

R-2 missing
Request to treat claim as ~~being~~
See ~~conclude~~ time - ~~conclude~~ time
Is Date of claim, not ~~request~~ ★ 50/95
MJG/SH/4

Commissioner's File: CA/171/1993

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992
CLAIM FOR ATTENDANCE ALLOWANCE
DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision as follows:-

- (a) I allow the claimant's appeal against the decision of the social security appeal tribunal dated 9 September 1993 as that decision is erroneous in law and I set it aside;
- (b) I direct the adjudication officer(s) (i) to refer to the Secretary of State for decision the question whether a claim for Supplementary Benefit made by the claimant's wife in April 1981 may be treated also as a claim on behalf of her son (the claimant) for attendance allowance and (ii) to notify me of the Secretary of State's decision: Social Security (Claims and Payments) Regulations 1979, S.I. 1979, No. 628, regulation 9(5);
- (c) When the Secretary of State's decision on this question is notified to me, I will give a Supplemental Decision on this appeal.

2. This is an appeal to the Commissioner on behalf of the claimant, a young man born on 30 July 1977. The appeal is brought on his behalf by his father and is against the unanimous decision of a social security appeal tribunal dated 9 September 1993 which dismissed the claimant's appeal against a decision of the adjudication officer to the effect that there could be no payment of attendance allowance to the claimant prior

the claim to be backdated to 30 July 1981 when the claimant attained his fourth birthday, stating that the claimant's requirements for attendance since his 4th birthday had been as great as subsequently. The father has produced considerable medical evidence to this effect.

3. However there can be no back-dating of a claim for attendance allowance because of the imperative provision of section 35(4) of the Social Security Act 1975 (now repeated in section 65(4) of the Social Security Contributions and Benefits Act 1992) to the effect that, subject to exceptions which do not apply in the present case, an attendance allowance "shall not be payable to a person for any period preceding the date on which he makes a claim for it". That imperative rule does not admit of any exceptions for eg. "good cause" for delay. Nevertheless, the claimant's father also contends that a claim made by his former wife (who then had the care of the claimant) for supplementary benefit in April 1981 could constitute also a claim made then for attendance allowance. On 11 May 1993 the Secretary of State gave a decision, stated to be made under regulation 9 of the above-cited Claims and Payments Regulations 1987, refusing to accept the wife's claim for supplementary benefit in 1981 as a claim in the alternative for attendance allowance. For reasons which I give below I consider that that decision of the Secretary of State is ineffective and I have therefore in paragraph 1(b) of my decision again referred the matter to the Secretary of State.

4. I have set the tribunal's decision aside as being erroneous in law because, in paragraph 2 of their reasons for decision, they said,

"The Presenting Officer submitted verbally that by virtue of Schedule 1 [to the Claims and Payments Regulations 1987] the only alternative to Income Support is Invalid Care Allowance. This appeared to the Tribunal to be correct, but clearly contradicted by the letter dated 27 April 1993 from the Chief Executive of the Benefits Agency to [the claimant's MP]."

5. I consider that the acceptance by the tribunal of the presenting officer's submission was incorrect in law, because the 1987 Regulations did not apply (see below) and moreover the tribunal did not deal with the fact that the claim in issue was not a claim for income support but was a claim for supplementary benefit. The tribunal cannot be blamed for this, because of the way in which the case was presented to them. Indeed they took pains to try and get an investigation of the matter. However their decision is nevertheless erroneous in law and I have set it aside.

6. The appeal has been the subject of three oral hearings before me on 14 September 1994, 26 January 1995; and 8 June 1995. At all the hearings the claimant was absent but the claimant's father was present and addressed me. The adjudication officer was on each occasion represented by Mr L Varley, of the Office

of the Solicitor to the Departments of Health and Social Security. I am indebted to the claimant and to Mr Varley for their assistance to me at the hearings.

7. At the conclusion of the hearing on 14 September 1994, after legal argument, I issued a Direction requesting the adjudication officer to make a further written submission on the following points,

- " (a) Whether the appropriate Regulations are the Claims and Payments Regulations 1979, S.I. 1979, No. 628 or the Claims and Payments Regulations 1987, S.I. 1987, No. 1968?
- (b) If the appropriate Regulations are those of 1979, are questions under regulation 9 thereof for determination by the Secretary of State or by the Statutory Authorities (adjudication officer, S.S.A.T. and Commissioner)? The repeal of section 95(1)(e) of the Social Security Act 1975 by paragraph 2 of Part I of Schedule 5 to the Social Security Act 1986 (cf. Part II of that Schedule) should be considered. Has any legislative provision replaced the repealed section 95(1)(e) of the 1975 Act? Reference should also be made to R(I) 79/54 and R2/69(II) (Northern Ireland).
- (c) If the appropriate Regulations are the 1987 Regulations (which do not refer in column 1 of Schedule 1 thereto to claims for supplementary benefit) is regulation 9(1) of those Regulations, conferring jurisdiction on the Secretary of State, intra vires, bearing in mind the repeal of section 95(1)(e) of the 1975 Act?"

8. I have received written submissions from Mr Varley (dated 13 October 1994) on behalf of the adjudication officer and a written reply by the claimant dated 17 October 1994. Those submissions and observations were the subject of oral amplification by Mr Varley and by the claimant at the hearing before me on 26 January 1995.

9. I will take each of the sub-paragraphs of my Direction (cited above) in turn. First, sub-paragraph (a) in which I asked whether the appropriate Regulations were the Claims and Payments Regulations 1979 or the Claims and Payments Regulations 1987 (which came into force on 11 April 1988). In paragraph 2 of his submission of 13 October 1994 Mr Varley submits that,

"It is the Regulations in force at the time the application is made to have a claim which has been made treated as a claim for another benefit that are applicable. In the present case this would be the 1987 Regulations because the claimant first asked that his claim for an attendance allowance for his son be backdated to the child's fourth birthday on 20 July 1990. Under the Social Security

(Claims and Payments) Regulations 1987 ('the 1987 Regulations') there was no power for the Secretary of State to treat a claim for supplementary benefit as a claim for attendance allowance." [There was for a time a power to treat a claim for income support as a claim for attendance allowance but that was removed as from 16 November 1992 by S.I. 1992, No. 2995]. "There was such a power by virtue of regulation 9(5) of the Social Security (Claims and Payments) Regulations 1979 ('the 1979 Regulations'), which provided:-

'(5) A claim for benefit under the Supplementary Benefits Act 1976 may be treated as a claim also for attendance allowance, or an invalid care allowance'.

However, by the time the claimant indicated that he wished the earlier claim for supplementary benefit to be treated as a claim for attendance allowance this provision was no longer in force. In support of this submission it is argued that the wording of regulation 9(1) of the 1987 Regulations is wide enough to cover claims made before the commencement of the regulation. It provides 'where it appears that a person who has made a claim for benefit specified in column (1) of Part I of Schedule 1 ...' these words are, it is submitted, wide enough to apply to claims made before the commencement of the regulation."

The claimant, by written observations dated 17 October 1995, contends that the appropriate regulations are the 1979 Regulations.

10. In my view, Mr Varley's submission is incorrect and I reject it. I hold that the appropriate regulations in this case are the 1979 and not the 1987 Regulations. That is because the claim that is sought to be treated now as a claim for attendance allowance was made in 1981 when the claimant's then wife made a claim for supplementary benefit. In my judgment the law applicable is the law in force in 1981 i.e. the 1979 Claims and Payments Regulations. If under those Regulations the claim for supplementary benefit could be considered as a claim for attendance allowance, it cannot be correct that, when the relevant part of the 1979 Regulations was revoked by the 1987 Regulations, that accrued 'right' to have the 1981 claim considered as a claim for attendance allowance was lost. Moreover, to take as appropriate the date when a claimant first asks for an earlier claim to be considered as a claim for an alternative benefit can produce quixotic results, depending on the exact date on which a claimant sought to have "an earlier claim thus considered. I do not consider that the words "has made" in column 1 of Part I of Schedule 1 to the 1987 Regulations of themselves alter this result, contrary to Mr Varley's submission. The past tense of the verb is naturally used because the regulation applies to a situation where a claim has already been made.

11. My conclusion that, in cases of this kind, the relevant date is the date of the claim, not the date of the request to have it considered as a claim for an alternative benefit, is fortified by the fact that the following extract from the Adjudication Officer's Guide (para 11005) was approved by Laws J. in the Divisional Court in R v. Secretary of State for Social Security, ex parte Weston, 10 March 1995 (unreported as yet) at p.7 of the transcript. The passage from the Guide reads as follows,

"Two sorts of law apply to claims to benefit. Substantive law provides the rules about entitlement to a benefit. Procedural law controls the determining and enforcement of entitlement. The claims and payments provisions are procedural law. In the case of procedural law the general principle is that you apply whatever rules are in force when the claim is made. This is so even though entitlement may have arisen some time ago and the rules have since changed,"

The Weston case was cited by Mr Varley for a further proposition, which I deal with below, but I follow the general approval given by Laws J. and particularly the words I have underlined.

12. Paragraph (b) of my Direction of 14 September 1994, (see above) envisaged the situation if the appropriate Regulations were those of 1979 and asked whether questions under regulation 9 thereof are for determination by the Secretary of State or by the statutory authorities. The Direction also drew attention to the repeal of section 95(1)(e) of the Social Security Act 1975 by paragraph 2 of Part I of Schedule 5 to the Social Security Act 1986. I should refer to section 95(1)(e) of the Social Security Act 1975 now.

13. Section 95(1)(e) of the 1975 Act provided (before its repeal by the 1986 Act) as follows,

"Other questions for Secretary of State

95. (1) It shall be for the Secretary of State to determine -

(a)-(d)

(e) a question arising under section 80 (claims in the alternative).

14. Section 80 of the 1975 Act (subsequently repealed by the 1986 Act) read as follows,

"Claims in the alternative

80. (1) A claim for any one benefit under Chapters I to III of this Part may be treated as a claim in the alternative -

- (a) for such other benefit under those Chapters as may be prescribed; or
- (b) for such benefit under Chapter IV or V as may be prescribed.

(2) A claim:-

- (a) for industrial injuries benefit; or
- (b) for benefit under the Supplementary Benefits Act 1976,

may be treated as a claim in the alternative for such benefit under Chapters I to III as may be prescribed."

15. It is therefore quite clear that the question in this case whether the 1981 claim could, under regulation 9(5) of the Claims and Payments Regulations 1979, be treated as a claim for attendance allowance was a question for the Secretary of State. The 1986 repeals had not in 1981 of course taken effect. I therefore consider that the appropriate course in this case is for the Secretary of State to give a decision as to whether or not the 1981 claim can be considered, under regulation 9(5) of the Claims and Payments Regulations 1979, as a claim for attendance allowance. I do not consider that the Secretary of State's decision of 11 May 1993 is effective for this purpose because it purports to be given under regulation 9 of the 1987 Claims and Payments Regulations and refers to provisions about claims in the alternative, which is not in fact what is involved here. What is involved here is a claim to have a claim for supplementary benefit treated also as a claim for attendance allowance. That is why in paragraph 1(b) of my decision I have directed the adjudication officer to refer the question under regulation 9(5) of the 1979 Regulations to the Secretary of State for decision. Moreover, section 95(2) of the Social Security Act 1975 (in force at the time) provided that the Secretary of State "may at any time or from time to time reconsider the exercise of his discretion with respect to such a question and decide it again with such other effect as may seem to him to be proper in the circumstances of the case." With respect, I request the Secretary of State to reconsider his decision in this case, bearing in mind the evidence that is available as to the nature of the claim for supplementary benefit made by the claimant's mother in 1981 which apparently included a claim for a dietary addition for the son under paragraph 14 of Schedule 4 (Part II) to the Supplementary Benefit (Requirements) Regulations 1983, S.I. 1983, No. 1399 which refers to a dietary requirement for a person "who needs a special diet because he ... suffers from diabetes ...". Diabetes is of course a condition that the present claimant suffers from. The Secretary of State will doubtless wish to consider the likelihood of the 1981 claim referring to the claimant's suffering from diabetes and possibly containing references to his attention needs. But I of course must leave the whole matter to the ultimate

discretion of the Secretary of State. The claimant's father may well wish to furnish the Secretary of State with as full particulars as he can ascertain (from his former wife or otherwise) of what the 1981 claim did say on this matter, bearing in mind that the Department can no longer locate the claim as the papers have apparently been destroyed. On receipt by me of the Secretary of State's decision I will give an appropriate Supplemental Decision in this case. In view of the length of time that has elapsed in this complicated case, I would ask the Secretary of State if possible to give priority to the giving of a decision in this case.

16. Sub-paragraph (c) of my Direction of 14 September 1994 dealt with the situation if the appropriate Regulations were the Claims and Payments Regulations 1987. As I have decided (see above) that they are not the appropriate Regulations I do not need to deal with the question posed in my Direction i.e. whether regulation 9(1) of the 1987 Regulations, conferring jurisdiction on the Secretary of State, was intra vires bearing in mind the repeal of section 95(1)(e) of the Social Security Act 1975 by the Social Security Act 1986 (see above). I have received submissions from the parties on this point and I should record that the adjudication officer and the Secretary of State do not accept that the provision is ultra vires. However, the matter is complicated and I do not think I should rule on it, as any statements by me would be obiter.

17. Lastly, I deal with a matter which arose in detail only at the hearing before me on 8 June 1995. Mr Varley had cited the case of R v. Secretary of State for Social Services, ex parte Weston (Divisional Court - Laws J: 10 March 1995) for the proposition that, "the High Court has ruled that the Secretary of State cannot exercise a discretion to treat a claim for one benefit as a claim for another benefit after the date the regulation giving that power was revoked." (para 5 of Mr Varley's written submission of 31 March 1995).

18. The full transcript of the Weston decision did not become available until the date of the hearing before me on 8 June 1995 but both the claimant's father and Mr Varley asked me to deal with it there and then and not to adjourn, which course I agreed to adopt.

19. In my judgment, the Weston decision, though binding on me, is not authority for the proposition for which Mr Varley cited it. The Weston case, unlike the present case, concerned a claim in about 1992 for back-dating of supplementary benefit to 1977. That claim was upheld by a social security appeal tribunal in 1992. It was then sought to have that back-dated claim treated as a claim for attendance allowance from 1977. Laws J held that the power in the Secretary of State to consider that request (in an earlier equivalent of the Claims and Payments Regulations 1979) was not available since it would contradict the express provision of section 35(4) of the Social Security Act 1975 that there should be no payment of attendance allowance for a period prior to the date of claim. Moreover, he held that

regulation 49 of the Claims and Payments Regulations 1987 (inserted by regulation 12 of S.I. 1988 No. 522 and preserving supplementary benefit law for claims to that benefit, whenever made) did not assist in a claim for attendance allowance.

20. Mr Varley very fairly drew attention to the factual difference between the Weston case and the present case, i.e. that here there is a pre-1987 claim for supplementary benefit but nevertheless contended that the general principle of the Weston case applied also to the present case. I do not agree. The ratio decidendi of the Weston case was that a 1992 claim for supplementary benefit, even though validly back-dated, could not be treated as a 1977 claim for attendance allowance, because the Secretary of State's power to consider the alternative claim had been revoked by the 1987 Claims and Payments Regulations. But in the present case the claim for supplementary benefit was made in 1981, when the Secretary of State's power did exist and had not been removed by the later 1987 Regulations. In my view, that is critical. The claimant does not have to rely on regulation 49 of the 1987 Regulations to 'validate' the 1981 claim, as did the claimant in the Weston case. I therefore hold that the Weston decision does not affect the general conclusion which I have reached, namely that the Secretary of State in this case still has the power, under regulation 9(5) of the 1979 Claims and Payments Regulations, to consider whether the 1981 Supplementary Benefit claim could also be treated as a claim for attendance allowance.

(Signed) M J Goodman
Commissioner

(Date) 15 June 1995