

ICB Dependants Increase - TRANSITIONAL (LAWZ)
- MEANING OF 'PARAGRAPH'
* 14/98
③ CRAG

MJG/SB/ZA/7

Commissioner's File: CIB/3522/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 6 February 1997 as that decision is erroneous in law and I set it aside. My decision is that, in relation to the claim for increase of incapacity benefit for his wife made by the claimant on 3 October 1996, the claimant is not entitled to that increase because his wife does not attain the age of 60 years until 19 September 1998 and the claimant is not entitled (nor can he be treated as entitled) to an increase of benefit for a child. Moreover, the conditions for a transitional award of the increase are not satisfied: Social Security Contributions and Benefits Act 1992, sections 86A and 92; Social Security (Incapacity Benefit - Increases for Dependants) Regulations 1994, S.I. 1994, No. 2945, regulation 9; Social Security (Incapacity Benefit) (Transitional) Regulations 1995, S.I. 1995, No. 310, regulation 24.

2. This is an appeal by the adjudication officer against the unanimous decision of a social security appeal tribunal, dated 6 February 1998, which allowed the claimant's appeal from a decision of an adjudication officer issued on 10 October 1996 in similar terms to my decision in paragraph 1 above. The appeal was the subject of an oral hearing before me on 5 February 1998 at which the adjudication officer was represented by Miss M. T. Deignan, instructed by the Solicitor to the Departments of Health and Social Security. The claimant was represented by Mr R Atkinson of the claimant's local Welfare Benefits Advice Unit. I am indebted to Miss Deignan and Mr Atkinson for their assistance to me at the hearing. There was also heard another case involving the same point on Commissioner's file CIB/1477/97 and I have given a separate decision on that file.

3. This appeal concerns transitional provisions (for details see below) resulting from the transfer under the Social Security (Incapacity for Work) Act 1994 from Invalidity Benefit to Incapacity Benefit. As part of that transfer, the entitlement to a dependency increase for incapacity benefit for an adult dependant was altered from what it had previously been. Section 84A of the Social Security Contributions and Benefits Act 1992 (inserted by the 1994 Act) permits regulations to specify the circumstances in which such an increase could be paid. In pursuance of that power, regulation 9 of the Social Security (Incapacity Benefit - Increases for Dependants) Regulations 1994, S.I. 1994, No. 2945 provides that there can be no increase for an adult dependant who is a spouse unless the spouse is aged at least 60 or the beneficiary is entitled to an increase for a child. In the present case, the claimant, by his claim made on 3 October 1996, cannot comply with that requirement as his wife does not attain the age of 60 until 19 September 1998 and he is not entitled to any increase for a child.

4. The claimant must therefore rely on transitional provisions (see below) because he had for certain earlier periods been able to claim an increase of invalidity benefit for his wife. The facts are accurately stated in paragraph 3 of the adjudication officer's submission of 24 June 1997 as follows,

".. [the claimant] is a married man aged 54 who claimed and became entitled to sickness benefit in 1983. He subsequently became entitled to invalidity benefit .. and then incapacity benefit .. he also claimed and became entitled to an adult dependency increase for his wife. Despite her fluctuating earnings, he continued to be entitled to an [adult dependency increase] after 16 09 85 when the earnings rules changed because of the provision in regulation 8(6) of the [Social Security (Dependency) Regulations 1977 - S.I. 1977, No. 343]. This provision provided that where a beneficiary was entitled to an increase of benefit on 14 09 85, or for a period including that day, the regulations in force on that day relating to the reduction of the rate of an increase on account of the earnings of the adult dependant (commonly referred to as 'the tapered earnings rule') shall continue to apply if they are more favourable to the beneficiary. The last payment of an [adult dependency increase] to be made was on 15 12 94 ... [The claimant] made a further claim for an [adult dependency increase] on 03 10 96 .."

I should comment that the fact that this was a 'tapered' earnings case does not affect the general scope of my decision, which applies equally to a case where earnings above a certain figure cut off the dependency increase altogether.

5. On the further claim for adult dependency increase made on 3 October 1996, the adjudication officer (on 10 October 1996) decided that the claimant was not entitled to the increase because he did not comply with the new more stringent requirement of regulation 9(1)(a) of the Social Security (Incapacity Benefit - Increases for Dependants) Regulations 1994 (see above) and was not assisted by the relevant transitional provisions.

6. Those provisions in fact consist of regulation 24 of the above cited 1995 Transitional Regulations (S.I. 1995 No. 310). In so far as it is relevant, regulation 24 provides as follows,

"Increase of rate of long-term incapacity benefit for dependants in transitional cases

24. (1) ... in a transitional case where at any time during a period of 56 days immediately before the appointed day [13 April 1995 - regulation 1(1)] -

(a)

(b) an increase in the rate of invalidity benefit was payable for a spouse who was an adult dependant under Part IV of the [Social Security Contributions and Benefits Act 1992],

an amount equal to that increase shall be payable." (My underlining.)

(2) - (6)

(7) A person shall cease to be entitled to an increase under paragraph (1) when either -

(a).....;

(b) no increase of invalidity benefit or long-term incapacity benefit is paid or payable for at least 57 continuous days in a period of incapacity for work." (My underlining).

The adjudication officer decided in his decision of 10 October 1996 that at the relevant date i.e. 13 April 1995, and for 56 days before that date, an increase for the claimant's wife was not "payable" to him because at that time her earnings were too high for him to be entitled.

7. The claimant appealed to the social security appeal tribunal on the basis that the increase was on 13 April 1995

in a sence "payable" to the claimant although it was not actually being paid, because the claimant "... had a continual and underlying entitlement to the dependency increase..." (claimant's representative's letter of 25 October. This contention was based on section 92 of the Social Security Contributions and Benefits Act 1992, (which has not been in any way amended by the Social Security (Incapacity for Work) Act 1994 or any other legislation. Section 92 provides as follows,

"Dependency increases: continuation of awards in cases of fluctuating earnings

92. (1) Where a beneficiary -

- (a) has been awarded an increase of benefit under this Part [IV] of this Act, but
- (b) ceases to be entitled to the increase by reason only that the weekly earnings of some other person ('the relevant earner') exceed the amount of the increase or, as the case may be, some specified amount,

then, if and so long as the beneficiary would have continued to be entitled to the increase, disregarding any such excess of earnings, the award shall continue in force but the increase shall not be payable for any week if the earnings relevant to that week exceed the amount of the increase or, as the case may be, the specified amount.

- (2) In this section the earnings which are relevant to any week are those earnings of the relevant earner which, apart from this section, would be taken into account in determining whether the beneficiary is entitled to the increase in question for that week." (My underlining.)

8. The tribunal allowed the claimant's appeal giving as their reasons (manuscript version - typed version is incomplete),

"The essence of the appeal is whether the underlying entitlement to increase in incapacity benefit for his wife still exists following the introduction of the Social Security (Incapacity Benefit) Transitional Regulations 1995. [section] 92 of the Social Security Contributions and Benefits Act 1992 provides that once a dependency increase is awarded it continues to be paid and will not end just because the person whose income is relevant has income exceeding the required amount. We accept that Reg. 24(1)(B) of the 1995 Transitional Regulations does not amend the Primary Regs. We also find that S.86A of the Social Security Contributions and Benefits Act 1992 does not avoid S.92. We do not accept the respondent's submission that the contrary intention is clearly shown in the Incapacity for Work [Act?] The fact that there [are] provisions in [reg.] 24 of the transitional Provisions does not avail the respondent. If it was the intention of the [Secretary of State] to repeal 92 this should have been stated specifically."

9. The adjudication officer has appealed against this decision, basically, on the ground that on and after (13 April 1995, the appointed day), the claimant's entitlement was no longer negated only by his wife's earnings, but was negated by the new conditions of regulation 9 of the 1994 Regulations (see paragraph 3 Above). The difficulty about that is that Section 92 seems to have a "once-and-for-all" effect, if fulfilled at the outset.

10. In my view, the correct way to resolve this particular problem is to take as the starting point the relevant transitional regulation. That is because the legislation, i.e. section 86A(1) of the 1992 Contributions and Benefits Act (inserted by Section 2 of the Incapacity for Work Act 1994) and regulation 9 of the 1994 Regulations (made under section 86 A(1)), prevents the claimant from receiving an increase of benefit for his wife (she not being 60 and he not be entitled to an increase for a child) on and after 13 April 1995 unless under the provisions of primary legislation (i.e. section 4 of the Incapacity for Work Act 1994) transitional regulations relieve the claimant from this. The starting point must therefore be regulation 24 of the above cited Transitional Regulations of 1995 (set out in paragraph 5 above.) Regulation 24(1)(b) will give the claimant transitional

protection if he can show that on 13 April 1995 etc. "invalidity benefit was payable for a spouse who was an adult dependant .." Was it therefore payable on 13 April 1995 or for a period of 56 days beforehand? It was not in fact being paid in that period because the wife's earnings were too great. Therefore, prima facie, the transitional provision is not complied with unless the claimant can show that, although the increase was not being paid, it was nevertheless "payable".

11. It is at that point that close attention has to be paid to the wording of section 92 of the Social Security Contributions and Benefits Act 1992 (set out in paragraph 7 above), which re-enacted section 84A of the Social Security Act 1975, inserted by the Social Security Act 1989. The phrase that I have underlined i.e., ".. the award shall continue in force but the increase shall not be payable for any week .." is critical. The section does not speak of any underlying entitlement (as the tribunal held). Quite the reverse, the expression used in section 92(1)(b) is "ceases to be entitled". All that the section does is to provide that "the award shall continue in force" i.e. there is no need for a series of revisions and reviews every time the wife's earnings go up or down. The section goes on to say "the increase shall not be payable for any week if the earnings relevant to that week exceed the amount of the increase, or as the case may be, the specified amount." The word is "payable". The section would have the effect in this case of providing that on 13 April 1995, and for 56 days beforehand, when the wife's earnings were too high, thus preventing entitlement, that the increase should not "be payable". That appears to me to be conclusive of the matter because regulation 24(1)(b) of the above-cited 1995 Transitional Regulations applies only where the increase for the wife is "payable" on 13 April 1995 or in the 56 days beforehand. Section 92 of the 1992 Act provides that in that period it was not "payable". Consequently the claimant was not on 13 April 1995 entitled to the transitional increase and cannot be entitled to it thereafter.

12. At the hearing before me on 5 February 1998, Mr Atkinson sought to 'get round' this difficulty by contending that section 92 of the 1992 Contributions and Benefits Act was "free-standing". He submitted that, prior to 13 April 1995, the claimant had the protection of section 92, which protection continued indefinitely until such time as section 92 was amended or repealed, neither of which had occurred. He added, correctly, that none of the relevant regulations could, or did, modify section 92. However, the answer to this is in my judgement, to be found in the primary legislation itself. Section 92 envisages "an increase of benefit under this Part of Act", i.e. initially in the claimant's case, an increase of

invalidity benefit, the award of which section 92 makes "to continue in force". But that award could only continue for as long as the benefit awarded legally continued in being. Invalidity benefit ceased to exist when sections 33 and 34 of the Contributions and Benefits Act 1992 (creating invalidity pension and invalidity allowance) were repealed by section 11(2) of, and Schedule 2 to, the Incapacity for Work Act 1994. It was replaced by the new Incapacity benefit created by that Act. Consequently, the claimant's award of Invalidity benefit, preserved "initially by section 92 of the 1992 Act, ceased by operation of law on the coming into operation (on 13 April 1995) of the above-cited provisions of the 1994 Act. The claimant has therefore to rely, for 'conversion' of his award to an award of Incapacity benefit, on section 4 of the 1994 Act and Transitional regulations made under that section. I have already held, for the reasons given above, that he cannot rely on them. I must, therefore, reject Mr Atkinson's contention on this point.

(Signed) M J Goodman
Commissioner

(Date) 16 February 1998