

CS 701/1980

JSW/EFM

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.S. 7/81

1. My decision is that the claimant is disqualified for receiving sickness benefit for the inclusive period 8 September 1978 to 27 October 1978 because he was absent from Great Britain, as provided by section 82(5)(a) of the Social Security Act 1975, and his absence was not for the specific purpose of being treated for incapacity which commenced before he left Great Britain nor on the day on which his absence began had he been continuously incapable of work for the past 6 months as provided by regulation 2(1) of the Social Security Benefit (Persons Abroad) Regulations 1975 (SI 1975 No. 563). He is not entitled to sickness benefit either by reason of regulation (EEC) No 1408/71 or under the provisions of a convention on Social Security between the United Kingdom and the Republic of Ireland.

2. At the oral hearing before me, the claimant appeared in person and the insurance officer was represented by Mrs G S Kerrigan of the Solicitor's Office of the Department of Health and Social Security, to whom I am indebted for her clear presentation of the submissions.

Facts

3. The history of the matter concerning the relevant period during which the claimant was continuously incapable of work commenced in France, where the claimant was in March 1978. While in that country, he had trouble with his left eye. He consulted an oculist in Toulouse and then consulted Dr Pierre Amalric on 25 March 1978 and had an operation on the eye in France. He returned to England on 19 May and consulted his doctor, who issued the first medical statement, dated 22 May 1978, advising the claimant to refrain from work on a diagnosis of detached retina. The claimant claimed social security benefit (or equivalent) in France and received treatment for his condition there. He contended that his incapacity commenced on 17 March 1978 and that has been accepted by the insurance officer.

Decision C.S. 7/81

4. The claimant attended Bristol Eye Hospital and had further treatment for his left eye, including a further operation, and he then went away with his wife for a period of convalescence, staying near relations in the Republic of Ireland. He was admittedly absent from Great Britain for the inclusive period 8 September to 27 October 1978. On 1 September 1978, his doctor issued a medical statement advising the claimant to refrain from work for 3 months. It is not in dispute that he was continuously incapable of work during the whole period from 17 March 1978 to and including a date in January 1979, which includes the relevant period of absence from Great Britain.

United Kingdom Legislation

5. By United Kingdom legislation, section 82(5)(a) of the said Act provides that, except where regulations otherwise provide, a person shall be disqualified for receiving any benefit, and an increase shall not be payable in respect of the beneficiary's wife or husband, for any period during which he is absent from Great Britain. Regulation 2(1)(b) of the said regulations provides that a person shall not be disqualified if he is temporarily absent for the specific purpose of being treated for incapacity which commenced before he left Great Britain. There are a number of Commissioners' decisions on what constitutes "being treated" to which it is not necessary to refer since the claimant has not contended that he went to the Republic of Ireland for treatment or that he received any treatment while there, other than medication which he took with him. I need refer only to R v National Insurance Commissioner, Ex parte McMenemey, reported as an appendix to Decision R(S) 2/69, in which the High Court decided that, under British legislation, a person who goes abroad merely for the purposes of rest and freedom from worry in order to allow nature to continue the cure and recovery is not going for the purpose of being treated.

6. Regulation 2(1)(c) of the said regulations provides that a person shall not be disqualified if on the day on which the absence began he was, and had for the past 6 months continuously been, incapable of work and on the day for which benefit is claimed he has remained continuously so incapable since the absence began. On the day on which the claimant's absence began he had not been continuously incapable of work for the past 6 months, although he was only short of the 6 months by 9 days. The claimant cannot therefore avoid disqualification under the provisions of the United Kingdom legislation.

Advice to persons temporarily absent from the United Kingdom

7. The claimant did not dispute the legal effect of the regulations. His main complaint was that he telephoned the local social security office on the morning of 1 September 1978, and confirmed by letter of the same date, that he was going on holiday to Eire for one month beginning on 7 September 1978. He gave the address at which he would be staying in Eire, enclosed a continuation medical certificate and stated that, if there were any queries would he be telephoned, giving

the number, before 7 September. No reply was sent to that letter either by telephone or in writing. A statement was put in evidence before me, signed by a HEO, that there was no record of the claimant's having telephoned on 1 September 1978 and at this stage the staff could not remember such a call. I am satisfied that the claimant telephoned as stated in his letter. It is also stated that the general practice with enquiries regarding absence abroad is to inform a claimant that benefit cannot normally be paid but will be considered in the light of the circumstances.

8. In the present case, I find that the claimant received no advice in response to his telephone call and letter before he went to Eire. Mrs Kerrigan conceded that the procedure had not been followed in this case. The earliest response the claimant received to his letter was dated 30 October 1978, after his return, asking a number of questions relating to his absence and containing a paragraph, which he signed, to the effect that the questions asked relating to possible continued entitlement to benefit whilst abroad, and about the method of payment, did not indicate that benefit could necessarily be paid.

9. The claimant said that the answer he received when he telephoned on 1 September was not very clear which was why he wrote the letter. The letter of 30 October 1978 was the first indication that there were possible problems. Had he known of the 6 months period, he would have considered whether to delay his departure for the few days necessary to complete the period since there was no pressing need to leave when he did. Those matters can not affect the application of the statutory provisions but I am informed that the claimant's allegations and his benefit position will be considered by the Department in the light of my decision.

10. It was suggested in Decision C.S. 10/80 (not reported), in regard to completion of the 6 months' period, that an interviewing officer should inform a claimant that he would be in a stronger position by delaying his departure. That would put a heavy responsibility on officers at local social security offices. It has been held that it is not the duty of officials to advise claimants on how to improve their entitlement to benefit, eg by advising a person to claim, or to refrain from claiming, in order to derive an advantage from the application of a particular period of interruption of employment. It would not be advisable, apart from the responsibility, for an official to advise a claimant that it would be advantageous to delay his departure. Such advice might be contrary to advice given by the person's doctor and might be contrary to the alleviation of a medical condition advised by the doctor. There is also no reason why an official should anticipate that a person's doctor will continue to advise a claimant to refrain from work. What is very necessary is that a person making enquiries should be fully informed of the conditions of entitlement to benefit whilst absent from Great Britain. It is then for him to decide for himself, and perhaps on his doctor's advice, whether he should delay his departure.

11. Instructions issued on the procedure to be followed when a claimant intimates his intention to leave Great Britain were put in evidence before me. In a number of appeals which have come before me, the procedure has not been followed and no information has been given as to the conditions for avoiding disqualification: in some cases only a number of questions have been asked as to the purpose and duration of the absence. Information is contained in Leaflet NI38 on guidance for people abroad but it is rather voluminous, dealing with different benefits, and a claimant's attention should be drawn to the part affecting his particular benefit. I have found in many cases coming before me that officials are usually brief and cautious in their advice, merely indicating that payment of benefit will be considered in the circumstances of the case. In Leaflet NI16, March 1979, Sickness Benefit, page 13, there is a paragraph which commences -

"Generally you cannot get sickness benefit for any period outside Great Britain, Northern Ireland and the Isle of Man. But you may be able to get benefit in some circumstances and in some countries."

That statement is, in general, correct and it would be fairer to advise claimants in receipt of sickness benefit to that effect, at the same time, of course, giving them information as to the conditions when benefit might be payable. Different considerations apply to invalidity benefit, which I have endeavoured to explain later, and to other benefits, which are subject to different provisions for which different advice is required.

European Economic Community Regulations

12. I turn now to the effect of the EEC provisions. Although the claimant was receiving sickness benefit, I have taken the opportunity to draw attention to the difference between sickness benefit and invalidity benefit, which is a pension. The relevant provisions of the Articles of Regulation (EEC) No 1408/71 of the Council are as follows:-

"Article 1

Definitions

For the purpose of this Regulation:

.....

(h) "residence" means habitual residence;

(i) "stay" means temporary residence".

.....

Article 10

1. Save as otherwise provided in this Regulation, invalidity, old age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

.....

2.

Article 22

1. A worker who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

(a) whose condition necessitates immediate benefits during a stay in the territory of another Member State, or

(b) who, having become entitled to benefits 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 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 legislation of the competent State.

2.
3.
4."

Article 89 provides special procedures for implementing the legislation of certain Member States set out in Annex V
Point I. (Point J. since the accession of Greece to the EEC).
United Kingdom. By regulations (EEC) No. 1309/76 and No. 1517/79
an addition was made to Annex V - Point J. United Kingdom,
retrospective to 1st April 1973 -

"14. For the purposes of Article 10 (1) of the Regulation, any beneficiary under United Kingdom legislation who is staying in the territory of another Member State shall, during that stay, be considered as if he resided in the territory of that other Member State."

13. Dealing first with Article 22, since that affects this appeal, there is no doubt that the claimant is a worker who satisfied United Kingdom legislation for entitlement to benefits. Article 18 relates to aggregation of insurance periods or periods of employment or residence and has no relevance to this appeal. Paragraph 1(a) relates to immediate benefits during a stay in another Member State. A person's condition does not necessitate cash benefits but benefits in kind, such as assistance from the local health service or a doctor (Decision R(S) 4/80). Paragraph 1(b) applies to return to, or transfer of, residence (as defined in Article 1(h) and is of no assistance to persons staying temporarily in another Member State. Paragraph 1(c) depends for its application on the Secretary of State authorising a person to go to another Member State to receive there the treatment appropriate to his condition. Without that authorisation, entitlement to the benefits stated in the two sub-paragraphs does not arise. "Treatment appropriate to his condition" in that context resembles absence for the specific purpose of being treated in regulation 2(1)(b) of the Persons Abroad Regulations (supra). One cannot assume that there is an exact coincidence between the meaning of "treatment" in Article 22(1)(c) and "being treated" in regulation 2(1)(b) (Decision R(S) 4/74, paragraph 13). For practical purposes, however, in the majority, if not in all cases, if a person does not satisfy the requirement of regulation 2(1)(b) it seems unlikely that he will receive the necessary authorisation under Article 22(1)(c).

14. My conclusion is, therefore, that in almost all cases of temporary absence from Great Britain for convalescence or a holiday in another Member State, Article 22(1)(b) and (c) is of no greater assistance than regulation 2 of the Persons Abroad Regulations. I should add that, in the present case, a statement on behalf of the Secretary of State, given after the claimant had returned home, did not give the claimant the authorisation required under Article 22(1)(b) and (c) and his claim fails on that account. It is, perhaps, worth

noting that, at first sight, the provisions of Article 22(1)(b) and (c) apply in like manner to a woman receiving maternity allowance.

15. The position is different for persons receiving invalidity benefit under the special procedures for applying the legislation declared by the United Kingdom in accordance with Annex V, paragraph 14 (above). As a general rule, persons receiving invalidity pension will not be disqualified for receiving United Kingdom benefit by reason of Article 10 which overrides the national provisions of regulation 2 of the Persons Abroad Regulations. In Case 51/73 Sociale Verzekeringsbank v Smieja [1973] 2 ECR 1213, the European Court of Justice decided that (1) The phrase "..... under the legislation of one or more Member States" in Article 10(1) of Regulation 1408/71 means national legislation as it is after the rules of Community law, in particular the principle of non-discrimination between nationals of the Member States, have been incorporated in it and (2) "acquired" means that the protection of that provision extends to the benefits arising from particular schemes under national law which are given effect by increasing the value of the payment which would otherwise be made to the recipient. For present purposes, the decision in (1) above is germane to temporary short stays in another Member State.

16. In Case 82/72 Walder v Sociale Verzekeringsbank [1973] ECR 599, the Court decided that Article 6 of Regulation 1408/71, which provides that the regulation replaces, as regards persons and matters which it covers, the provisions of any Social Security convention binding two or more Member States exclusively, subject to Articles 7, 8 and 46(4), (which do not apply in this case), is mandatory and replaces such conventions even if their application is more advantageous to persons entitled to benefit than the EEC regulation. In Case 32/77 Giuliani [1977] 2 ECR 1857, reported under Case 112/76 Manzoni v FNROM [1977] 2 ECR 1647, at pages 1658-70, the Advocate General expressed the opinion that Article 51 of the Treaty of Rome did not empower the Council of Ministers in this context to legislate to the detriment of workers who exercise their right to freedom of movement.

17. In Case 99/80 Galinsky v The Insurance Officer (not yet reported) judgment delivered on 31 March 1981, Mr Monroe had referred to the Court, amongst other questions, the validity of Article 6. The Court decided, in view of their decision on the other questions, that it was not necessary to reply to it. The Advocate General in the case was the one who had expressed the opinion above in the Giuliani case and he conceded that his arguments were wrong in that case. He said that most of the provisions of the bilateral and multilateral conventions between Member States operate by reference to the nationality of the person concerned in any particular case and the effect of keeping such provisions alive is inevitably, in many cases, to maintain discrimination of a kind forbidden by Article 7 of the Treaty. In his opinion, the authors of the Treaty cannot have intended such a result. He also said that the complexity and variety of the bilateral and multilateral conventions are such that it would make administrative nonsense to require the Social Security institutions of Member States to consider, in the case of every migrant worker, not only his rights under national law and

Decision C.S. 7/81

under Community law, but also his possible rights under such conventions. He had been persuaded that the authors of the Treaty cannot have intended such a result either. In Case 110/79 Coonan v The Insurance Officer [1980] ECR 1446 at p. 1465-66, however, another Advocate General has expressed a similar opinion to that previously expressed by the Advocate General in the Giuliani case. In my opinion, until the validity of Article 6 becomes a live issue again, the provisions of Article 6 must be treated as replacing the provisions of any Social Security convention between the United Kingdom and another or other Member States as regards persons and matters which it covers.

Conclusion

18. Although I do not consider it necessary to have regard to the convention on Social Security between the United Kingdom and the Republic of Ireland, Article 7 of the National Insurance and Industrial Injuries (Republic of Ireland) Order 1960 (SI 1960 No 707), provides that where a person who is insured under the Act of one country is in the other country, the provisions of the Act of the first-mentioned country shall not apply in his case. The claimant, therefore, derives no assistance from the reciprocal convention.

19. In summary, in my opinion -

- (1) a person in receipt of United Kingdom sickness benefit or maternity allowance, who is absent from Great Britain for a temporary stay in another Member State, is unlikely to qualify for payment of such benefits unless the conditions of regulation 2(1) of the Social Security Benefit (Persons Abroad) Regulations 1975 are satisfied;
- (2) a person in receipt of United Kingdom invalidity pension, who is absent from Great Britain for a temporary stay in another Member State, will not normally be disqualified for receiving such benefit so long as the conditions of United Kingdom legislation for entitlement to that benefit continue to be satisfied.

20. The claimant's appeal is dismissed.

(Signed) J S Watson
Commissioner

Date: 20 May 1981

Commissioner's File: C.S. 701/1980
C I O File: I.O. 2422/S/79
Region: Overseas Group, Newcastle-upon-Tyne