CS 546/1979

JGM/JP

SOCIAL SECURITY ACTS 1975 TO 1979

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Decision C.S. 19/79

1. My decision is that an increase of sickness benefit is payable to the claimant for the eldest three (as well as for the youngest) of the children referred to in paragraph 3 below for the inclusive period from 15 January to 3 February 1979.

2. This is the insurance officer's appeal from a decision of the local tribunal awarding such increase for two only of the first three children above referred to. It follows from Decision R(F) 1/72 that notwithstanding that this is the insurance officer's appeal I have jurisdiction if satisfied that it is the right decision, to give a decision more favourable to the claimant than that from which the insurance officer has appealed. As will appear I reject the grounds on which the local tribunal decided the appeal to them.

3. The claimant was incapable of work for the period mentioned in paragraph 1. He was at that time living with a woman to whom I shall refer as "W" and the household included 4 of the children of W, to whom I shall refer in order of age from eldest to youngest as J, A, B and E. The claimant is the father of E but not of J, A and B. The claimant claimed an increase of sickness benefit for the four children but though the increase was awarded for E, of whom the claimant is the father, it was refused for the other three children. The ground of the refusal was that under section 41(1) of the Social Security Act 1975 as amended by the Child Benefit Act 1975 it is a condition of a claimant's title to an increase of sickness benefit for a child that he should be entitled to child benefit in respect of that child. At the time in question W, and not the claimant, was entitled to child benefit in respect of all four children. Schedule 20 to the Social Security Act as amended (under the definition of "entitled to child benefit") authorises the making of regulations under which for the purposes of that Act a person may be treated as entitled to child benefit.

4. Regulation 6(1) of the Social Security Benefit (Dependency) Regulations 1977 [SI 1977 No 343] (the Dependency Benefit Regulations) makes provision so far as relevant as follows:-

"for the purposes of ..... or sections 41, 49 and 64(1) [of the Social Security Act 1975] (benefit for beneficiary's dependent children) a person shall be treated as if he were entitled to child benefit in respect of a child for any period throughout which -

(a) child benefit has been awarded to a parent of that child with whom that child is living and with whom that person is residing and either -

(i) the child is being wholly or mainly maintained by that person; or

(ii) that person is also a parent of the child; or

(b) .....

5. The increase was awarded for E under sub-paragraph (a)(ii) above but the increase for J, A and B could be awarded only if, in relation to them, the claimant satisfied the requirement that he was wholly or mainly maintaining them. The insurance officer refused the increase on the ground that he was not, and the local tribunal decided that he was wholly or mainly maintaining J and A but not B. The test that has been evolved for deciding whether a person is wholly or mainly (or to any other extent) maintaining a person living with him in a single household is known as the family fund test. It is not a statutory test and it had, I believe, until recently been regarded as obsolete and irrelevant to any questions that commonly arose until it cropped up again in connection with regulation 6(1)(a)(i). It is a subject of which I was relatively unfamiliar and I directed an oral hearing of the appeal, at which the insurance officer was represented by Mr R G S Aitken of the solicitor's office to the Department of Health and Social Security. The claimant did not attend and was not represented. Mr Aitken invited me to state the rules as to the application of the test in the light of the introduction of child benefit and of other matters in a way that will be capable of being applied by insurance officers hereafter. If I am able to do so even incompletely I owe much to the assistance that I derived from his submissions.

6. The family fund test was devised by the Umpire under the Unemployment Insurance Acts. It was held by a Tribunal of Commissioners in Decision R(I) 1/57 that the family fund method of assessing the contribution of one person to the maintenance of another should apply unless there are wholly exceptional circumstances. Although this was stated in general terms I take it to mean that the method should be applied where the maintainer and the person maintained are living in a single household unless there are wholly exceptional circumstances.

7. The test entails the apportionment of the weekly "income" of the household among its members in a complicated way and I do not feel at liberty to depart from the principles already laid down merely because I think that some alternative would be simpler. As the amount of a household's income is liable to change markedly as soon as one member of the household becomes incapable of work or unemployed, a question immediately arises as to the date as at which the question should be

determined. In Decision R(I) 1/57 and many other decision on the family fund test the question was whether a deceased person had been maintaining a member of his household and the question had clearly to be determined by reference to the situation before his death. There is some authority, however, on cases like the present. In Decision C.S. 58/49 (KL) it was held that where a beneficiary had wholly or mainly maintained his wife or other dependant for the period during which he was not incapable of work, that period should be regarded as continuing until it was manifest that it had come to an end (see paragraph 9 of the Decision). I have, therefore, in this case to look at the position immediately before the claimant became incapable of work.

8. The decision last cited is an authority also on the regulation now found as regulation 2(1) of the Dependency Benefit Regulations. This so far as material provies as follows:-

> "..... a beneficiary shall not for the purposes of the [Social Security Act 1975] be deemed to be wholly or mainly maintaining another person unless the beneficiary -
>
> (a) when unemployed, or incapable of work, or, as the case may be, retired from regular employment, contributed towards the maintenance of that person an amount not less than the amount of increase of benefit received in respect of that person; and
>
> (b) when in employment, or not incapable of work or, as the case may be, not so retired ..... contributed more than half of the actual cost of maintenance of that person."

It was held in Decision C.S. 58/49 (KL) (paragraph 6) that a person who was incapable of work and received no increase for the dependant in question satisfied sub-paragraph (a) seemingly because there would be nothing to contribute. But it was held also (see paragraph 7) that as the regulation is in the"shall not ..... unless" form and not a "shall ..... if" form it was not to be inferred from it that a person who complied with sub-paragraph (a) automatically fell to be regarded as wholly or mainly maintaining that person. He still has to establish affirmatively that he can be regarded as wholly or mainly maintaining that person, that is to say that he was contributiong more than half the cost of the maintenance. I have, therefore, in this case to ascertain whether on the application of the family fund test the claimant here was at the material time contributing more than half the cost of the maintenance of J, A and B.

9. As I am here dealing with the question whether the claimant satisfies the family fund test, I propose to state the rules as I understand them in terms of the claimant. It must be remembered, however, that it is not always the claimant to whom the test has to be applied.

10. There is a series of steps or stages in the test as follows:-

(a) The weekly "income" of the household must first be ascertained. This will include the net earnings of each member of the household, and other income (if any) coming in, social security and supplementary benefits, maintenance payments under court orders or agreements. The list is not intended to be exhaustive. For instance I was told at the hearing that where the household does not live in rented accommodation an amount equal to the notional rental value of the accommodation is added to the household income and attributed (at stage (c)) to the person properly regarded as providing accommodation (cf C.I. 151/50 (KL)). Some special cases are referred to in paragraphs 6 and 17 of Decision R(I) 1/57. There may be a question what is deductible in arriving at the net income of a person. Clearly income tax and social security contributions where payable may be deducted. In the present case the claimant suffers deduction under an attachment of earnings order in favour of the child of his "previous" marriage. This too must be a deduction, but there may well be other allowable deductions.

(b) The amount of the family fund is assumed to be the aggregate cost of maintenance of the household. The cost of maintenance of each individual member of the household is ascertained by dividing the family fund by the number of members of the household, children under 14 being considered as half of persons over 14. In other words the fund is divided among the household in the proportion of 1 for each child under 14 and 2 for the others. The amount so apportioned to each member of the household is referred to as his "unit cost".

(c) The sources (internal or external) of the various components of the family fund are identified. The net earnings of each member of the household are treated as contributed by that member. Pensions in respect of past service (even voluntary pensions (see Decision C.S. 58/49 (KL) at paragraph 5) are treated as a contribution by the member concerned. Contributory benefits are regarded as provided by the person whose contributions gave title to the benefit (see Decision C.P. 96/50 (KL) where it was held that a pension payable to a wife on her husband's contributions was to be regarded as contributed to the family fund by her husband. The position of non-contributory benefits and supplementary benefit and the like is more complex. I think it right to say that prima facie such benefits must be regarded as

being contributed by outsiders, but there are exceptions to this. This appeal concerns primarily the proper treatment of child benefit for purposes of the family fund test and I make further reference to the subject in paragraph 14 below.

(d) When contributors of the various components of the family fund have been ascertained, the contributions may be divided into three groups: those derived from the claimant, those derived from other members of the household and those derived from outside. The part contributed by the claimant is assumed to have been applied first in meeting the claimant's unit cost. If there is no balance the claimant cannot have contributed to the maintenance of anyone else and the question is answered. If there is a balance this is ascertained and is known as his surplus. The same rule applies to the contributions of other members of the household, and they will end up with either a surplus or a deficit (unless by chance they break even). Those members of the household who have no contributions have a deficit equal to their unit cost.

(e) The claimant's and any other surpluses and the contributions from outside (other than "earmarked" contributions, see (f) below) are then applied rateably in meeting the aggregate deficits of those with deficits. In cases where there are no earmarked contributions, if the amount of the claimant's surplus applied towards meeting the deficit of a member of the household amounts to more than half of his net unit cost then he is wholly or mainly maintaining that person; and if not, not.

(f) A complication is introduced where contributions from outside are regarded as earmarked for particular members of the household rather than for the household as a whole. Earmarked payments (whatever else they include) include payments made for the maintenance of children under court orders or agreements. The Umpire in Decision 1261/31 tried to reject this complication and departed from earlier Umpires' decisions but the Commissioner in Decision C.U. 544/50 (KL) preferred to retain it. This is to my mind an unfortunate complication and it raises the question what if any other classes of payment are to be regarded as so earmarked. In the present case the question arises whether child benefit should be treated as so earmarked. In cases where there are such contributions from outside earmarked for a particular member or members of the household and not the household as a whole these are to be applied in reducing the deficits of those for whom the contribution is earmarked. This is done before the claimant's surplus and any non-earmarked funds from outside are applied in meeting the various deficits.

11. Applying these rules in the present case the insurance officer reached the following conclusion:-

(a) The family fund is £60.70 made up as follows:-

Claimant's net earnings	£38.20
Child Benefit	£12.00 (£3 per child)
Family income supplement	£10.50
	£60.70

(b) The unit cost of the claimant and W is one-quarter of this family fund (£15.17½) and of the children is one-eighth (£7.58¾).

(c) and (d) The only contributor other than outside contributors is the claimant who thus has a surplus of £38.20 less £15.17½, ie £23.02½.

(e) Child benefit should be treated as earmarked for the children so that at stage (e) only family income supplement (of £10.50) is deducted from the deficits of W and the children in proportion to their deficiencies, viz £3.50 from W's deficit and £1.75 from each of the children's deficits. This reduces the children's deficiencies to £5.83¾.

(f) The child benefit is then deducted exclusively from the deficits of the children (£3 from each) reducing them to £2.83¾, which is all that is left to be met out of the claimant's surplus. This being less than half the children's unit cost, the claimant cannot be regarded as wholly or mainly maintaining the children. The insurance officer's calculations are not expressed exactly in these terms but this is the effect of them.

12. It will be noticed that under the test so applied the claimant notionally contributed a substantial if insufficient amount to the cost of maintaining each of the children. If those notional contributions could be treated as made for the children in such proportions as would secure as large a payment as possible (rather as actual contributions can be treated under regulation 3 of the Dependency Benefit Regulations) the claimant might have qualified for the increase in respect of some of the children J, A and B. The local tribunal seem to have tried to achieve this by modifying step (b) and allocating the family fund among the household in the proportion of 6 each for W and the claimant 5 for J and A, 4 for B and 3 for E. In this way they reached the conclusion that the claimant was wholly or mainly maintaining J and A but not B, (nor incidentally E who qualified anyhow on other grounds). I do not consider that it was right to modify the test in this way. I recognise that the method of apportionment is arbitrary, but no kind of certainty

can be achieved if the determining authorities are free to adjust the apportionment in order to achieve the result that they happen to think appropriate. It is sometimes permissible to reject the family fund test altogether as impracticable (cf Decision R(I) 46/52), but where this is not the case any departure from the standard method is to be avoided see Decision C.S.I. 50/49 (KL).

13. The conclusion reached by the insurance officer was based on the assumption that child benefit should be treated as earmarked for children in respect of whom it was paid. This was in accordance with what had been accepted without argument (the decision not turning on the point) in the cases on Commissioners files C.W.S. 31/79 and C.S. 465/78, the latter of which was a decision of my own. The point not having been argued there, I do not consider the decision to be authoritiative on it. If child benefit is in this case not treated as earmarked for the children then it would like the family income supplement have been treated at stage (e) in paragraph 10 as money contributed from outside for the benefit of the household at large and there would have been no step (f). In that case the claimant's surplus of £23.02½ would have been apportioned between W and the children at £7.67½ for W and at £3.83¾ for the children and each child's share of that surplus would then be more than half his unit cost so that the claimant would be wholly or mainly maintaining them. It is thus crucial to determine the proper way in which to treat child benefit for the purposes of the family fund test.

14. It may in some future case be argued that child benefit (like in effect an income tax allowance for a child) should be regarded as contributed by the member of the household who is entitled to it (in this case W). Some benefits not derived from the beneficiary's own contributions have been treated in this way, as National Assistance in Decisions C.I. 266/50 and R(I) 1/57. Likewise a widowed mother's allowance was held to be a contribution by the widowed mother in Decision R(I) 20/60, where also the increase of widowed mother's allowance for a child was treated as the child's contribution. If child benefit were treated as contributed by W it would be applied in reducing her deficiency and the claimant's surplus would have gone almost entirely to meeting the children's unit cost, and would easily have exceeded one half of it. I do not however decide this appeal on that ground but leave open the question whether child benefit should be regarded as a contribution by the person entitled to it. I am satisfied that, even if I assume against the claimant, that it is not such a contribution, it should not be regarded as earmarked exclusively for the children in respect of whom it is paid so that the claimant succeeds by virtue of the calculations made at the end of paragraph 13 above.

15. Child benefit replaced family allowances and in a sense also the income tax allowances for children which are being phased out. Family allowances were expressed by section 1 of the Family Allowances Acts both of 1945 and 1965 as paid for the benefit of the family as a whole, and for that reason they were not regarded as contributed by the person entitled to them (as in Decision R(S) 1/51). They were not regarded as earmarked for the children, though possibly (on this I have had no

authority referred to me) they might have been earmarked for those members of the household that were members of the family for purposes of the Family Allowances Acts. For the same reason I consider that family income supplement (which by section 1 of the Family Income Supplements Act 1970 is paid for a family as defined in that Act) should not be regarded as contributed by the person to whom it is paid or as earmarked for any particular member or members of the family. Child benefit is not expressed in the Child Benefit Act 1975 to be payable for any particular person or class of persons, though it is expressed to be payable in respect of children. I think it undesirable to extend the class of payments earmarked for particular members of the family when the payments in question are in practice quite properly used as mere additions to the family fund. I find in the Child Benefit Act and regulations under it a number of indications that child benefit is to be regarded as intended to go towards providing for the needs of the household. Thus under Schedule 1 paragraph 4 no person is entitled to child benefit (subject to regulations) if he is not subject to income tax; and the differential rates payable in case of the "one-parent families" under regulation 2(2) of the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976 /S.I. 1976 No. 1267/ as amended point the same way. I hold therefore that child benefit (even if not treated as the contribution of any member of the household) should not be treated for purposes of the family fund test as earmarked for the children in respect of whom it is paid. It follows that (whether or not child benefit should be regarded as contributed by the person entitled to it) the claimant establishes that he was (by virtue of the calculations set out at the end of paragraph 13) wholly or mainly maintaining all the children and that he was for the period before me entitled to an increase of sickness benefit in respect of J, A and B as well as E.

(Signed) J G Monroe
Commissioner

Date: 6 January 1980

Commissioner's File: C.S. 546/1979

C I O File: I.O. 1615/S/79

Region: South Western