 19(1)(a)). There is no doubt that the claimant's wife came within the terms of section 19 in so far as it relates to participation etc in a trade dispute.

10. However, the claimant contends through his representative that section 49A of the 1975 Act does not apply in the present case. It is pointed out that the claimant's wife did not come

within section 49A(i) i.e. "disqualified under section 19 above for receiving unemployment benefit" because she would have no title in any event to unemployment benefit because of her lack of contributions. Consequently she can only be brought, if at all, under section 49A(ii), i.e. "would be so disqualified if [she] were otherwise entitled to [unemployment benefit]".

11. The claimant's argument before the tribunal, rejected by the majority decision, was that because the claimant was not entitled in any event to unemployment benefit because of her lack of contributions it could not be said that she was "otherwise entitled to that benefit" within section 49A(ii). I agree with the majority decision of the tribunal that that contention must be rejected. Section 49A(ii) is clearly designed to cover all those who come within the factual description of participation etc in trade disputes, whatever their actual position as to entitlement to unemployment benefit. That is what the word "otherwise" means, in my judgment. It might of course have been simpler if section 49A had simply contained an omnibus factual description of all those who participate etc, in a trade dispute but I consider that sub-paragraphs (i) and (ii) of section 49A have the same effect as such an omnibus description. It follows that any dependant who is participating etc in a trade dispute will be a dependant in respect of whom an increase of, eg. invalidity pension, cannot be claimed, whatever the personal position of the dependant in relation to any potential claim for unemployment benefit.

12. Criticism has been made by the claimant's representative of the examples given by the tribunal in a carefully reasoned decision, e.g. where the tribunal refers to disqualification for misconduct. A reference has been made in the submissions to the Commissioner to section 98(1)(c) of the Social Security Act 1975 (now section 20(1)(c)(i) of the Social Security Administration Act 1992). Both those provisions (which are in slightly different words) refer to a situation where a person would be disqualified for receiving unemployment benefit "if he otherwise had a right to it". The fact that those provisions do not in fact relate to 'disqualification' for not having sufficient contributions does not, in my view, matter. The sections are dealing with questions that may be submitted to an adjudication officer and I do not consider that they have much bearing on the construction of section 49A of the 1975 Act. Certainly no error of law was committed by the tribunal by referring to other kinds of disqualification because in my view the undoubted conclusion from the overall wording of section 49A(i) and (ii) is that everyone who takes part in a trade dispute cannot be claimed for as a dependant if in fact they are participating etc. in a trade dispute.

13. The next question therefore arises from my direction dated 22 March 1993 (see paragraph 4 above) i.e. raising the point whether a one day strike can lose entitlement to a week's increase for a dependant of invalidity benefit. The written submissions dated 26 April 1993 on behalf of the adjudication officer point to the fact that section 15(1)(b) of the Social

Security Act 1975 (now section 33(1)(b) of the Social Security Contributions and Benefits Act 1992) provides that a person is entitled to invalidity pension "for any day of incapacity for work in [the relevant] period". Section 15(5) of the 1975 Act (now section 33(6) of the 1992 Act) provides that,

"The amount payable by way of an invalidity pension under this section shall for any day of incapacity for work be one-sixth of the appropriate weekly rate."

14. To pause there, that is clearly an indication that invalidity benefit is a daily benefit, as indeed is unemployment benefit (compare the decision to that effect of a Tribunal of Commissioners in R(U) 1/91, paragraph 14). Section 17 of the Social Security Act 1975 (now section 57 of the Social Security Contributions and Benefits Act 1992) proceeds on the same assumption.

15. However, the increase for a wife of invalidity benefit is conferred by section 45 of the Social Security Act 1975 (now section 83 of the Social Security Contributions and Benefits Act 1992) and provides that, "... the weekly rate of [an invalidity pension] when payable to a man, shall be increased by the amount respectively specified in relation to the relevant pension in Schedule 4, Part IV, column (3) .. for any period during which the pensioner is residing with his wife .." (my underlining). There is no reference there to an increase by the day but I accept as correct paragraph 6 of the written submission of 26 April 1993 of the adjudication officer now concerned as follows,

"The increase in Invalidity Pension which a husband may claim in respect of his wife under section 45, Social Security Act 1975 is not a separate benefit. It is an increase in the weekly rate of the Invalidity Pension - see section 45(2). The fact that the weekly rate of the Invalidity Pension may be increased in certain cases does not alter the fundamental position that the benefit in payment is the daily benefit. Entitlement to Invalidity Pension accrues on a daily basis, whatever the weekly rate of the pension may be in accordance with sections 15 and 45 of the Act."

16. I accept that as correct. It follows that even the increase for the dependant is a daily increase and can therefore be lost under section 49A of the 1975 Act by a one day's strike. The position would be that in the week in which the wife took part in a one day strike the rate of increase for the wife would be diminished in proportion. Moreover there would be no entitlement to an increase of benefit on the day of the strike.

17. That is important because it brings into play the above - cited provision of regulation 8(6) of the Social Security Benefit (Dependency) Regulations 1977 that there should be a transitional protection of in this case the tapered increase only "until such time as the beneficiary first ceases to be entitled to that

increase." Although there is no reference there to a "day" but merely to "such time" I conclude that that is the effect of the regulation even though the regulation is couched in terms of a "week". (See regulation 8(1) and (2) cited above.) The word "time" is capable of covering any period, even one as short as one day.

18. It follows that the decision of the tribunal was correct and there remains only the question of whether or not the claimant should be required to pay the consequent overpayment of £238.61 on the ground that he failed to disclose the material fact that his wife was involved in a trade dispute. No question of misrepresentation arises in this case. It was expressly disclaimed by the local adjudication officer before the tribunal because the relevant payable orders could not be traced. This matter is governed by the provisions of section 53(1) of the Social Security Act 1986 (now section 71 of the Social Security Administration Act 1992). Recovery is required in any case where a claimant fails to disclose a material fact whether that non-disclosure was fraudulent or otherwise. There is no doubt in this case that the claimant acted with complete bona fides but that does not assist him if in fact there was a non-disclosure by him of a material fact which occasioned the overpayment. In this respect the majority of the tribunal concluded there had been such a non-disclosure, particularly on the ground that the claimant had received (though some time before) Form BF228 warning him specifically to report the fact of any one for whom he was claiming being involved in a trade dispute.

19. The minority member of the tribunal is reported on this matter as follows,

"Finally, one member of the Tribunal feels that it was not reasonable for the Claimant to disclose that his wife had been involved in a trade dispute. The form telling him to advise this was sent out in November 1988 and the dispute did not happen until some 7 months later i.e. in July 1989. In addition [the claimant] had assumed, and the member thinks it very understandable, that only increases in wages need to be reported, and the Claimant did this promptly in October 1989. In all those circumstances this member feels that overpayment may have occurred but is not recoverable."

20. It is true that this matter came to light because of the claimant's prompt notification of an increase in his wife's wages and when the wages slips were examined by the Department they made reference to deductions for the one day strikes. However I conclude that in the circumstances disclosure was reasonably to be expected of the claimant of his wife's striking and I therefore confirm the tribunal's decision that the overpayment is recoverable i.e. the £238.61 overpayment before the claimant revealed the matter by forwarding his wife's wage slips. The Secretary of State may, however, wish to take note of the somewhat mitigating circumstances in this case when determining the mode and intervals of recovery of the overpayment from the claimant.

21. Lastly, I refer to a contention that was advanced by Mr Cooper on behalf of the adjudication officer, in a written submission dated 25 February 1993, as follows,

"The decision of the Social Security Appeal Tribunal dated the 13 May 1991 .. purports to be a unanimous decision. Moreover, it is clear from an examination [of the tribunal's record of decision] that one member of the Tribunal did in fact dissent. That being the case, regulation 25(3)(c) of the Social Security (Adjudication) Regulations 1986 [S.I. 1986 No. 2218] provides that the chairman should have recorded a statement that one of the members dissented and the reasons given by him for so dissenting. It is my submission that although the Chairman recorded the reasons given by the member for his dissent, she did not record a statement that one of the members dissented. There is no statement to that effect in box 3 [of the tribunal's record of decision] and indeed that box as it stands records that the decision of the Tribunal was unanimous. I therefore submit that there is an error of law in the Tribunal's decision."

22. I appreciate the force of Mr Cooper's submission but in fact all that regulation 25(2)(c) requires the chairman of the tribunal to do is as follows, "if a decision is not unanimous, record a statement that one of the members dissented and the reasons given by him for so dissenting." In two places in the tribunal's reasons for decision the chairman did in fact record that one of the members dissented on two different points (one of which I have quoted above) but the typewritten portion of Form AT3 (tribunal's record of decision) which provides for either the word "unanimous" or the word "majority" has been wrongly completed to show that the tribunal's decision was unanimous. I have only the typewritten version of the tribunal's decision and not the original manuscript version. It is, however, quite clear from the tribunal's careful and detailed reasons for decision that a member did dissent on these two points and the reasons are carefully recorded for the dissents. In those circumstances the mere fact that the printed part of the Form AT3 had been wrongly deleted does not in my view vitiate the decision, though clearly it would have been preferable if it had been indicated there also that the decision was not unanimous but was by a majority.

(Signed) M.J. Goodman
Commissioner

(Date) 26 July 1993