JMe/1/LM Commissioner's File: CIS/706/92

SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

1. The claimant's appeal is allowed. The decision of the Liverpool social security appeal tribunal dated 2 June 1992 is erroneous in point of law, for the reasons given below, and I set it aside. I consider it expedient to give the decision on the claim, having made further findings of fact, and that decision is set out in paragraph 2 below (Social Security Administration Act 1992, section 23(7)(a)(i)).

2. My decision on the claim is that the claim for income support made on 5 August 1991 is to be treated as having been made on 16 August 1990 as the claimant has proved that she had continuous good cause from 16 August 1990 to 5 August 1991 for the failure to claim before 5 August 1991 (Social Security (Claims and Payments) Regulations 1987, regulations 19(2) and 6(3)). The claimant is entitled to income support at the rate specified in column (2) of paragraph 19 of Schedule 7 to the Income Support (General) Regulations 1987 from 16 August 1990 to 4 August 1991.

The background

3. The claimant is a married woman who lives with her husband and her non-dependent son. Before 5 August 1991 her husband was in receipt of income support for the couple. No premiums were included in his applicable amount. The claimant had had to give up her job some years earlier and had been submitting medical statements of incapacity for work to the Department of Social Security. On 5 August 1991 the claimant made a claim for income support and asked that it should be backdated to 16 August 1990, so that arrears of disability premium could be paid. She said on the claim form that because of the effect that her angina had had on her mobility she had been unable to make enquiries about her personal benefit entitlement.

4. The adjudication officer on 18 December 1991 awarded the claimant income support from 5 August 1991, but decided that she was not entitled to income support from 16 August 1990 to

O.S.S.C.S.C. No. 3839 P. 2
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4 August 1991 because she had not proved continuous good cause for the late claim. The claimant's solicitors appealed against that decision on her behalf. The claimant attended the hearing before the appeal tribunal on 2 June 1992 and was represented by Mr Chris Browne of Benjamin, Kay & Co, solicitors. In the written submission on form AT2 the adjudication officer maintained the view that the claimant either personally or by instructing someone to act on her behalf could reasonably have been expected to claim income support within the prescribed time. At the hearing, the presenting officer referred to Commissioner's decision R(S) 21/54 as holding that a claimant who is unable to make a claim personally can reasonably be expected to instruct someone on her behalf. Mr Browne's submission was that there was good cause in the claimant's ignorance of her entitlement to the disability premium, because she could not reasonably have been expected to know about that entitlement or to have realised that there was anything to enquire about to the Department of Social Security.

The appeal tribunal's decision

5. The appeal tribunal disallowed the claimant's appeal. Its findings of fact were as follows -

> "1. [The claimant's husband] is a casual labourer and had claimed appropriate benefit, whenever unemployed, over many years.
> 2. [The claimant's husband] was the benefit claimant prior to 5/8/91, receiving benefit for himself and his wife. On 5/8/91 [the claimant] claimed Income Support, requesting award be backdated to 16/8/90.
> 3. [The claimant] left school at age 15 and had lodged sick notes since ceasing work a few years ago. She received no personal benefit as her contributions were not sufficient.
> 4. [The claimant] has angina and uses a stick. She is not housebound.
> 5. [The claimant] did not visit a DSS office to ask about lack of sickness benefit or any entitlement.
> 6. [The claimant] did not instruct husband or son, aged 19, and in receipt of benefit, to make enquiries on her behalf.
> 7. Since late 1987 either partner can be the claimant."

Its reasons set out in box 4 of form AT3 were as follows -

> "The appellant's husband has been involved with the benefit system over many years and her son is also a recipient. Although [the claimant] is not in first class health, once she was lodging sick notes as she could no longer work it was reasonable for her to consider whether there should be a further entitlement and for her to make appropriate enquiries, either in person or through her husband or son. [The claimant] has not shown that she could not reasonably be expected to be aware of her rights or that she had a mistaken belief, reasonably held, that was responsible for

her failure to assert them. To proffer the excuse as appeared on the form dated 12/8/91 that because of her angina and the effect it had on her mobility she was precluded from making enquiries is unacceptable - again her husband and son were available to make them on her behalf. The suggestion by Mr Brown is that the parties could not have known about a disability premium or that it was better for [the claimant] to be the claimant was because of a lack of a publicity campaign by the Department. This cannot be sustained having regard to R(S) 8/81 where lack of publicity of rights of self employed contributions to claim sickness benefit was held not of itself to constitute good cause.

(R(S) 2/63, R(SB) 6/83, R(P) 1/79 all considered and applied).

(Appropriate law - Box 2 AT2)."

6. The solicitors applied for leave to appeal to the Commissioner, which was initially refused by an appeal tribunal chairman (not the chairman of the appeal tribunal of 2 June 1992), but granted by a Commissioner on 4 November 1992. The grounds put forward (see page 22 of the papers before me) were, briefly, that the appeal tribunal had acted in the way criticised in R(P) 1/79 by treating the claimant's ignorance as of itself fatal to her plea of good cause and that there was nothing about which the claimant could reasonably have been expected to make enquiry. The adjudication officer now concerned with the appeal, in the submission dated 8 December 1992, supports the claimant's appeal on the basis that the appeal tribunal had considered whether the claimant's husband or son, neither of whom was her appointee, had good cause for the delay. It was submitted that the appeal tribunal had dealt with the issue of whether the claimant's ignorance was reasonably held.

Was the appeal tribunal's decision erroneous in point of law?

7. I have concluded that it was, but not for the reasons put forward in the submission of the adjudication officer now concerned with the appeal. If the appeal tribunal had asked itself whether the claimant's husband and son had good cause in addition to asking itself whether the claimant personally had good cause that would have been an error of law, as submitted by the adjudication officer. But I am satisfied that the appeal tribunal did not do that. Admittedly, the findings of fact and reasons at points get close to the boundary between the acceptable and the unacceptable, but I am satisfied that the appeal tribunal was throughout only concerned with the claimant's personal good cause. The point that if a claimant is physically not able to make enquiries, she may be able to get other people to visit offices or post letters for her is relevant to that issue. R(S) 21/54, the decision cited by the presenting officer to the appeal tribunal, does not support the principle which she sought to draw from it. In that case, the lack of people whom the claimant could ask to enquire about the address to which a

claim should be sent was part of the circumstances which made her delay in claiming reasonable. There is no principle that a claimant who is unable to make a claim personally, but can reasonably be expected to instruct a person to make a claim on her behalf will not show good cause for the delay by failing to instruct that person (to adopt the formulation used in box 5 of the adjudication officer's written submission to the appeal tribunal on form AT2). The availability or otherwise of someone to carry out tasks which the claimant could not be expected to carry out personally is just one factor to be weighed in the consideration of "all the circumstances" required by paragraph 11 of R(S) 2/63.

8. I accept the broad thrust of the submissions by the claimant's solicitors. The way in which the appeal tribunal dealt in its reasons for decision with the effect of the limitations on the claimant's mobility and with the claimant's ignorance of the fact that the disability premium would be applicable if she, rather than her husband, were the claimant shows in my view that it was considering each element put forward as good cause in isolation, rather than considering all the circumstances cumulatively, and thus erred in law. In addition, I conclude that on the facts found the appeal tribunal should have decided that there was nothing about which the claimant could reasonably be expected to enquire, so that she could not reasonably be expected to be aware of her entitlement to an increased amount of income support for her and her husband if she became the claimant. That entitlement is a highly complex matter. The claimant's husband was in receipt of income support, calculated, so far as the claimant knew, on full information about the couple's circumstances. There was no reason why any ordinary person should suspect that the amount of income support payable in respect of exactly the same circumstances should be different if the claimant made the claim rather than her husband. Therefore, there was no reason why an ordinary person in those circumstances should think that there was anything to enquire about. The case is very different from those of self-employed people who assume that they have no entitlement to sickness benefit. The question whether any given facts constitute good cause for delay in claiming is one of law (R(S) 2/63, paragraph 12, and R(SB) 39/85, paragraph 7). Therefore, the appeal tribunal's failure here to reach the right conclusion was an error of law.

9. For those reasons, the appeal tribunal's decision dated 2 June 1992 must be set aside. I am clearly in a position to give the proper decision on the good cause issue. For the reasons set out in paragraph 8 above, on the facts found by the appeal tribunal, the claimant has proved that she had continuous good cause from 16 August 1990 to 5 August 1991 for the failure to claim before 5 August 1991. Since the claimant was not aware of her entitlement and that unawareness was reasonable, she acted as a reasonable person of her age and experience would have done. It seems not to be disputed that she acted promptly once she did learn of the entitlement. Therefore, the time for claiming income support for the period beginning on 16 August 1990 is

extended to 5 August 1991 and the claim is treated as having been made on 16 August 1990 (Social Security (Claims and Payments) Regulations 1987, regulations 19(2) and 6(3)).

10. I consider that I am also able, by making a few further findings of fact, to decide the question of the claimant's entitlement to income support from 16 August 1990 and that it is expedient that I should deal with the entire case. Prima facie, the claimant is not entitled to income support for that period because section 20(9) of the Social Security Act 1986 (replaced after the end of the period in question by section 134(2) of the Social Security Contributions and Benefits Act 1992) provides that "except in prescribed circumstances, the entitlement of one member of a family to any one income-related benefit excludes entitlement to that benefit for any other member for the same period". So the claimant's husband's entitlement to income support would exclude hers. But section 20(9) has an exception for prescribed circumstances. Regulation 21(5) of the Income Support (General) Regulations 1987 provides -

> "(5) A claimant to whom paragraph 19 of Schedule 7 (disability premium) applies shall be entitled to income support for the period in respect of which that paragraph applies to him notwithstanding that his partner was also entitled to income support for that same period."

Therefore, the claimant will be entitled to income support from 16 August 1990 if she falls within paragraph 19 of Schedule 7.

11. I set out paragraph 19 in full, in particular because that paragraph was by an oversight omitted from the 1993 edition of Mesher, Income-Related Benefits: the Legislation. The heading is "Claimants entitled to the disability premium for a past period". Paragraph 19 applies to a claimant -

> "(a) whose time for claiming income support has been extended under regulation 19(2) of the Social Security (Claims and Payments) Regulations 1987 (time for claiming benefit); and
>
> (b) whose partner was entitled to income support in respect of the period beginning with the day on which the claimant's claim is treated as made under paragraph 6(4) of Schedule 7 to those Regulations and ending with the day on which the claim is actually made; and
>
> (c) who satisfied the condition in paragraph 11(b) of Schedule 2 and the additional condition referred to in that paragraph and specified in paragraph 12(1)(b) of that Schedule in respect of that period."

The amount of entitlement is, under column (2), "the amount only of the disability premium applicable by virtue of paragraph 11(b) of Schedule 2 as specified in paragraph 15(4)(b) of that Schedule".

12. The claimant clearly satisfies sub-paragraph (a) by virtue of my decision on good cause. The claimant also satisfies sub-paragraph (b). Paragraph 6(4) of Schedule 7 to the Social Security (Claims and Payments) Regulations 1987 was revoked on 11 April 1988 by the same Regulations which introduced paragraph (3) into regulation 6 of the Claims and Payments Regulations. In these circumstances, by virtue of sections 17(2)(a) and 23(1) of the Interpretation Act 1978, the reference to paragraph 6(4) is to be construed as a reference to regulation 6(3). It is not in dispute that the claimant's husband (her "partner" as defined in regulation 2(1) of the Income Support (General) Regulations) was entitled to income support in respect of the period beginning with 16 August 1990 up to and including 4 August 1991. It appears that since the claimant was awarded income support by the adjudication officer from 5 August 1991, her husband's entitlement to income support must have been reviewed and revised so as to terminate on 4 August 1991. That state of affairs must satisfy the requirement that the claimant's partner is entitled to income support for the period ending with the day on which the claim is actually made, otherwise paragraph 19 would be deprived of any realistic effect. That leaves sub-paragraph (c). The claimant needs to satisfy the condition of paragraph 12(1)(b) of Schedule 2 to the Income Support (General) Regulations throughout the period in question. That condition is that "the circumstances of the claimant fall, and have fallen, in respect of a continuous period of not less than 28 weeks, within paragraph 5 of Schedule 1". Paragraph 5 of Schedule 1 applies to a person who -

> "provides evidence of incapacity in accordance with regulation 2 of the Social Security (Medical Evidence) Regulations 1976 (evidence of incapacity for work) in support of a claim for sickness benefit, invalidity pension or severe disablement allowance within the meaning of sections 14, 15 or 36 of the Social Security Act 1975, provided that an adjudication officer has not determined that that person is not incapable of work, ... "

Commissioner's decision CSIS/65/1991, to be reported as R(IS) 8/93, holds that paragraph 5 of Schedule 1 and paragraph 12(1)(b) of Schedule 2 may be satisfied by retrospective medical evidence. The appeal tribunal made no clear finding on this issue, as it never reached the stage of considering paragraph 19 of Schedule 7. It refers to the claimant having lodged sick notes since ceasing work "a few years ago". The chairman's note of evidence records the claimant as saying "About 5 years ago a little job and put sick notes in - heard nothing - not receive any money", and the presenting officer as saying "Medical evidence not received until claim by [the claimant]". That suggests that the claimant was not supplying contemporaneous medical evidence during the period in question, but supplied retrospective evidence at the time of the claim of 5 August 1991. There is confirmation in the grounds of the application for leave to appeal to the Commissioner, where it is said that "proper medical evidence" was submitted to

support the claim. Although I have not seen any of the medical evidence, I do not consider it necessary to impose the further delay of having it produced. I am prepared to find as a fact that medical evidence of continuous incapacity for work going back at least to 28 weeks prior to 16 August 1990 has been provided by the claimant. On that basis, she satisfies sub-paragraph (c).

13. Since the claimant falls within paragraph 19 of Schedule 7 to the Income Support (General) Regulations she is entitled to income support of an amount equal to that of the disability premium under column (2) of paragraph 19 from 16 August 1990 to 4 August 1991 (both dates included). My decision is to that effect. If that decision is given in ignorance of, or under a mistake as to, some material fact, it is open to review by an adjudication officer under section 25(1)(a) of the Social Security Administration Act 1992.

Conclusion

14. The claimant's appeal succeeds. My decision is set out in paragraph 2 above.

(Signed) J Mesher
Commissioner

Date: 8 December 1993