

C G 68/1980

MJG/FB

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR MATERNITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.G. 1/81

1. My decision is that maternity allowance is not payable to the claimant for the inclusive period from 26 April 1976 to 28 August 1976 because her only claim for maternity allowance was made on 20 July 1978 and the Social Security Act 1975, section 82(2)(c), prohibits the payment of maternity allowance in respect of any period more than 12 months before the date on which the claim is made. The claimant's appeal against the decision of the local tribunal dated 5 December 1979 is therefore dismissed.
2. The claimant is a married woman and on 16 July 1976 she gave birth to her second child, a daughter. At that time she made a timeous claim on form BM4 for maternity grant which was paid to her on 15 June 1976. Unfortunately the claim form BM4 completed by the claimant in June 1976 is not now available. However, I accept the submission of the insurance officer now concerned (paragraph 5) that the evidence which he details in that paragraph shows that that claim on form BM4 was for maternity grant only and not for maternity allowance. Moreover, the claimant herself in her letter dated 17 July 1978, appears to confirm this.
3. I have considered whether or not that claim for maternity grant on form BM4 (headed "Claim for Maternity Benefit") in June 1976 could in any way be treated as a claim also for maternity allowance, in which case the time limit point would not apply. There are a number of provisions in the Social Security (Claims and Payments) Regulations 1975 (now replaced by identical provisions in the Claims and Payments Regulations 1979) and I have considered whether any of them would assist the claimant in treating the claim for maternity grant on form BM4 in June 1976 as a claim also for maternity allowance. The relevant regulations are regulations 4, 8(2) and 9(1) of the 1975 Regulations but it is quite clear that they do not assist the claimant (cf C.S.G. 1/79). I do not propose, therefore, to set them out at length.
4. I must therefore hold that the first claim for maternity allowance was made by the claimant on 20 July 1978, which date was more than 12 months after the last date for which maternity allowance

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could be payable i.e. 28 August 1976. As a result the claim cannot succeed because of the imperative provision of section 82(2)(c) of the Social Security Act 1975 which provides,

"82 (2) ... no sum shall be paid to any person ...

(c) On account of any ... benefit ... in respect of any period more than 12 months before the date on which the claim is made".

5. Section 82(2)(c) of the 1975 Act is absolute in its terms and does not allow the payment of maternity allowance for any period more than 12 months before the date on which the claim is made for that allowance, even if there is a good cause for the delay and even if, as the claimant alleges in this case, the delay is contributed to by wrong or incomplete information being given by the Department (by mentioning that point, I must not be taken as expressing any opinion on its factual correctness). The time limit of 12 months is absolute and the statutory adjudicating authorities, including the Commissioner, have no power to waive or alter the provisions of section 82(2)(c). Only Parliament can do that. The claim must therefore fail and the claimant's appeal against the decision of the local tribunal must be dismissed.

6. A further matter of procedural importance arises in connection with the claimant's appeal to the local tribunal. That arises from the fact that the claimant did not receive notice of the first hearing fixed before the local tribunal for 1 August 1979 because she was away on holiday at the time. As a result the claimant made written application on 13 October 1979 to set aside the decision of the local tribunal dated 1 August 1979 on the ground that she had not received notice of the hearing. This application was of course made, as it can only be made, under regulation 3 of the Social Security (Correction and Setting Aside of Decisions) Regulations 1975. Regulation 3(1) provides as follows,

"3 (1) ... on an application made by a person interested in the decision, a decision may be set aside by the body or person who gave the decision in a case where it appears just to set the decision aside on the ground that -

(a) a document relating to the proceedings in which the decision was given was not sent to, or was not received at an appropriate time by, a party to the proceedings or the party's representative ...,  
or

(b) a party to the proceedings in which the decision was given or the party's representative was not present at a hearing related to the proceedings".

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7. Clearly as the claimant did not receive the notice of hearing before the local tribunal and did not therefore attend that hearing, both grounds in regulation 3(1) for asking for the decision of the local tribunal to be set aside were present.

8. The clerk of the local tribunal put the claimant's application (to set aside) to the chairman who had been chairman of the local tribunal at its first hearing on 1 August 1979 (which the claimant had not attended), accompanied by a memorandum from the clerk asking the chairman to "consider having the decision set aside". The local tribunal chairman endorsed that memorandum with the following statement signed by him, "Accepting the fact that the original listing was not received until after the hearing I agree that the decision be set aside and the case re-listed". There is no evidence in this case that in making that endorsement, the chairman of the local tribunal had consulted the lay members of the tribunal who had sat with him at the first hearing.

9. The procedure thus adopted was in my view incorrect because regulation 3 of the Correction and Setting Aside of Decisions Regulations (cited in paragraph 6 above) gives the power to set aside a decision of a local tribunal only to "the body ... who gave the decision" (the reference to "person" in regulation 3(1) refers of course to decisions other than by local tribunals e.g. a decision by a local insurance officer or by a Commissioner). That means that the power to set aside a decision of a local tribunal is under regulation 3 exercisable only by the local tribunal itself i.e. the tribunal that reached the original decision sought to be set aside (or by another tribunal, in certain circumstances - see paragraph 12 below) and there is no power in regulation 3 or elsewhere for the chairman alone to set aside the decision of a local tribunal.

10. The importance of this matter is shown by the fact that regulation 3(3) of the Correction and Setting Aside of Decisions Regulations does require that persons interested in the decision should be "afforded a reasonable opportunity of making representations on [the application to set aside] before the application is determined", which emphasises that all members of the tribunal must have an opportunity of taking part in that determination, a safeguard particularly necessary as regulation 4(3) of the Regulations provides that there is no appeal against a determination on an application to set aside. It ought also to be noted that a similar limitation applies to the correction of accidental errors in decisions under regulation 2 of the Regulations, where the correction can only be made by the "body ... who gave the decision" (regulation 2(1)) and that means also that a correction of an accidental error cannot be made by the chairman alone without the concurrence of his members.

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11. If the matter stood there, the original decision of the local tribunal dated 1 August 1979 would not have been validly set aside with the result that the subsequent decision of a local tribunal dated 5 December 1979 would be a nullity, the first decision of the local tribunal (of 1 August 1979) still being extant. That would have the further unfortunate consequence that the appeal to the Commissioner would also be a nullity since the appeal is only against the decision of the local tribunal dated 5 December 1979.

12. However it seems to me that on the facts of the present case that unfortunate result can be avoided, since I am prepared to regard the fact that a full tribunal on 5 December 1979 reheard the case as implying a setting-aside by that tribunal of the earlier tribunal decision. If by chance the composition of the local tribunal on 5 December 1979 was the same as that of the tribunal on 1 August 1979, the setting-aside would have been by "the body ... who gave the decision" (regulation 3(1)). If, however, the local tribunal of 5 December 1979 were differently constituted, there must be considered Regulation 4(5) of the Correction and Setting Aside of Decisions Regulations, which provides as follows,

"4 (5) In the event of it being impracticable or of it being likely to cause undue delay for a decision or record of a decision to be dealt with pursuant to regulation 2 or 3 of these regulations by the body or person who gave the decision, another body or person of like status may so deal with it".

If the local tribunal of 5 December 1979 were differently constituted, then I am prepared to assume that it was impracticable or likely to cause undue delay for the tribunal as originally constituted on 1 August 1979 to deal with the application to set aside, with the result that the differently constituted tribunal (if such it was) of 5 December 1979 exercised the power of setting aside given under regulation 4(5) (cited above).

13. Consequently I hold that the decision of the local tribunal of 1 August 1979 was validly set aside and that therefore the decision of the local tribunal dated 5 December 1979 and the appeal from it to the Commissioner are valid. The fact that I have been

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able to make this finding on the facts of this particular case does not mean that a similar finding could be made in other cases nor do I in any way commend the procedure that was adopted in this case. I would draw attention to what is said above about the correct procedure that should be adopted on applications for setting aside, i.e. that they must be put to a full tribunal and determined by that tribunal. A chairman alone cannot determine them.

(Signed) M J Goodman  
Commissioner

Date: 17 June 1981

Commissioner's File: C.G. 68/1980  
C I O File: I.O. 1185/M/80  
Region: London North