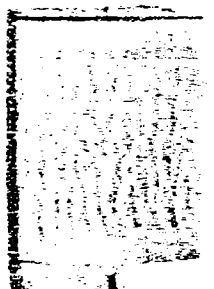


Claimant: ~~XXXXXXXXXXXXXXXXXXXX~~

Commissioner's File No: CSS 17/82

THIS DECISION IS STARRD BECAUSE IT IS A DECISION OF
A TRIBUNAL OF COMMISSIONERS



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SOCIAL SECURITY ACTS 1975 TO 1982

CLAIM TO NON-CONTRIBUTORY INVALIDITY PENSION

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

[ORAL HEARING]

1. Our decision is that non-contributory invalidity pension under section 36 of the Social Security Act 1975 is not payable to the claimant in respect of her claim made on 28 November 1980.

2. This appeal was dealt with by a Tribunal of Commissioners. It raises issues regarding the meaning of the words "entitlement", "disqualification", and "payability", in connection with non-contributory invalidity pension under the provisions of section 36 of the Social Security Act 1975 ("the 1975 Act"). The Chief Commissioner decided that it was appropriate to re-consider certain previous decisions bearing upon this subject. An oral hearing was held at which the claimant who was unable to attend was represented by her husband. He based his appeal upon a written submission prepared by solicitors. The insurance officer was represented by Mr. M. R. Parke of the Solicitor's Office of the Department of Health and Social Security.

3. The claimant is a married woman born on 4 February 1918. She therefore attained the age of 60 on 4 February 1978. She has suffered from mental ill-health for a number of years and last carried out paid work on 3 February 1976. Since that date the claimant has spent much of the time in hospital, either as a day patient or as a long-term patient. Whilst an in-patient she has returned home to live with her husband at weekends and on holidays. Neither the claimant nor her husband was aware of the existence of non-contributory invalidity benefit until shortly before the present claim was made on 28 November 1980. The claimant was by that date aged 62.

4. Under the provisions of section 36(1) and (2) of the 1975 Act non-contributory invalidity pension is payable to persons who are and have for an immediately preceding period of not less than 195 consecutive days been incapable of work. A married woman living with her husband is not entitled to the benefit unless she is also incapable of performing normal household duties. Section 36(4) provides:-

"36.- (4) Subject to subsection (3) below, a person who has attained pensionable age shall not be entitled to a pension under this section unless he was so entitled (or is treated by regulations as having been so entitled) immediately before attaining that age."

Subsection (5) is not material for present purposes. In terms of section 27(1) of the 1975 Act "pensionable age" in the case of a woman means the age of 60.

5. The local insurance officer disallowed the claim upon the ground under section 36(4) that the claimant had attained pensionable age and was not entitled and could not be treated as having been entitled to the benefit immediately before attaining that age. The claimant appealed to a local tribunal who unanimously refused the appeal. The tribunal erroneously stated in the grounds of their decision that the claimant was "over 60 years of age prior to the passing of the relevant Act". The claimant was not in fact over the age of 60 either at the date of the passing of the 1975 Act (20 March 1975) or the date when the provisions extending non-contributory invalidity pension to married women came into force (17 November 1977). The claimant's solicitors applied for leave to appeal to the Commissioner upon the ground of this error and leave to appeal was granted by the chairman of the local tribunal. The real issue in this appeal is of course whether the provisions of section 36(4) of the 1975 Act quoted above operate to exclude this claimant from benefit as a person who had attained pensionable age at the date of claim and who was not entitled to the benefit immediately before attaining that age. It is accepted that the reference in the subsection to persons being "treated by regulations as having been so entitled" cannot assist the claimant as the only relevant regulation (regulation 7 of the Social Security (Non-Contributory Invalidity Pension) Regulations 1975) relates to special circumstances of no relevance in the present case.

6. It was contended on behalf of the claimant in her solicitor's written submission that she could establish entitlement to the benefit prior to attaining the age of 60 by showing that if she had claimed the benefit she would have been awarded it; that her only reason for not claiming the benefit earlier was her ignorance of its existence; that entitlement to benefit and the right to receive payment are different concepts; that the provisions of section 82(2) of the Act preventing a claimant from receiving benefit for any period more than 12 months before the claim is made are simply a limit upon the payment of benefit in arrears, and do not operate to extinguish any prior entitlement. In this case therefore it could be shown that the claimant was "entitled" to the benefit immediately before attaining the age of 60. On behalf of the insurance officer Mr. Parke submitted that the right to benefit was a right to receive the payment of money; that there could not be entitlement without a claim; that the penalty for failing to claim timeously was disqualification; that although there was limited relief from disqualification under the statutory provisions relating to "good cause", disqualification where it operated caused the loss of entitlement; and that the claimant failed because she was unable to establish entitlement to receive the benefit immediately before the age of 60.

7. Section 79(1) of the 1975 Act provides:-

"79.- (1) Subject to the following provisions of this Chapter, and, in the case of retirement pensions, to section 27(6), it shall be a condition of a person's right to any benefit that he makes a claim for it in the prescribed manner and within the prescribed time."

/That

That subsection echoes comparable provisions in section 48(1) of the National Insurance Act 1945 and section 28(1) of the National Insurance Act 1946. Apart from certain categories of retirement pension and age addition dealt with in section 79(2), section 79(1) preserves the long-established position that there cannot be entitlement to benefit without a claim made in the prescribed form and within the prescribed time.

8. Section 82(1) provides:-

"82.--(1) Regulations may provide for disqualifying a person for the receipt of any benefit if he fails to make his claim for it within the prescribed time; but any such regulations shall provide for extending, subject to any prescribed conditions, the time within which the claim may be made in cases where good cause is shown for the delay."

Regulation 14 of and Schedule 1 to the Social Security (Claims and Payments) Regulations 1979 lay down the prescribed time for claiming benefit and the conditions for extension of that time on proof of "good cause". Regulation 14 provides as follows:-

"14.--(1) Subject to the provisions of Schedule 2 to these regulations -

- (a) the prescribed time for claiming any benefit specified in column (1) of Schedule 1 to these regulations shall be the appropriate time specified opposite that benefit in column (2) of that Schedule; and
- (b) if a person fails to make his claim for any such benefit within the prescribed time, he shall be disqualified for the receipt of benefit to the extent specified opposite thereto in column (3) of that Schedule.

(2) If in any case the claimant proves that there was good cause for the failure to make the claim before the date on which it was made, the prescribed time for making that claim shall (subject to the provisions of section 82(2)) be extended to the date on which the claim is made:

Provided that

.....

(3) If in any case the claimant proves that -

- (a) on a date earlier than the date on which the claim was made, apart from satisfying the condition of making a claim, he was entitled to the benefit; and
- (b) throughout the period between the earlier date and the date on which the claim was made there was good cause for delay in making such claim;

he shall not (subject to the provisions of section 82(2)) be disqualified under Schedule 1 to these regulations for receiving any benefit to which he would have been entitled if the claim had been made on the said earlier date:

Provided/

Provided that

....."

The provisos to subsections (2) and (3) have no relevance in this case. The claimant's claim in the present case was a "first" but not an "original" claim and fell to be made within 6 days of the first day for which it was made in terms of Schedule 1 to these regulations.

9. Section 82(2) of the Act provides as follows:-

"82.-(1)

(2) Notwithstanding any regulations made by virtue of subsection (1) above, no sum shall be paid to any person -

- (a) on account of a maternity grant in respect of a confinement occurring more than 12 months before the date on which the claim for the grant is made;
- (b) on account of a death grant in any case where the prescribed time for making a claim falls to be extended by virtue of subsection (1) above by more than 12 months;
- (c) on account of any other benefit (except a death grant, or disablement benefit or industrial death benefit) in respect of any period more than 12 months before the date on which the claim is made."

10. The issue in this case is whether having regard to the foregoing statutory framework a qualifying entitlement to non-contributory invalidity pension could be established by the claimant in relation to the period immediately prior to her attaining the age of 60, irrespective of the payability of the benefit at the time, or whether entitlement for the purposes of section 36(4) necessarily involves the right to payment of the benefit. If, as is clearly the case under the provisions of section 79(1), there cannot be entitlement to such a benefit without a claim, what is the effect of section 82 and regulation 14 upon entitlement to benefit in periods prior to the date of claim? In particular, does disqualification under the statutory provisions involve loss of entitlement, and what is the extent of the relief from disqualification which can be gained by proof of good cause? Is that relief limited by section 82(2) to the period of 12 months or is the effect of section 82(2) merely to operate as a bar to payment?

11. The question whether a statutory provision that no sum should be paid on account of any benefit in respect of any period more than 6 months prior to the date of claim involved disqualification or represented merely a bar to payment was considered in reported decision R(S)2/65, where however the statutory provision analogous to section 82(2) was contained in regulations made under statutory provisions similar to those in section 82(1). The Commissioner pointed out in paragraph 15 that it had never been suggested that the effect of the words "no sum shall be paid" is that the statutory authorities award the benefit and the Ministry refuse to pay it and that the words have always been treated as affecting the right to an award of the benefit. The Commissioner (in a comment still true today) also pointed out in paragraph 17 that the terminology used in the statutory provisions for the possession of a right to benefit, the loss of a right to benefit, and the absence of a right to benefit, is not always consistent and does not always maintain the distinctions between these concepts. In particular he pointed out under reference to decision C.S.174/49, the decision

of a Tribunal of Commissioners, that "disqualified" may in certain contexts include "not entitled". The Commissioner came to the conclusion with some hesitation that the statutory provisions that "no sum shall be paid" was merely another way of saying that the person is disqualified even though he has good cause for the delay in claiming.

12. The situation arising in the present case was considered and dealt with in decision R(S)6/83. There, as here, the claim for benefit was made more than 12 months after the claimant attained the age of 60. The Commissioner expressed the view in paragraph 12 of that decision: "A person is entitled to a particular benefit, if he satisfies all the conditions whose fulfilment is a pre-requisite of the award of such benefit. However, even if he satisfies such conditions, he will still lose title to benefit if he incurs disqualification". In paragraph 16 the Commissioner said: "Benefit consists of a payment of money, and if a claimant is not entitled to a payment of money, then he is not entitled to the benefit". The Commissioner referred to decision R(S)2/65 and held that the effect of section 82(2) was to preclude entitlement to benefit for any period more than 12 months prior to the date of claim. The Commissioner therefore held that the claimant could not establish entitlement to non-contributory invalidity benefit immediately before attaining pensionable age and so, irrespective of proof of good cause, could not make out a valid claim to benefit.

13. An argument similar to that advanced by the claimant in the present case was put forward by the appellant in the case of Pearson v Secretary of State for Social Services 1983 S.L.T. 73. In that case an addition to supplementary benefit, payable in respect of the attendance requirements of a person entitled to attendance allowance under section 35 of the 1975 Act, was sought in respect of a period prior to the award of the attendance allowance. It was argued that the concept of entitlement was different from the concept of payability and that entitlement was established when the necessary medical conditions specified in section 35(1) of the 1975 Act were met. The Second Division of the Court of Session refused the appeal and upheld the contention on behalf of the Department of Health and Social Security that the words "entitled to attendance allowance" meant "entitled to payment of an attendance allowance". There were special considerations arising from the statutory context of that case (some of which have been affected by subsequent statutory amendments) but the decision of the Court is consistent with the conclusion reached by the Commissioner in decision R(S)6/83 referred to above. The opposite interpretation was described as "strained and unrealistic" by Lord Hunter at page 76, and Lord Stott observed on page 77 that it would be a "misuse of language to say that anyone is entitled to an attendance allowance for which she is not eligible."

14. Having reconsidered the matter in light of the previous decisions we find the reasoning advanced by the Commissioner in R(S)6/83 to be convincing and consistent with the conclusions reached in R(S)2/65 and, in another context, by the Court of Session in Pearson v Secretary of State for Social Services. It is in our opinion particularly significant that under the provisions of section 82(1) and regulation 14 the disqualification which may be incurred is disqualification "for the receipt of benefit." That must be equated with the absence of right to benefit under section 79(1). The relief from such disqualification afforded by regulation 14 upon proof of good cause for a delayed claim is expressly stated to be "subject to the provisions of Section 82(2)", a provision which would not strictly speaking be necessary if section 82(2)

/were

were merely a bar to payment and if regulation 14 fell to be construed as permitting a "bare" entitlement to benefit, irrespective of payability, to be established for any period upon proof of good cause for a late claim. The construction contended for on behalf of the claimant, although given some plausibility by the imprecise terminology of the statutory provisions quoted above, remains in our opinion "strained and unrealistic" in its interpretation of the word "entitlement" where it is used in relation to a benefit payable in money. It would also have the "stale claims" disadvantage referred to in paragraph 15 of decision R(1)6/82 and by Lord Hunter in Pearson, p. 76, of causing or permitting enquiries, not necessarily by the appropriate determining body, into a medical condition or state of facts which might have existed some considerable period before the claim under adjudication.

15. Our conclusions accordingly are:-

- (1) A valid claim is a precondition of entitlement to benefit for any period under section 79(1) of the 1975 Act;
- (2) The penalty for failing to lodge a claim within the prescribed time is disqualification under section 82(1) and regulation 14. Such disqualification causes loss of right to payment of the benefit;
- (3) Relief from the penalty of disqualification is provided by proof of "good cause" under section 82(1) and regulation 14; but
- (4) The relief so provided is effectively limited to the period of 12 months by the provisions of section 82(2) of the Act which prohibit payment of any sum in respect of a claim for any earlier period; and
- (5) Section 82(2) eliminates the possibility of entitlement arising in respect of any such claim.

16. The claim made by the present claimant on 28 November 1980 was made for a period commencing on that date. Even if it could be treated as made for an earlier period and good cause were accepted for the delay, no entitlement to benefit could arise in respect of that claim for any period more than 12 months prior to that date, i.e. 29 November 1979, when the claimant was 61. It follows that in the absence of any claim on the basis of which the claimant's entitlement to payment of non-contributory invalidity pension could be established immediately prior to the claimant's sixtieth birthday, she fails to satisfy an essential condition of entitlement to the benefit under section 36(4) of the 1975 Act and her claim must therefore fail. We reach this result with some regret since, having regard to the claimant's age, it excludes the claimant from the possibility of establishing any entitlement to this benefit. The statutory provisions must, however, be applied.

17. The appeal of the claimant is refused.

(Signed) I. O. Griffiths
Chief Commissioner

(Signed) Douglas Reith
Commissioner

(Signed) J. G. Mitchell
Commissioner

Date:

Commissioner's File: C.S.S. 17/82.
C.I.O. File: I.O. 8236/NV/81.
Central Office File: North Fylde.