

JGM/PS

NICK WARREN

next  
Bulletin

SOCIAL SECURITY ACTS 1975 TO 1977

CS 488/1976

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Case No. 17/76 - 2

[ORAL HEARING]

Decision C.S. 3/77

1. My decision is:-

- (i) that the decision or decisions awarding to the claimant non-contributory invalidity pension (to which I shall refer as "the pension") for the inclusive period from 20 November 1976 to 7 January 1976 are to be reviewed;
- (ii) that on review they are to be revised so as to provide that, in respect of the period 20 November to 2 December 1975 only, the benefit was not payable; and
- (iii) that in consequence of such revision there has been an overpayment of benefit repayment of which is not required.

2. The pension is a new benefit introduced by section 36 of the Social Security Act 1975 (to which I shall refer as "the Act") which so far as material provides as follows:-

"36.-(1) Subject to the provisions of this section, a person shall be entitled to a non-contributory invalidity pension for any day on which he is incapable of work, if he has been so incapable for a period of not less than 196 consecutive days ending immediately before that day.

(2) ...

(3) A person shall not be entitled to such a pension unless he satisfies prescribed conditions as to residence or presence in Great Britain.

(4) ...

(5) ...

(6) ...

(7) Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as incapable of work ..."

3. The above section was brought into force (except in relation to certain classes of women) by the Social Security Act 1975 (Commencement No 1) Order 1975 [S I 1975 No 1013] (to which I shall refer as "the commencement order"). This came into operation on 20 July 1975 "but not so as to confer entitlement to that pension in respect of any period before 20 November 1975".

4. By virtue of regulation 3(1) of the Social Security (Non-Contributory Invalidity Pension) Regulations 1975 [S I 1975 No 1058] (to which I shall refer as "the principal regulations") the prescribed conditions as to residence and presence in Great Britain in relation to any person in respect of any day are:-

"(a) that he is present in Great Britain;

(b) that he has been present in Great Britain for a period of, or periods amounting in the aggregate to, not less than 26 weeks in the 12 months immediately preceding that day; and

(c) that he has been resident in Great Britain for a period of or periods amounting in the aggregate to -

(i) 10 years in the 20 years immediately preceding that day; or

(ii) ..."

By regulation 3(3) it is provided that when a person has been entitled to the pension for any day, the conditions set out above shall not apply to that person in respect of any subsequent day of incapacity for work falling within the same period of interruption of employment. It must be remembered that quite apart from regulation 3(1), section 82(5)(a) of the Social Security Act provides that, subject to exceptions, a person shall be disqualified for receiving any benefit for any period during which he is absent from Great Britain.

5. Regulation 4(1) of the principal regulations provides that for all the purposes of the pension a person shall not be treated as incapable of work for any day unless that day would be a day of incapacity for work under the provisions of section 17(1)(a) of the Act or of certain of the regulations made under section 17. Regulation 4(2) provides as follows:-

"In determining for the purposes of section 36(1) of the Act whether a person has been incapable of work for 196 consecutive days, a day shall not be treated as a day on which that person was incapable of work if on that day he was absent from Great Britain or undergoing imprisonment or detention in legal custody."

Regulation 6 provides that in the case of a person who has previously been entitled to the pension, the requirements of section 36(1) as to the period for which a person must have been incapable of work shall be deemed to be satisfied on any day in a period of interruption of employment if they have been satisfied on any earlier day in that period.

6. The claimant is a man now aged 46 who has throughout his life been incapable of work as the result of an attack of poliomyelitis contracted in infancy. Both he and his wife, who represented him at the oral hearing before me, attended in wheel-chairs. The insurance officer was represented by Mr J S Finney of the solicitor's office of the Department of Health and Social Security. He did not dispute that subject to any effect of regulation 4(2) of the principal regulations above quoted the claimant has at all material times been incapable of work for the purpose of the pension.

7. The claimant is dependant on an iron lung for breathing at night. But in the year 1975 it was decided that he should be given an opportunity of trying a Tunnicliffe portable breathing jacket as a possible future substitute for the iron lung. The effect of this is more beneficial in a warm climate and a decision was taken to go to the West Indies for this purpose. He and his wife were thus absent from Great Britain from early in November until they arrived back in this country on 3 December 1975. On 4 September 1975 the claimant had made a claim for the pension and a decision awarding it from 20 November was given before he left this country. This decision was, under Article 3 of the commencement order, subject to the condition that the requirements for entitlement to the pension were satisfied when the pension became payable and subject to review if they were found not to be satisfied.

8. The claimant's wife made enquiries of the local office of the Department about the pension generally well before they went abroad, but she told me that she did not think that at that time she mentioned that they were going abroad. She was given leaflet NI 210. She considered that she was not adequately advised about the matter, which is not perhaps surprising as the benefit was a new one and the relevant regulations are complex. It is clear also from the fact that, as related below, the pension was mistakenly paid that there was some confusion. The pension was put in payment with effect from 20 November 1975 after the claimant's return to this country, the first payment, covering the period from that date until 24 December 1975, being made on 22 December. Before this payment was made the claimant's wife on advice to do so had herself made a claim for the pension. The claim should have been rejected because she was one of the class of women excluded from the operation of the commencement

order but in fact the benefit was paid to her for some of the time. Making her claim she reported the details of the visit to the West Indies and this led, it seems, to enquiries about the claimant's absence abroad. In the end payment of the pension was stopped from 8 January 1976 and the insurance officer gave a decision reviewing and revising the decisions awarding the pension from 20 November 1975 to 7 January 1976 so as to provide that the pension was not payable for that period, with the result that there was an over-payment of £55.30 repayment of which was not required. The basis of the revised decision in relation to the period while the claimant was absent from Great Britain was that he did not then satisfy the first condition as to presence in Great Britain set out in paragraph 4 above; and in relation to the period after the claimant had returned to Great Britain the basis was that he did not satisfy the provisions of section 36(1) of the Act as, having regard to regulation 4(2) of the principal regulations (set out in paragraph 5 above) the period of absence prevented there being 196 consecutive days of incapacity immediately preceding the period in issue. Though payment of the pension was discontinued, it was subsequently, as I understand it, resumed after the expiration of 196 days from the claimant's return to Great Britain.

9. The claimant appealed from the decision of the insurance officer. As repayment of amounts overpaid was not required the decision appealed from did not affect him adversely, but he was concerned with its implications not only as to the period before payment of the pension was resumed but also as to any future period of absence from Great Britain. The local tribunal dismissed the appeal and the claimant now appeals to the Commissioner.

10. Four grounds of appeal have effectively been put forward;

(i) the claimant was misled by the local office and by the terms of leaflet NI 210;

(ii) there was in the circumstances no power to review the decision awarding the pension;

(iii) the claimant became entitled [prospectively] to the pension either on the date when the commencement order came into force, or alternatively as I understood the claimant's wife to suggest at the hearing, on the date when the decision was given awarding the pension from 20 November, at both of which dates (even if not at 20 November) he satisfied all the relevant conditions and so was by virtue of regulations 3(3) and 6 of the principal regulations entitled to the pension from 20 November;

(iv) regulation 4(2) of the principal regulations is ultra vires.

11. I accept that (apart from the ultra vires point) leaflet NI 210 is misleading inasmuch as it purports to set out the effect of the conditions as to residence and presence in Great Britain (including the requirement of presence in Great Britain for at least 26 weeks in the 12 months before payment starts) without reference to the effect of regulation 4(2), which is to impose a requirement of presence in Great Britain for 196 days (28 weeks) out of the 196 days before entitlement begins. In view of my decision hereafter that regulation 4(2) is ultra vires the leaflet is fortuitously not misleading in this respect. But even if it were misleading, I should be unable to take into account, in reaching my decision, the possibility that the claimant may have adopted a course as a result of misleading information from official sources and so lost title to benefit. (See Commissioner's Decision R(F) 3/61 at paragraphs 7 and 8).

12. The claimant's point on the right to review would be of little practical use to him even if I upheld it, and it was not pressed at the hearing before me. In my judgment the decision awarding benefit from 20 November, which was given before the claimant left this country, can clearly be reviewed on the ground that his going abroad was a relevant change of circumstances within the meaning of section 104(1)(b) of the Act. If any relevant decision was given by the insurance officer after the claimant's return I am satisfied that it was given in ignorance of the material fact that the claimant had been absent from Great Britain and so fell within the provisions of section 104(1)(a) of the Act. I realise that the claimant's wife's own claim disclosed her absence, but I am not persuaded that this information was conveyed to the insurance officer before he gave the relevant decisions, and I do not think that knowledge of members of the staff of the Department should in these circumstances be imputed to the insurance officer. The decision or decisions in question were in my judgment properly reviewed.

13. The claimant's next point is that he was "entitled" to the pension (albeit only from a future date) as soon as the commencement order came into operation or at the latest when the anticipatory decision awarding benefit was given. At either of such dates he satisfied the conditions for an award of the pension (or would have done so if entitlement to the pension could have been conferred in respect of that day) and, if he could be regarded as entitled on such day, then on 20 November he would have been a person who had previously been entitled to the pension and he would have been relieved by regulations 3(3) and 6 of the principal regulations from the need to satisfy further the relevant pre-conditions to entitlement. I cannot accept this. Article 2 of the commencement order specifically rules out entitlement to the pension in respect of any period before 20 November 1975 and I do not consider that a person can be described as entitled to the pension before that date. The anticipatory decision awarding the pension from 20 November was subject to review and in the circumstances of this case fell to be reviewed and I do not consider that prior to 20 November the claimant was in any real sense entitled to the pension.

14. This leaves the claimant's point that regulation 4(2) is ultra vires. This point affects only the period after the claimant returned. While the claimant was absent from Great Britain he did not satisfy the first of the conditions as to presence in Great Britain and, whether regulation 4(2) is valid or not, the pension was not payable to him for the period of his absence, and the award of benefit for that period must be revised in the sense indicated in paragraph 1(ii). Mention was made during the hearing of the point that disqualification on account of absence abroad (under section 82(5)(a) of the Act) is subject to an exception for those who have been continuously incapable of work for 6 months. This exception, however, is not relevant to the question whether the conditions as to presence in Great Britain are satisfied, though it could well be important in the event of the claimant's going abroad again.

15. The claimant's wife submitted that regulation 4(2) of the principal regulations was ultra vires on the ground that the power in section 36(7) of the Act to prescribe circumstances in which a person is or is not to be treated as incapable of work cannot be exercised by reference to considerations entirely unconnected with incapacity (such as absence from Great Britain). I am afraid that I am unable to accept this. We are concerned with a power, not to define the phrase "incapable of work", but to prescribe the circumstances in which a person is or is not to be treated as incapable of work. Section 17(2) of the Act includes (as did earlier Acts) a power to make regulations making provision as to the days which are or are not to be treated as days of incapacity for work. Regulations made under this and the earlier Acts have always contained a provision (not incorporated into regulation 4(1) of the principal regulations) to the effect that a day is not to be treated as a day of incapacity for work if it is a day in respect of which a person is disqualified for receiving sickness benefit. Disqualification can be based on a variety of grounds unconnected with incapacity for work, such as late claim or absence abroad. There are many Commissioners' decisions in which a day has been treated as a day of incapacity for work under such provision without its validity being questioned; I cite as an example the Decision of a Tribunal of Commissioners C S 174/49 (K L). Regulation 4(2) is thus not ultra vires on the ground suggested by the claimant.

16. But there is another and I think more formidable objection to regulation 4(2). Regulation 4(1) prescribes circumstances in which a person is or is not to be treated as incapable of work for any day for all the purposes of the pension; and there is no doubt that the claimant has at all material times been incapable of work in terms of regulation 4(1). Therefore 3 December 1975 was a day on which he was incapable of work. Regulation 4(2) purports to have the effect that he was not in terms of the same section "so incapable" for a period of not less than 196 consecutive days immediately preceding 3 December. It has this effect not because the circumstances of his incapacity on these days were any different, but because the regulation, for this limited purpose only, further

restricts the circumstances in which the claimant is to be treated as incapable of work. I called in advance of the hearing for argument on the question whether this was a permissible exercise of the power to make the regulations. Mr Finney referred me to section 166(2) of the Act which so far as material is as follows (the numbers in square brackets being mine):-

"Except in so far as this Act otherwise provides, any power conferred thereby to make ... regulations or an order may be exercised -

(a) either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case;

(b) so as to make, as respects the cases in relation to which it is exercised -

(i) ... ;

(ii) [1] the same provision for all cases in relation to which the power is exercised, or, [2] different provision for different cases or different classes of case or [3] different provision as respects the same case or class of case for different purposes of this Act;

(iii) ... "

17. Part [1] of section 166(2)(b)(ii) clearly does not authorise what has been done. Part [2] in my judgment applies only where the regulations or orders identify the cases or classes of case for which they make different provision, as with the commencement order which makes a different provision for certain classes of women. Part [3] allows different provision to be made as respects the same case for different purposes of the Act. I do not think that every reference to being incapable of work in section 36 is necessarily a different purpose of the Act. If the power in section 166(2)(b)(ii) is to be construed as widely as that, it would enable the regulation-making authority to emasculate a statutory exception to a statutory rule by making different provisions in respect of the rule and the exception. At all events it is not in my judgment permissible to prescribe one set of circumstances in which a person is to be treated as incapable of work for the purpose of the first part of subsection (1) of section 36 of the Act down to the comma, and a more restricted set of circumstances in which he is to be treated as "so incapable" for the purpose of the rest of that subsection. I hold regulation 4(2) of the principal regulations to be invalid accordingly.

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18. In consequence the claimant from 3 December onwards satisfied all the conditions for an award of the pension and the decisions awarding the pension from that date are not to be revised on review. As to the period before that date although the decision is revised with a resultant overpayment of benefit, there is no question of lack of due care and diligence and repayment is not required.

19. At the hearing the question was canvassed as to the position if the claimant went abroad again both during the period abroad and after his return. It is notoriously hazardous to give or rely on pronouncements made in relation to hypothetical future circumstances particularly as the regulations may have been changed by them. Much depends on the length of the absence and the place visited. It would be most unwise to dispense with further enquiry.

20. The claimant's appeal is, to a large extent, allowed.

(Signed) J G Monrce  
Commissioner

Date: 26 July 1977

Commissioner's File: C.S. 488/1976  
C.I.O. File: I.O. 1775/NV/76  
Regional File: W.H. (Unregistered Papers)