WRB—NS Entitlement abroad—EEC 1408/71 —German licences (except cards as UK LB. 7

(63)

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/4243/1999

Starred Decision No: 56/01

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Mr Damien Abbott,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 17th July 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The Secretary of State's appeal is allowed. The decision of the Whittington House social security appeal tribunal dated 23 February 1999 is erroneous in point of law, for the reasons given below, and I set it aside. I substitute a decision on the claimant's appeal against the adjudication officer's decision issued on 28 July 1998 (Social Security Act 1998, section 14(8)(a)(i)). My decision is that the claimant is entitled to long-term incapacity benefit from and including 1 February 1997, but is not entitled to incapacity benefit for the period from 2 February 1996 to 31 January 1997. The calculation of the amount payable is to be made by the Secretary of State as explained in paragraph 21 below.

2. This case stems from the claim for sickness benefit submitted by the claimant to the German authorities in February 1996. He was awarded sickness benefit from 2 February 1996, under his insurance with the Allgemeine Ortskranskenkasse (AOK), Hessen. The insurance is compulsory under the German social security legislation, but an individual can choose the provider of health and sickness cover. The payment of the sickness benefit continued until 2 June 1997, but from 1 February 1997 was set off against the award of retirement pension (paid from the age of 60 on account of invalidity) from that date. The claimant, who was 59 in February 1996, had worked and been compulsorily insured in Germany for many years. However, he had worked and paid national insurance contributions in the United Kingdom prior to 1971. Accordingly, the claim was in February 1997 referred to the Department of Social Security in the United Kingdom by the German authorities, for a determination of whether the claimant was entitled to, in European Community terms, a sickness or invalidity benefit.

3. The decision eventually given on 28 July 1998 was first that the claimant was not entitled to incapacity benefit from 2 February 1996 to 21 January 1997 because he was not entitled to invalidity benefit under German legislation and he was throughout that period entitled to cash sickness benefit under German legislation. The second part of the decision was that the claimant could not be treated as satisfying the all work test from and including 21 January 1997 in respect of his claim for incapacity benefit because he had not provided evidence of incapacity for work from that date. It was the claimant's appeal against that decision which was before the appeal tribunal of 23 February 1999.

4. The claimant attended the hearing on 23 February 1999. Having realised from the terms of the written submission to the appeal tribunal on form AT2 the need to provide medical evidence, he provided several certificates and reports, and also challenged the doctor's report dated 20 January 1997 sent by the German authorities as not having been based on an examination. The appeal tribunal accepted that he had not been examined for that report and that there was sufficient medical evidence to meet the conditions of regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995. Those findings have not been challenged in the appeal to the Commissioner and I adopt them as the basis of my decision.

5. I need at this point to explain briefly how the case was put to the appeal tribunal on behalf of the adjudication officer. The claim was properly treated as a claim for incapacity benefit. It was though plain that the claim could not succeed on the basis of the British legislation considered on its own. As from April 1995 the previous system under which sickness benefit (which could last for six months) was followed, if there was still incapacity for work, by invalidity benefit was replaced by incapacity benefit. This is divided into short-term incapacity benefit and long-term incapacity benefit. Under section 30A(1) and (2) of the Social Security Contributions and Benefits Act 1992 there is entitlement to short-term incapacity benefit for days of incapacity for work forming part of a period of incapacity for work where the claimant satisfies some age requirements and the contribution conditions. A person cannot be entitled to short-term incapacity benefit for more than 364 days in any period of incapacity for work (section 30A(4)). When a person ceases to be entitled to short-term incapacity benefit under the 364 day rule, "he is entitled to long-term incapacity benefit in respect of any subsequent day of incapacity for work in the same period of incapacity for work on which he is not over pensionable age" (section 30A(5)). There are also lower and higher rates of short-term incapacity benefit, the significance of which I discuss below.

6. Thus there is an explicit contribution test only for short-term incapacity benefit. Entitlement to long-term incapacity benefit depends on the previous 364 days' entitlement to short-term incapacity benefit, plus continuing satisfaction of the test of incapacity for work. The two contribution conditions for short-term incapacity benefit are set out in Schedule 3 to the Social Security Contributions and Benefits Act 1992. The second condition requires the claimant to have paid or been credited with contributions as an employed or self-employed person in the last two complete tax years before the year in which the period of incapacity for work started. In the present case, the claimant had no British contributions paid or credited after 1971, so that plainly the second contribution condition could not be met in respect of a claim in 1996. He could not qualify for short-term incapacity benefit and therefore could never move on to long-term incapacity benefit. For good measure there is also a provision disqualifying a person for receiving benefit (including incapacity benefit) when absent from Great Britain (Social Security Contributions and Benefits Act 1992, section 113(1)(a)). The claimant would not have come within the permitted exceptions to that rule in regulation 2 of the Social Security (Persons Abroad) Regulations 1975, because his absence was not temporary.

7. For those reasons, the claim for incapacity benefit could not succeed without assistance from European Community law, and in particular Council Regulation (EEC) No 1408/71. This was not explained very clearly in the adjudication officer's written submission on form AT2, but seems to have been explored rather more at the hearing on 23 February 1999. It seems to have been assumed that British short-term incapacity benefit came within the category of sickness benefit within Regulation 1408/71 and that there was nothing in the Regulation to assist the claimant towards qualification for short-term incapacity benefit. I shall have to come back to those questions in detail below. The focus was then on British long-term incapacity benefit as an invalidity benefit within the categories of Regulation 1408/71, and in particular Article 40(3):

"(a) For the purpose of determining the right to benefits under the legislation of a Member State, listed in Annex IV, part A, which makes the granting of invalidity benefits conditional upon the person concerned having received cash sickness benefits or having been incapable of work during a specified period, where an employed person or a self-employed person who has been subject to that legislation suffers incapacity for work leading to invalidity while subject to the legislation of another Member State, account shall be taken of the following, without prejudice to Article 37(1):

(i) any period during which, in respect of that incapacity for work, he has, under the legislation of the second Member State, received cash sickness benefits or, in lieu thereof, continued to receive a wage or salary;

(ii) any period during which, in respect of the invalidity which followed that incapacity for work, he has received benefits within the meaning of Chapters 2 and 3 of Title III of the Regulation granted in respect of invalidity under the legislation of the second Member State,

as if it were a period during which cash sickness benefits were paid to him under the legislation of the first Member State or during which he was incapable of working within the meaning of that legislation.

(b) The right to invalidity benefits under the legislation of the first Member State shall be required either upon the expiry of the preliminary period of compensation for sickness as required by that legislation or upon expiry of the preliminary period of incapacity for work as required by that legislation, but not before:

(i) the date of acquisition of the right to invalidity benefits referred to in subparagraph (a)(ii) under the legislation of the second Member State, or

(ii) the day following the last day on which the person concerned is entitled to cash sickness benefits under the legislation of the second Member State."

The claimant is an employed or self-employed person as defined within Regulation 1408/71, as he was insured for one of the relevant contingencies, and he had in the past been subject to United Kingdom social security legislation. The United Kingdom legislation on incapacity benefit is listed in Annex IV to the Regulation.

8. Thus, it was submitted that the claimant's receipt of sickness benefit from AOK under the German social security legislation had to be counted towards the qualifying period of 364 days for British long-term incapacity benefit. The adjudication officer's initial decision seems to have been based on there not having been 364 days' receipt of German sickness benefit for any day in the period down to 20 or 21 January 1997, and from 21 January 1997 onwards, even if there was qualification under the 364 day rule, the claimant not having provided medical evidence of incapacity for work. That was bolstered by the medical report of 21 January 1997 indicating partial incapacity only. In the oral submissions to the appeal tribunal, it seems to have been accepted that if that medical report were discounted and if the medical evidence provided by the claimant were accepted, then the period of entitlement to the German sickness benefit could be counted towards the 364 days.

9. The appeal tribunal accepted that submission. In the statement of findings of fact and reasons it said (page 63):

> "It was accepted by the Presenting Officer before the Tribunal today that had the medical report dated 20th January 1997 not intervened, the Sickness Benefit payments by the Private Insurance Company to [the claimant] would have satisfied the contribution conditions showing that he was entitled to benefit for more than 364 days."

The appeal tribunal then accepted that there was sufficient evidence to satisfy regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995 and, rightly, that the existence of the report of 21 January 1997 did not affect the fact that sickness benefit was paid to the claimant from 2 February 1996 to 2 June 1997. However, its conclusion was expressed as follows in the statement:

> "We therefore revise the Adjudication Officer's decision to state that '[the claimant] is not disentitled to Incapacity Benefit from 2nd July 1996 to 21st January 1997'. Throughout the period from 2nd February 1996 to 2nd June 1997 he was in receipt of a qualifying benefit in Germany. From 21st January 1997 (and before) he has provided sufficient evidence of his incapacity for work to satisfy Regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995."

The decision notice issued on 23 February 1999 had given the following decision:

> "[The claimant] is not disentitled to Incapacity Benefit from 2.2.96 to 21.1.97. Throughout the period 2.2.96 to 2.6.97 he was in receipt of a qualifying benefit in Germany. From 21.1.97 he has provided sufficient evidence of his incapacity for work to satisfy Reg 28 Soc Sec Incapacity for Work Regs 95."

10. The Secretary of State now appeals against the appeal tribunal's decision with my leave. I do not think that there can be any doubt that there were errors of law in the appeal tribunal's decision. First there was a discrepancy between dates given in the decision notice and in the statement for the beginning of entitlement (2 February 1996 and 2 June 1996). The second date might well have been a slip of the pen, but the discrepancy is still there. Second, and much more important, the appeal tribunal did not explain how it reached the conclusion that the claimant was entitled (or not disentitled) to incapacity benefit from either 2 February 1996 or 2 June 1996 to 31 January 1997. That was not what had been submitted on behalf of the adjudication officer, which was that the claimant could not be entitled to incapacity until there had been 364 days' receipt of German sickness benefit. The appeal tribunal did not explain what legal basis it found for the claimant to be entitled at any earlier date.

11. The appeal tribunal's decision must therefore be set aside. But the crucial question is what the proper decision should be on the claimant's appeal against the adjudication officer's decision of 28 July 1998. I granted the claimant's request for an oral hearing in order to discuss the legal difficulties of that question. The claimant attended, having been allowed expenses for travel from Germany, and the Secretary of State was represented by Mr Heath of the Office of the Solicitor to the Department of Social Security. I am grateful to both of them for their assistance.

12. The claimant made a number of good points about the length of time it took for the adjudication officer to make a decision in his case and about the desirability of Benefits Agency staff knowing of the effect of European Community law. He submitted that the appeal tribunal had reached the right result as the result of a careful and skilled examination of the law and that Regulation 1408/71 should be interpreted in a flexible way that gave effect to his connections with the United Kingdom and the amount saved by the National Health Service by his receiving treatment in Germany funded by his health insurance. He also reiterated his point about the medical report of 21 January 1997, which he felt had caused a lot of his problems in this case. As noted above, I have adopted the appeal tribunal's view about that report. However, I have concluded that the legal provisions by which I am bound do not allow me the flexibility to award the claimant British incapacity benefit before 1 February 1997. And in such a complicated matter it is no reflection on the legal expertise of the chairman of the appeal tribunal (emphasised by the claimant) for me to reach a different conclusion after full argument.

13. As explained above, the claimant cannot succeed on the British legislation alone. The European Community legislation must be examined. It is plain that the claimant comes within the personal scope of Regulation 1408/71 as a person who has been subject to the social security legislation of both the United Kingdom and Germany. I look first at whether Regulation 1408/71 can assist towards entitlement to short-term incapacity benefit and second at whether it can assist towards entitlement to long-term incapacity benefit.

14. In so far as short-term incapacity is a sickness benefit for the purposes of Regulation 1408/71, the Regulation does not assist. The principle is firmly established that Articles 13 to 17 of the Regulation provide an exhaustive rule for the legislation which is to apply for the purposes of both liability to pay contributions and the payment of benefits (see Ten Holder v Nieuwe Algemene Bedrijfsvereniging (Case 302/84) [1986] European Court Reports 1821). Article 13 provides:

> "1. Subject to Article 14c, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.
>
> 2. Subject to Articles 14 to 17:
> (a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;
> [(b) - (e) not relevant]
> (f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone."

The claimant was subject to the legislation of Germany while he was working there, by virtue of Article 13(2)(a). When he ceased working, because of illness, he remained subject and solely subject to that legislation, by virtue of Article 13(2)(f). None of Articles 14 to 17 are relevant in his case.

15. Accordingly, the legislation to which the claimant had to look under Regulation 1408/71 for the payment of sickness benefit was that of Germany. Despite the rather unhelpful and circular definitions of "competent State" in Article 1 of the Regulation (which were explored at the oral hearing), I am satisfied that Germany is the competent State for the purpose of the provisions on sickness and maternity benefits in Articles 18 to 36 of the Regulation. The claimant needed no assistance from those provisions in relation to his entitlement to sickness benefits from AOK under the German legislation. Those provisions do not contain anything to require payment of sickness benefit by a State which is not either the State of residence or the competent State.

16. However, I need to ask whether British short-term incapacity benefit is a sickness benefit, not an invalidity benefit, when it is paid at the higher rate as well as when it is paid at the lower rate. The lower rate is paid for the first 196 days of entitlement in any period of incapacity and the higher rate is paid for the remainder of the 364 days (Social Security Contributions and Benefits Act 1992, section 30B(2)). From April 1996 the higher rate was £54.55 per week and the lower rate was £46.15, while the rate of long-term incapacity benefit was £61.15. Where a person has been entitled to short-term incapacity benefit for at least 196 days and is either terminally ill or entitled to the highest rate of the care component of disability living allowance, a rate equal to that for long-term incapacity benefit is payable (section 30B(4)). Finally, under section 30B(7) the amount of long-term incapacity benefit is increased where a person's incapacity began below certain ages (35 for the higher increase, 45 for the lower increase).

17. There is no definition of sickness or invalidity benefit in Regulation 1408/71, but those terms must have a Community meaning. I take the essential difference to be between a benefit which is designed to replace income during an interruption to earnings caused by sickness which is or may be temporary and a benefit which is designed to replace income where there is a permanent or long-standing diminution in earning capacity due to invalidity. Before April 1995, the change from one type of benefit to the other came in the United Kingdom after six months entitlement to sickness benefit, when entitlement to invalidity benefit (including a pension and age-related allowances) came in. It is I think clear that short-term incapacity benefit at the lower rate is a sickness benefit and that long-term incapacity benefit is an invalidity benefit, but where does short-term incapacity benefit at the higher rate stand? There is a recognition in the higher rate of the effects (in increasing expenses and depleted savings) which often follow from long periods of sickness. It should be borne in mind that there may have been up to 28 weeks of entitlement to statutory sick pay before any entitlement to incapacity benefit starts. However, I conclude on balance that short-term incapacity benefit at the higher rate should still be classified as a sickness benefit. Two factors influence me in particular. The first is the absence of any increases according to the age of onset of incapacity (a recognition of the effect of a reduction in earning capacity in the ability to make provision for the future). The second is the rule in section 30B(4) of the Social Security Contributions

and Benefits Act 1992 in effect allowing long-term incapacity benefit to replace short-term incapacity benefit at the higher rate in cases of terminal illness or particularly severe disability (ie in cases where there is or can be presumed to be a permanent or long-standing diminution in earning capacity). I conclude that the purpose and nature of short-term incapacity benefit at the higher rate, within the overall structure of incapacity benefit, show it to be a sickness benefit.

18. It follows from that conclusion that the claimant is not entitled to British short-term incapacity benefit for any period from and including 2 February 1996.

19. But the effect of Regulation 1408/71 on the claimant's entitlement to long-term incapacity benefit is agreed in principle. The provisions of Articles 37 to 43 on invalidity do not use the concept of the competent State. The claimant comes within Article 40(1):

> "An employed or self-employed person who has been successively or alternately subject to the legislations of two or more Member States, of which at least one is not of the type referred to in Article 37(1), shall receive benefits under the provisions of Chapter 3, which shall apply by analogy, taking into account the provisions of paragraph 4."

The type of legislation referred to in Article 37(1) is legislation under which the amount of invalidity benefit is independent of the length of the period of insurance completed, as listed in Annex IV. The British legislation is listed as of that type, while the German legislation is not. Then the provisions of Chapter 3 require each Member State to calculate the entitlement to the benefit in question, in accordance with the rules in the Regulation, and carry out a complicated process of apportionment. Article 10(1) requires that invalidity benefits to which a person is entitled (but not sickness benefits) are to be paid by a Member State although the person resides in another Member State, so that section 113(1)(a) of the Social Security Contributions and Benefits Act 1992 cannot be applied.

20. In the present case, the claimant is entitled to rely on Article 40(3)(a) (see paragraph 7 above) because entitlement to long-term incapacity benefit is conditional on the receipt of cash sickness benefits for a specified period (364 days). Thus the claimant's entitlement to sickness benefit from AOK is to be treated as if it had been entitlement to British short-term incapacity benefit. Mr Heath, adopting the written submission dated 3 September 2000 on behalf of the Secretary of State, submitted that the 364 days expired on 31 January 1997, so that the claimant's entitlement to long-term incapacity benefit could not, under Article 40(3)(b), begin before 1 February 1997. However, if 2 February 1996 was the first day of payment of sickness benefit from AOK, I make the 364th day of payment 30 January 1997 (1996 being a leap year). Accordingly, the claimant's entitlement to long-term incapacity benefit would appear to start on 31 January 1997. But subparagraphs (i) and (ii) of Article 40(3)(b) impose another limit on the date from which a right to invalidity benefit under Article 40(3)(a) can operate. In the present case, the claimant's retirement pension awarded early because of invalidity is in my judgment within subparagraph (i) of Article 40(3)(b), so that there can be no entitlement to invalidity benefit before 1 February 1997. The submission for the Secretary of State on the date of entitlement to long-term incapacity benefit is

therefore right, but not for precisely the right reason.

21. My award of benefit is made in paragraph 1 above. It is now for the Secretary of State to calculate, if this has not already been done, the amount payable from 1 February 1997 as a result of the apportionment process. If there is any disagreement about the calculation of that amount, the appeal is to be returned to me or to another Commissioner for further decision.

J. Mesher

(Signed) J Mesher
Commissioner

Date: 23 April 2001

therefore right, but not for precisely the right reason.

21. My award of benefit is made in paragraph 1 above. It is now for the Secretary of State to calculate, if this has not already been done, the amount payable from 1 February 1997 as a result of the apportionment process. If there is any disagreement about the calculation of that amount, the appeal is to be returned to me or to another Commissioner for further decision.

(Signed) J Mesher
Commissioner

Date: 23 April 2001