

LVKS - Down rating in breach of 77/7
for woman at 60. Also refers to
Qu of reg 37/37A suspension

MH/1/LM

Commissioner's File: CS/269/92

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Appeal

Case No.

1. My decision is that this appeal by the adjudication officer must be dismissed. The claimant was entitled to invalidity benefit at the full rate from her 60th birthday.

2. This case is one of a large number of cases in which the same question of law arises. The Appendix to this decision is in common form with that in relation to each of the others in the group. A copy of the Appendix is annexed to and forms part of this decision. The relevant law and its application to the facts of each case in the group is set out in the Appendix.

3. For the reasons set out in the Appendix I do not grant the postponement of this decision which has been sought by the adjudication officer. For the further reasons therein set out, the appeal of the adjudication officer is dismissed.

(Signed) M Heald
Commissioner

Date: 29 April 1993

APPENDIX

1. This appendix is common to each of the considerable number of some 80 invalidity benefit cases which have been sent (with one exception) in two groups on appeal by the adjudication officer from various social security appeal tribunals. For convenience, where necessary, I will refer to the two groups as the "1992 appeals" and "1993 appeals". The exception is case 168/91, where the appeal tribunal had rejected the appeal of a claimant, and the claimant is now appealing to the Commissioner.

2. Each of the 1992 appeals included a submission by the adjudication officer. I made a direction dated 2 December 1992, dealing with various matters of procedure, inviting a further submission by the adjudication officer in relation to a request for deferment of the making of decisions in each of those appeals. Such a further submission was made by the adjudication officer a short period outside the time which I had limited for the making of such a submission; in the circumstances, I extend time for making such second submission until the date when it was received in the Commissioners' Office. Each of the 1993 appeals was accompanied by a submission by the adjudication officer in very similar terms to that made in relation to the 1992 appeals. In the circumstances, I did not find it necessary to invite any further submission as to the question of deferment, since all the arguments had already been set out in the second submission in relation to the 1992 appeals. I first deal separately with the question of deferment of each of the appeals, and since, as will be seen, I do not accept the application of the adjudication officer, I then deal with the questions of law which lead to my decision in each of these groups of appeals. In accordance with the Social Security Commissioners Procedure Regulations 1987, there is a separate decision in writing in each appeal, and each of those decisions incorporates this appendix as part of that decision. It is accepted by all concerned, and particularly the adjudication officer, that there are no disputed questions of fact arising on these appeals, and that the questions of law which arise are identical in each case.

Deferment of decision

3. In the original submission in relation to the 1992 appeals, it was not clear exactly what was the nature of the deferment that was being asked for by the adjudication officer, and in particular in relation to the two cases involved, that of Thomas, which was at that stage under consideration by the European Court, or Graham, which was on appeal from the Commissioner to the Court of Appeal. I therefore directed that the further submission of the adjudication officer should make this matter clear. The question was addressed in the further submission, but, unfortunately, it is not clear to what point of the procedure in one or other of those cases, the present deferment is being requested. This is shown by reference to the following paragraphs in that submission:

7. This paragraph requests deferment until the Court of Appeal have decided the case of Graham, under reference CS/27/91.

16. Deferment is requested until the "judgment" in Thomas is available. This reference itself is not conclusive, since it does not indicate which part of the procedure relating to references to the European Court is indicated. The House of Lords has referred certain questions to the European Court for its judgment, upon which the invariable practice is for that Court to answer the questions in terms of European law, but to remit the case to the National Court for formal judgment by that National Court. It follows that the answers to the questions posed to the European Court, which were in fact delivered publicly by that Court on 30 March 1993, have to be sent back to the House of Lords, who will give formal judgment in the matter at some future date. It is not possible to make any estimate what such future date will be, if only because it is a matter for the House of Lords to decide whether they require any further argument from the parties in relation to the answers provided by the European Court.

21. This paragraph asks for deferment of a hearing of the case until the appeal in Graham is "finally" disposed of. This again contains an ambiguity, since at present the hearing of Graham by the Court of Appeal has been stayed (see Hansard, Answers to Written Questions, 15 November 1992). That stay will presumably operate until the House of Lords have disposed of the outstanding matters in the case of Thomas. However, thereafter it would be open for a party not succeeding before the Court of Appeal making further appeal to the House of Lords, and it must also be anticipated that there may be a reference either by the Court of Appeal or the House of Lords to the European Court thereafter.

4. In all the circumstances, I think it right to take the attitude that the application is to defer the hearing of each of this group of appeals until after the "final" determination of Graham.

5. In the second submission in relation to the 1992 appeals, dated 8 January 1993, several different grounds are advanced to support the application for deferment. It is convenient to deal with each separately, by setting out briefly the ground of application, and my reaction to it. These grounds are:-

- 1.) Since Graham has been stayed before the Court of Appeal, the Commissioner should act likewise. I have not been given any details of the stay of proceedings in that appeal, and, in particular, I do not know whether it was stayed by agreement of all the parties concerned; of course, if it was, that would be a matter of considerable relevance. Since I do not know the circumstances in which the stay was granted by the

Court of Appeal, I cannot find that it a valid ground on which to defer decisions by the Commissioner in dealing with this group of appeals. None of the claimants in the present groups of claimants has agreed to a deferment.

- 2.) that if I decide the case by following Graham, it would merely lead to a series of further appeals with all additional costs and duplication of work involved. The point is self-evident, merely because there may be further appeals involved, and even, as suggested, if further appeals from tribunals are generated by my giving decisions on the current appeals. Nevertheless it is not a very major factor when weighed up with the other factors which operate against deferment of a decision, which are discussed below.
- 3.) A further ground for deferment is to await the short time before the "judgment" in Thomas is available. I have dealt with this point already, and in view of the sequence of events, it no longer appears to me to be a relevant consideration.
- 4.) Reference is then made to the newly enacted regulation 37A of the Social Security (Claims and Payments) Regulations, introduced in April 1992. The terms of that new regulation are set out in the submission. Briefly, they give a power to suspend payment of benefit in other appeals when an appeal raising the same point of law is on appeal in the way set out in the regulation. I fully appreciate that the exercise of the power, which is discretionary, is entirely a matter for the Secretary of State, and not for the Commissioner, or indeed the adjudication officer to be concerned with. If the Secretary of State did decide to exercise this discretionary power, it may be, I fully accept, the case that the claimant would not immediately receive the benefit in issue. But that would be a political decision by the Secretary of State and not a judicial one by the Commissioner. This argument does not take account of the legal consideration in the detailed notes at pages 622 and 623 of Mr J. Mesher's Income Related Benefits, the 1992 Edition. These relate to regulations 37 and 37A of the Claims and Payments Regulations, in the form at present applicable. The effect of the notes is to raise considerable doubt as to whether in a case where the progress of the appeal has been as in the present group of cases, the suspension of benefit may not be available on an appeal to the Court of Appeal, where the claimant has been successful both before the appeal tribunal and before the Commissioner.
- 5.) Finally, reference is made in paragraphs 19 and 20 of

the written submission that there would be an absurd consequence, if the decisions in the present appeals are upheld, in the case of some other cases related to unemployment and sickness benefit paid to men. I do not have sufficient detail of those cases (which are of course not before me at present) to be able to obtain any benefit from their consideration as a reason for deferment. At the moment I do not think that that can be the case.

- 6.) Deferment of decisions seem to me to involve consideration of the fact that, by definition, each of the present cases involve a woman of at least 60 years of age, who is in receipt of invalidity benefit, and therefore not in good health. I do not have details of all their financial circumstances, but the papers do show that the reduction of benefit involved in each case is not inconsiderable, amounting in some cases to £30.00 or £40.00 per week, and that it is not unlikely that in some cases at least, if not most, this reduction is a considerable part of the income of the claimant. In each case the Secretary of State has limited the benefit payable to the amount originally allowed by the adjudication officer. The Commissioner has no jurisdiction to alter that decision, or to defer an appeal on terms. I am not impressed by the "in terrorem" argument that a large number of appeals will build up in the Court of Appeal. This will, of course, be a matter for the Court of Appeal, and not for the Commissioner.

My conclusion is that the position is that if the Secretary of State does not wish to pay the reduced benefit involved in relation to each of these claimants, that is a decision which, from a procedural point of view, ought to be taken by him, and not by the Commissioner. Assuming that Mr Mesher, in the reference made above, is not correct in supposing that the terms of regulation 37 and 37A do not permit the Secretary of State to further suspend benefit while the cases are on appeal to the Court of Appeal, I nevertheless think that the decision about suspension ought to be left to the Secretary of State, and that accordingly this application for deferment is not granted.

The law

6. Before dealing with the legal questions in this group of appeals, I need to set out no more about the facts that that which follows. Each claimant was a woman who had reached the age of 60 between some date in March 1988 and in June 1992. Each claim was in receipt of invalidity benefit. In each case the adjudication officer had applied the terms of section 15 of the Social Security Act 1975 and in reliance thereon had reduced the invalidity benefit to an amount equal to the retirement pension to which the claimant would then be entitled. The pensionable

age for women is prescribed as 60 years and for men at 65 years. If the claimant had been a man the calculation of invalidity benefit, according to retirement pension contributions, would not apply to her until she had attained the age of 65 years. In each of the cases, the claimant appealed against the reduction brought about in that manner to the social security appeal tribunal. Before any of the present groups of appeals were decided by such appeal tribunals, the case of Graham was decided by Mr Commissioner Skinner. The terms of this decision were referred to each of the appeal tribunals by the adjudication officer, and in each of the cases (subject to the exception separately referred to) the tribunal accepted that the current appeal was entirely covered by the decision in Graham, and allowed the appeal of the claimant. It is not disputed on behalf of the adjudication officer that the factual situation, including the relevant benefit, in each of the present groups of appeals were identical with that of Graham.

7. It is accepted by the adjudication officer that the effect of section 15 above is discriminatory, and that each of the claimants was entitled to the benefit of Directive 79/7/EEC of the European Community. In respect of each case, as the claimant was working until she became incapable of work, there is no dispute that she comes within the scope of that Directive.

8. Directive 79/7/EEC is concerned with "the progressive implementation of the principle of equal treatment for men and women in matters of social security" and states, so far as relevant to this case, -

Article 2 provides that 'it shall apply to the working population including workers whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired or invalid workers and self-employed persons'.

Article 3, paragraph 1 provides that the Directive shall apply to statutory schemes providing protection against a number of contingencies, including invalidity.

Article 4 states that 'there shall be no discrimination whatsoever on the ground of sex either directly or indirectly.....'

But paragraph 1 of Article 7 specifically permits Member States to exclude from the scope of the Directive -

'(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

(b)

(c)

(d)

(e) the consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme."

9. The first question which arises in each of these appeals is whether that the admittedly discriminatory effect of section 15 of the 1975 Act is permitted by the exclusions in Article 7(1)(a) and where relevant (e). I have considered at length the decision of the Commissioner in Graham's case, and I have no doubt in reaching the conclusion that it is that decision which I ought to follow in each of the present group of appeals. The argument on behalf of the adjudication officer was based on the proposition that Graham is wrongly decided, which is now a matter for the Court of Appeal or superior Courts. I do not find any purpose in repeating at length the arguments considered in Graham (a copy of which is in each set of appeal papers, and therefore available to each claimant).

10. The conclusion of the reasoning in Graham is in paragraph 11 of the decision of the Commissioner, as follows:-

"11. It is argued by Mr Pannick (for the Secretary of State) that the general principles of construction in relation to the construction of Article 7(1)(a) established in Thomas' case is not to be applied in the instant case because invalidity benefit is a contributory benefit. While I accept that there is a distinction in that Thomas' case concerned non-contributory benefits and the case before me relates to a contributory benefit, it seems to me that that is a distinction without a difference in so far as the principles established by Thomas are concerned. I find therefore that by reason of the provisions of Council Directive EEC 79/7 the claimant's invalidity benefit is not to be reduced and invalidity pension is payable to her at the rate fixed by section 15(3)."

In relation to the derogation sought to be relied upon under that sub-paragraph, I therefore follow the decision of the Commissioner in Graham, and make the order set out in the separate decision in each case to which this appendix is attached.

11. A further point arises in relation to some of the case under appeal where the claimant has exercised an option to pay married women's reduced rate contribution. In such a case it is submitted that the provisions of Article 7(1)(e) are applicable, since it is said that the married women's option falls squarely within the derogation which allows Member States to exclude from the equal treatment principle the consequences of the exercise before the adoption of the Directive of an option not to acquire rights or incur obligations under social security schemes. The question was dealt with by Commissioner Skinner in appeal CS/34/92, which is at present under appeal to the Court of Appeal. I have considered the reasoning of the Commissioner in

that decision, and have come to the same conclusion. A summary of his reasoning is as follows:-

"I bear in mind that Article 7(1)(e), being part of a derogation from individual rights conferred by the Directive, must be construed strictly. Slade LJ in Thomas referred to the principle in relation to Article 7(1)(a). It seems to me that the same principle is to be adopted when looking at regulation 7(1)(e). In my judgment the right of option made by the claimant was to acquire rights relating to her retirement pension: the statutory scheme related to a retirement pension and the consequences of the exercise related to her retirement pension. She did not exercise any right of choice not to acquire rights relating to the scheme of invalidity benefit. No consequences concerning invalidity benefit flowed from the choice which she did make."

On that basis, which I consider correct, reduction of the benefit otherwise due to the claimant caused simply by her reaching the age of 60, is not justified by the derogation in Article 7(1)(e).

12. For the reasons set out above, the result in each one of these cases must be decided to the same effect as in Graham with the consequence that (with the single exception referred to above) the appeal of the adjudication officer is disallowed in each case. In that exception, case CS/168/91, the appeal is allowed for the reasons set out in this Appendix.

APPENDIX - PART 2

13. A further submission dated 23 April 1993 has been made in the same terms in each appeal by the adjudication officer, following receipt of the judgment of the European Court in Thomas.

14. That submission continues to ask for a deferment of the decision in each appeal, and, in paragraphs 9-12, repeats three of the grounds already considered above in this Appendix.

15. Paragraphs 6 and 7 repeats some arguments of law in favour of allowing the appeals, which have been considered fully in Graham, and which call for no further consideration here.

16. In those circumstances, I do not find it necessary to invite any further submissions on behalf of any of the claimants.