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CG/2973/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with my permission, against a decision of the Fox Court Appeal Tribunal made on 2 December 2003. For the reasons set out below that decision was in my judgment erroneous in law and I set it aside. In exercise of the power in s.14(8)(a)(ii) of the Social Security Act 1998 I make the further findings of fact set out below and give the decision which is appropriate in the light of those findings (which is the same as the decision made by the Tribunal), namely that the Claimant's appeal against the decision of the Secretary of State made on 6 November 2001 is dismissed.

Introduction

2. I held an oral hearing of the appeal, at which the Claimant appeared and was represented by Miss E. Baldwin from North Kensington Law Centre, and the Secretary of State by Mr. Leo Scoon of the Office of the Solicitor to the Department for Work and Pensions. Shortly after the hearing I issued a Direction annexing a draft decision. I proceeded in that way because my draft decision raised certain points which I felt had not been adequately covered at the hearing. I gave the parties the opportunity to present further evidence or submissions in writing. The Secretary of State did so on 9 December 2004, and on 25 January 2004 a submission on behalf of the Claimant, prepared by Mr. Paul Stagg of counsel, was received.

3. The Secretary of State's decision of 6 November 2001, under appeal to the Tribunal, was that the Claimant was entitled to widows benefit only from 29 July 2001, and not from the date of death of her husband on 23 May 2000. That was on the basis that no claim form had been received until 29 October 2001. On that basis, entitlement to benefit ran from 29 July 2001, since in respect of bereavement benefits there is automatic backdating for 3 months.

4. The Claimant's case is that she had posted a claim form on 4 July 2000. There is no doubt that on 29 October 2001 the Benefits Agency received from the Claimant what purported to be a photocopy of that claim form, she having heard nothing about her claim. (The Benefits Agency then requested that an original form be completed, and this was done, and was received by the Benefits Agency on 14 December 2001).

The error of law: natural justice

5. On 16 October 2003 the Chairman of the Tribunal adjourned the hearing, but directed that there were to be no further adjournments or postponements on the ground of the Claimant's ill-health unless the application was supported by medical evidence. The further hearing was fixed for 2 December 2003. On 27 November 2003 the Claimant, whose breathing was very seriously affected by aspergillosis, a lung disease, sent to the Clerk to the Tribunal at Nottingham, by fax from a friend's house, a letter referring to a telephone conversation which she had had with the clerk on 24 November and stating that she would not be able to attend the hearing. That letter was faxed to the tribunal hearing venue at Fox Court in London on the following day, with a handwritten note by someone at the Appeals Service called John Dudley indicating that the Claimant had also telephoned again on 28 November 2003 asking for a postponement, and asking the Chairman to give a direction.

6. On the day of the hearing the chairman (and sole member) of the Tribunal, dealing with the matter on the papers in the Claimant's absence, refused to postpone the hearing, on the ground that there was no medical evidence in support of the application. On the substance of the appeal the Tribunal said:

> "The Secretary of State tells me that although his officers have conducted a thorough search of Departmental records, no trace of any such claim has been found. Although I accept that the Department does sometimes lose claim forms, it does not normally do so. In the absence of any other evidence, it is more likely that [the Claimant] is mistaken about having claimed widow's benefit in June 2000 – or, alternatively, that the claim was sent but not received – than that the Department has received it and lost it. I have therefore accepted the date of claim as being 29/10/2001."

7. With a letter dated 19 December 2003 seeking a set aside of the Tribunal's decision the Claimant submitted a copy of a "to whom it may concern" letter, dated 28 November 2003, from Dr. Torrego, at the Royal Brompton Hospital, stating that he had seen the Claimant that day and that the Claimant was suffering from an asthma exacerbation and would be unfit to travel for at least 2 weeks.

8. The Claimant contends that she sent a copy of that letter to the Appeals Service on 28 November. There is no evidence in the Appeals Service file that the Appeals Service received a copy of it until one was sent, as I have said, on 19 December, and it is clear that the chairman was not aware of the existence of that letter.

9. At the hearing before me there was produced a letter dated 2 November 2004 from Mr. Mullen, who says that on 28 November 2003 he drove the Claimant to the Hospital, and on the way back the Claimant asked him to make some photocopies of the letter of that date in a shop, which he did in the Fulham Road. He says that he then posted the letter for her on the same day, with a first class stamp.

10. The Claimant also gave oral evidence to me to the same effect, and having heard it I am satisfied that that evidence was truthful and that the Claimant had a good recollection of the events. She stated that in her telephone conversations with the clerk she was in fact told that a letter from her seeking a postponement would be sufficient, but that she was worried that it would not be in view of the Direction which had been made, and so obtained and sent off the letter of 28 November to make sure. I accept the Claimant's evidence on this point for 4 main reasons. First, it is supported by the detailed and specific evidence of Mr. Mullen. Secondly, it seems to me unlikely that the Claimant would have gone to the trouble (as she undoubtedly did) of obtaining the letter dated 28 November 2003 while she was with the doctor at the hospital if she did not intend to make use of it to obtain the postponement. Thirdly, there is no doubt that the Claimant had gone to the trouble to telephone the Appeals Service on at least 2 occasions to ask for a postponement, and to write the letter of 27 November, and that in my view makes it unlikely that she would not, having obtained the letter of 28 November, have posted it. Fourthly, I was impressed with the way in which she gave evidence to me. I do not overlook the point, rightly made by Mr. Scoon, that in her grounds for this appeal she stated: "I think that I submitted the letter dated 28 November to TAS before the hearing on 2 December but I have no proof that I did so." The words "I think" show substantially less certainty about the position than is now being claimed. I think,

however, that the statement was phrased in that way simply because proof of posting could not be submitted.

11. The fact that the letter of 28 November 2003 did not reach the Tribunal chairman in my view resulted in an inadvertent breach of the rules of natural justice. I accept the submission of Miss Baldwin, in her able and thorough presentation of the Claimant's case, that the case is analogous in this respect with CIB/303/1999, where it was held that the fact that a notice of hearing had not reached the claimant meant that there was a breach of natural justice. The fact that the Claimant unsuccessfully sought a setting aside on this ground does not prevent the Claimant taking the point on appeal to a Commissioner. The ground given (by a district chairman who was not the chairman of the Tribunal) for the refusal of the setting aside application was that there could have been no prospect of the appeal succeeding. I interpret that to mean that the Claimant's presence at the Tribunal could have made no difference. I do not think that that is correct. The Claimant's evidence was highly material to whether the original claim form had been sent, which was in turn relevant to whether it was likely to have been received. I must therefore set aside the Tribunal's decision.

My substituted decision: when was the claim first made?

12. At the time of giving permission to appeal I indicated that it was likely that I would exercise my power to make findings of fact for the purpose of substituting my own decision, and the substantive issue in the appeal – i.e. the issue when the claim for widow's benefit was first made - was also dealt with at the hearing before me.

13. By Reg. 4(6)(b) of the Social Security (Claims and Payments) Regulations 1987 a person wishing to make a claim for benefit shall deliver or send the claim to an appropriate office. By Reg. 6(1)(a) "the date on which a claim is made shall be .... the date on which it is received in an appropriate office". By Reg. 2(1) "appropriate office" means "an office of the Department for Work and Pensions".

(a) Was the original claim form posted?

14. I accept the Claimant's evidence that she did post the claim form on 4 July 2000. I do so for 3 main reasons. First, I am quite satisfied, having heard her give evidence, that she would not have manufactured a photocopy of a form purportedly dated 4 July 2000 – i.e. that the photocopy of the form signed on 4 July 2000 was genuine. If she did sign the original form on 4 July 2000, it is likely that she also posted it on or around that date (although I recognise that it is of course possible that she signed it but did not get round to posting it). Secondly, her evidence is supported by the evidence of Mr. Singe (p.43). Thirdly, as I have said, she impressed me by the way she gave her evidence. I do not overlook the very substantial delay between then and the date (25 October 2001) when a further copy of the original claim form was submitted. The failure to chase up more quickly what had happened to the original claim form might be thought to cast substantial doubt on whether it was indeed sent, but I accept that the Claimant was so gravely ill in the intervening period that she was more concerned for her life than with details of what benefits she might be entitled to.

(b) Was it received?

15. Mr. Stagg relies, in his submission in reply, on s.7 of Interpretation Act 1978 as casting the burden of proof on the Secretary of State to establish that the claim form was not received by the Benefits Agency. He does not, however, suggest that s.7 means that proof of posting concludes the matter – i.e. prevents the Secretary of State seeking to establish that it was not received at all.

16. Putting to one side for the moment the issue of where the legal burden of proof lies, it must be an undoubted fact that most documents sent by post do arrive at their destination. Had there been no evidence from the Secretary of State whatsoever as to non-receipt of the original claim form, the fact that I have accepted that it was posted would therefore have led to a finding that it was likely to have been received. My finding that it was posted therefore throws an evidential burden on the Secretary of State (i.e. " a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact" – Lord Bingham in *Sheldrake v. DPP* [2005 1 All ER 237 at p.243) to produce evidence that it was not received.

17. The Secretary of State's written submission to the Tribunal stated: "the department conducted a thorough search of records held, but found no trace of [the Claimant] having submitted an earlier claim to widow's benefit." Mr Scoon handed to me at the hearing an undated but obviously very recent memorandum from a Mr. Shaw at the DWP Adjudication and Constitutional Issues Division, stating that he has talked to the "office in question" and ascertained the procedures for dealing with claims. On receipt of a claim, if a National Insurance number (NINo) is shown, the claim is entered on to the computer system. If not, the record of the issue of the claim is noted clerically on a form A22 and a clerical BF date is entered on that form. Mr. Shaw went on to state (wrongly) that in this case the photocopy received on 29 October 2001 had a NINo, so that if there had been a previous form it would, on balance of probabilities, have been entered on the system upon receipt. It is clear, as Miss Baldwin pointed out, that the photocopy received on 20 October 2001 (and therefore the form originally sent on 4 July 2000) did not in fact have a national insurance number entered on it when it was sent.

18. However, it is clear that at some time after the date (29 October 2001) when the Benefits Agency received the photocopy of the original claim form, someone at the Benefits Agency wrote the Claimant's national insurance number above the box which is provided for the claimant to enter it (and indeed appears to have done the same with the Claimant's husband's insurance number). To the right of that box someone has written: "..... DCI. No NINO." The Secretary of State's further written submission sent after the hearing, written by Shaw, includes the following submission in relation to that:

> "The Secretary of State accepts in this matter that the claimant had in fact entered her NINo only on the second claim form provided by the local office and had not in fact entered it on the "photocopy" form. I would respectfully submit however that the claim form in question shows that, upon receipt, the claimant's NINo had been traced using the Department's Central computer index system (DCI). The DCI system contains a record of all persons who have claimed any of the many benefits that the Secretary of State administers. As both the claimant and the Secretary of State are in agreement that there was no contact between the date of the alleged claim and the date that the photocopy was received I submit that the DCI system would have contained the claimant's record at the time of the alleged original claim and would have been used, as it was on the later occasion, to trace and record the claimant's NINo. Thus I submit that, on balance of probabilities, had there been an earlier claim the tracing procedures would have applied and it would have been recorded on the computer system as suggested in my memorandum."

I think I can accept, and I therefore find, that the probable explanation for the writing of the national insurance number on the photocopy received on 29 October 2001 is that given by Mr. Shaw. I therefore find that, if the claim form sent on 4 July 2000 did arrive at the Benefits Agency Office in Glasgow, correct operation of the normal Benefits Agency procedure would have resulted in the claim being entered on the computer (which it was not).

19. The photocopy of the original form received on 29 October 2001, and the further claim form received on 14 December 2001, both have a stamp "BA/Post Opening Services" "Royal Mail G1-4". The Secretary of State's further submission following the oral hearing includes the following by way of explanation:

> "Following enquiries to the relevant Department unit that deals with the Service Level Agreement with Royal Mail I would respectfully advise that the following procedures are in place with regard to incoming post destined for the Glasgow Benefit Centre.
>
> All post in the London area is transported overnight to the Royal Mail post opening facility in Glasgow where it is sorted and date stamped by a dedicated team that then directs that post to the relevant "cluster" at the Benefit Centre, a cluster being a section that deals with a particular benefit. The procedures are in fact similar to the post opening procedures that used to apply in Departmental offices themselves but for the fact that the post opening team is employed by Royal Mail rather than the Department. In this action I submit that Royal Mail, as the Commissioner suggests [i.e. in my draft decision], does act as an agent of the Department and the date of receipt of a claim is in fact the date that the form is stamped by Royal Mail (29 October 2001 in the case of the photocopied claim). There is no record kept of individual pieces of mail because of the amount of post involved. .....The claim would not be entered on the computer system until the Benefit Centre received it but the details of receipt would reflect the date that Royal Mail received the form.
>
> ..... It is both Departmental policy and consistent with the need to deal with claims efficiently to enter all claims on to the computer system if possible and staff at the Benefit Centre would have taken all necessary steps to trace a NINo, as they did on 29 October 2001."

20. The Secretary of State thus accepts that in opening the mail the Royal Mail acts as agent for the Benefits Agency. Bereavement benefits for the Claimant's area (then Chiswick, in London) are administered from Glasgow, which is where the original and subsequent claim form were posted to. It therefore seems to me that if the original claim form got as far as being opened by the Royal Mail on behalf of the Benefits Agency, it had then been received in "an appropriate office". It does not seem to me to be necessary that it should actually have arrived at the Benefits Agency building in Glasgow. The recording of the claim which is mentioned in the memorandum from Mr. Shaw would only have taken place once the claim form had actually arrived at the Benefits Agency building in Glasgow.

21. The absence of any trace of the original claim form or any record of it at the Benefits Agency could therefore be consistent with it having been received in the appropriate office; the following possibilities exist: (i) that it was mislaid in the Royal Mail building where it was opened or (ii) that it was mislaid in transit from there to the Benefits Agency building in Glasgow or (iii) that the procedure for tracing the Claimant's national insurance number and then recording the claim on the computer, described by Mr. Shaw in his further written

submission and operated in relation to the photocopy form received on 29 October 2001, was not properly operated in relation to the original form sent on 4 July 2000, and that form was then mislaid. As against that, there is the possibility that it was mislaid by Royal Mail before it ever got to the building where it was opened, and so was not received in an appropriate office.

22. It is, of course, impossible to determine with any degree of certainty which of those possibilities actually occurred. However, it seems to me, on the evidence now available, and I so find, that it is rather more probable that that it was mishandled by Royal Mail before it got to the building where (had it not been mishandled) it would have been opened, than that one of the possibilities labelled (i), (ii) and (iii) in the previous paragraph occurred. The post box or office at which the Claimant posted the original claim form potentially contained letters destined for any part of the country, indeed the world. It would have been necessary for Royal Mail to sort those, along, presumably, with letters posted at numerous other post boxes, and then transport the letters destined for Glasgow in the appropriate direction. Letters so destined would then presumably have had to be sorted again when arriving there in order to be delivered to the appropriate addresses. That seems to me, as a matter of common sense, to be a rather more complex process, involving more scope for error, than the processes which had to take place once the letter reached the Royal Mail Building where it was opened, if the claim was to become recorded on the Benefits Agency computer.

(c) The burden of proof: s. 7 of the Interpretation Act 1978

23. Although it is strictly unnecessary for me to do so, I shall go on to consider what the result would have been if I had found myself, as I confess I have been tempted to do, unable to decide on the balance of probabilities at what stage the error occurred. The matter would then have had to be resolved by reference to the legal burden of proof. Given that the Secretary of State has satisfied the *evidentia*l burden (see para. 16 above) of producing some evidence that the original claim form was not received, does the legal burden of proof lie on the Claimant to show that that form was received, or on the Secretary of State to show that it was not?

24. The starting point must be that the Claimant has the burden of establishing her claim. However, as noted above, Mr. Stagg relies on s.7 of the Interpretation Act, 1987, which he says has the effect of creating a rebuttable presumption that the claim form was delivered. S.7 (which by virtue of s.23 of that Act applies equally to subordinate legislation) provides as follows:

> "Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve", or the expression "give" or "send", or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

25. Mr. Stagg argues that s.7 applies to claim forms, by virtue of the requirement in Reg. 4(6)(b) of the 1987 Regulations that "a person wishing to make a claim for benefit shall .....deliver *or send* the claim to an appropriate office." That was held to be so in CSIS/48/92, which was followed in CIS/759/1992. In the former case the Deputy Commissioner said:

> "A claim for a social security benefit is, therefore, a document authorised by an Act to be served by post and which is presumed to have been served (or delivered) in ordinary course of post unless it is proved not to have been so delivered"

26. However, in neither of those cases was express consideration given to a point made by Miss Commissioner Fellner in CIS/306/03. She said that she was

> "fortified by [the Secretary of State's] suggestion that in the face of regulation 6(1)(a)'s legislative allocation to a claimant of the risk of any miscarriage of delivery taking place, s. 7 does not actually come into play: "the contrary intention appears" from regulation 6(1)(a) and negates the application of s.7, which is a "fallback" deeming provision."

27. Mr. Stagg, although he did not cite CIS/306/03, anticipated the argument which Miss Commissioner Fellner appears to have accepted by submitting that reg. 6(1) does not evince an intention that s.7 is not to apply. He submits that all that reg. 6(1) establishes is the date on which a claim is deemed to be made, and that it is silent as to the question of how receipt of a claim form is to be proved.

28. However, I think that Miss Commissioner Fellner is correct and that CSIS/48/92 and CIS/759/1992 were wrong on this point. It seems to me that reg. 6(1)(a), in stating that "the date on which a claim is made shall be .... the date on which it is received in an appropriate office" indicates quite clearly that a claim is not made unless and until the claim form is actually received. In short, that seems to me to be inconsistent with the first part of s. 7, which says that service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document. I therefore think that reg. 6(1)(a) does indicate an intention that s.7 should not apply to claim forms.

29. I accept that there are some circumstances where s.7 applies in which, despite the deeming in the first part of that provision, the Courts have held that it is permissible for the addressee to prove that the document did not arrive at all (as opposed to proving merely that it arrived late, which is expressly permitted in the second part of the section). I considered some of the cases on this confusing area in my decision in R(JSA)1/04. The circumstances in which that is permissible appear to be those where the document must have been received by a particular date or time in order to be effective. I doubt whether that principle applies to most claim forms: although the date on which the form arrives will determine the date from which benefit can be awarded, the claim does not normally have to arrive before a particular date in order to be effective at all. It seems to me that, if s.7 were applicable in this case, the effect would be not to throw on to the Secretary of State the burden of establishing that the claim form did not arrive, but rather to deem the posting to have been good service and so to prevent the Secretary of State even seeking so to establish. As I said above, Mr. Stagg does not suggest that that is the position.

30. It therefore follows that, s.7 being in my judgment inapplicable, the burden lay on the Claimant to establish that it was more likely that the claim form was lost in the post than that it was mislaid after arriving at the Royal Mail building in Glasgow where it would have been opened. Accordingly, even if I had been unable to determine which of those was more probable, the Claimant would still not have succeeded in establishing that the original claim was in fact made.

Postscript

31. I am sure that this decision will come as a considerable disappointment to the Claimant, particularly in view of the fact that my draft decision came to the opposite conclusion. The difference in the result is accounted for mainly by the fact that the additional information produced by the Secretary of State and referred to in para. 18 above has to my mind tipped the balance of probabilities in favour of the Secretary of State's contention that the original claim form was not received. In addition, I think that I was wrong in relying on the simple proposition that the burden lay on the Secretary of State to establish non-receipt. Having been prompted by Mr. Stagg's helpful submission to examine this more carefully, I think that that view confused the evidential burden, resulting from my finding that the claim form was posted, with the legal burden of proof.

(Signed on original) **Charles Turnbull**
Commissioner
2 February 2005