RETIREMENT PENSION

1. Validity of an adjudication officer's decision. Confirmation of the point at which a decision is perfected.

2. Review on the ground of error of law.

By a decision given on 21.7.82 (the "first decision") the claimant was awarded a Category B retirement pension which incorrectly included an award of increments in respect of a period of deferred retirement during which she herself had been in receipt of graduated retirement benefit. The error was recognised before the decision was communicated to the claimant or acted upon and on 2.11.82 a second decision was given in which the pension entitlement was re-calculated to omit the award of increments. Payment was made to the claimant in pursuance of the second decision only. The claimant appealed on the ground that she was entitled to increments.

Held that:

1. the validity of an adjudication officer's decision does not depend on its being communicated to the claimant (paragraphs 3–8);

2. the first decision, albeit incorrect, is an effective decision. The second decision is a nullity because it covers the same ground as the first decision (paragraphs 8–9);

3. a decision of an insurance officer given before the introduction, on 23.4.84, of section 104(1A) of the Social Security Act 1975 and the Social Security (Adjudication) Regulations 1984, may be reviewed by an adjudication officer if erroneous in law. The review cannot have effect before 23.4.84 (paragraphs 9–13).

1. My decision is:

(a) that the decision of the insurance officer dated 21 July 1982 (the "first decision") awarding to the claimant Category B retirement pension at the basic weekly rate of £17.75 plus basic increments of £2.99 is an effective decision and the claimant is entitled to payments of pension thereunder. The purported decision of the insurance officer dated 2 November 1982 (the "second decision"), which sought to remove the claimant's entitlement to basic increments of £2.99 per week was a nullity: Social Security Act 1975, sections 99, 100(2), 104(1)(a) and (b) and 104(1A); and

(b) the first decision is reviewable as from 23 April 1984 on the ground of error of law by an adjudication officer: Health and Social Services and Social Security Adjudication Act 1983, Schedule 8, paragraph 3; and the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No. 451], regulation 89.

The claimant's appeal against the decision of the national insurance local tribunal dated 27 October 1983 is allowed.

2. This is an appeal to the Commissioner by the claimant, a married woman living with her husband. She was born on 3 September 1914 and is thus now aged 70. At her request the appeal was the subject of an oral hearing before me on 2 August 1984 at which the claimant was present and accompanied by her husband but was not represented. The adjudication officer was represented by Mr. M. N. Qureshi of the Solicitor's Office of the Department of Health and Social Security.

3. The first decision awarded Category B retirement pension to the claimant, i.e. on her husband's contributions. As part of that decision the claimant was awarded a basic incremental pension of £2.99 per week because her husband had postponed his retirement until 1 July 1982, some two and a quarter years after he had attained his 65th birthday on 25 March

1980. That award was in error of law (and conceded so to be by Mr Qureshi) because in fact the claimant was not entitled to treat the days from her husband's 65th birthday up to his actual retirement on 1 July 1982 as "days of increment" as she had throughout that period been receiving on her own contributions a small graduated pension of 54 pence per week (see the Social Security Pensions Act 1975, Schedule 1, paragraphs 1–5; the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, [S.I. 1979 No. 642] regulation 4(1) and the Social Security (Graduated Retirement Benefit) (No. 2) Regulations 1978 [S.I. 1978 No. 393] Schedule 1, paragraphs 36(7) and (9). The insurance officer was aware of that graduated pension and indeed awarded continued payment of it in his decision. There was therefore no ignorance or mistake of *fact*. The mistake was one of law.

4. When the error of law in the first decision was realised (it would appear because the Central Pensions Branch of the Department notified the local office of the error), an attempt was made to put the matter right by the completion of the second decision, in which a different insurance officer re-calculated the entitlement to pension of the claimant leaving out the £2.99 basic increment. That officer stated in the decision that she had done so by way of review of the first decision (which had awarded the basic increment in question). Neither the first nor the second decision were put before the local tribunal but they have been produced to the Commissioner. Moreover, when the claimant appealed to the local tribunal against the second decision, that decision was expressed in the tribunal papers (form LT2) in the terms of a first instance decision to the effect that the claimant was not entitled to the basic increment. No reference was made there (or indeed earlier in communications to the claimant) to the fact that that decision was a review decision. There may be an explanation for this but it is unfortunate that the review issue was not drawn to the attention of the local tribunal and has only emerged subsequently. In fact when the second decision was made, there was no power of review since the first decision was not given in ignorance of a material fact, nor was it based on a mistake as to a material fact, nor had there since that decision been any relevant change of circumstances (Social Security Act 1975, section 104(1)(a) and (b)), as indeed Mr. Qureshi conceded. There was at that time no power to review on the ground of a mistake of law. Such a power has since been introduced by the Health and Social Services and Social Security Adjudications Act 1983 and the Social Security (Adjudication) Regulations 1984, [S.I. 1984 No. 451] (see paragraph 9 below).

5. The question therefore is whether the claimant can retain the benefit of the incorrect award under the first decision, including the increase of Category B retirement pension for her husband's deferred retirement, to which in law she was not entitled. In this connection, the adjudication officer now concerned submits (paragraphs 11 and 12 of written submission dated 18 April 1984),

> "...the award of increments was incorrect, and was recognised before the decision of 21 July 1982 of the insurance officer [the first decision] was put into effect. For this reason the case was again referred to the insurance officer on 2.11.82 (on this occasion a different insurance officer) and the decision recorded on Form BR3A(N) i.e. the purported review decision [the second decision] was given. A statement has now been given by this insurance officer and it will be seen that, whilst ostensibly the decision she gave purported to be a review of the earlier decision it was not so intended".

To pause at that point, I understood Mr. Qureshi to say at the hearing that he did not in fact rely on the statement of the insurance officer concerned that she had meant the second decision to be a decision at first instance (for

reasons which appear below). In any event I do not consider that a statement made afterwards by an insurance officer as to what she intended to do can vary the effect of the plain language of the decision itself, particularly when that statement may have been made with hindsight.

6. The adjudication officer's submission continues,

> "In the circumstances, I submit that it is for consideration whether, although the decision of 2.11.82 [the second decision] is so phrased that it purports to review the decision made on 21.7.82 [the first decision], in fact it was a decision given at first instance. The decision of 21.7.82 [the first decision] therefore, falls to be disregarded as it had not been promulgated or acted upon, and the present appeal may be correctly taken as being an appeal against the decision dated 2.11.82 [the second decision] as was intended by the claimant" (my underlining).

7. In my judgment the first decision could not "be disregarded as it had not been promulgated or acted upon" (adjudication officer's submission). It is a complete decision on a form intended for that purpose signed and dated by the insurance officer and it bears the statement, "Final at outset". It appears from what Mr. Qureshi told me at the hearing that it was then sent to the Pensions Branch of the Department for implementation. That Branch then drew attention to the fact that it was incorrect. The second 'decision' was then made. It was only after that decision was made that any communication of the computation of her pension was given to the claimant. The first decision was not as such communicated to the claimant though it could be said that by communicating the effect of the second decision to the claimant (which by its terms stated that it reviewed the first decision though that fact was not communicated) there had been a communication to the claimant of the first decision, if such is required in law.

8. However in my judgment, communication of an insurance officer's decision is not necessary for 'promulgation' of that decision or for its completeness. In R(I) 14/74 (paragraph 14(a)) the learned Commissioner stated (in a different context),

> "In my view it is not possible to make an effective decision without communicating it to the person whose rights are dealt with in it. Writing the words of an intended decision on a piece of paper and placing the piece of paper in a file is not a complete decision-making process".

However in considering that statement, a Tribunal of Commissioners in reported decision R(U) 7/81 accepted an argument put to it that the proposition "that all decisions of insurance officers should be communicated to the person concerned and that if this is not done the decision is incomplete and invalid" was "too general" (R(U) 7/81, paragraph 18). In the context of section 100(2) of the Social Security Act 1975 which requires communication of an insurance officer's decision to the claimant where it is adverse to the claimant (the requirement does not apply to a favourable decision as here), the Tribunal held that non-communication did not invalidate the decision (paragraph 21). I therefore conclude, in accordance with R(U) 7/81, that no communication of an insurance officer's decision to a claimant is necessary to validate it and that the first decision in the present case, which was dated, complete in every particular, and expressed to be "Final at outset" was indeed a fully valid decision. That being so, the second decision was a nullity, even if it was a decision at first instance and not, as it said it was, a review decision, because the second decision would be covering the same ground as the first decision.

9. The result is that the first decision awarding the claimant a basic incremental weekly pension of £2.99 on account of her husband's deferred retirement must stand and is effective. However, in the submission of the adjudication officer now concerned (paragraph 13 of written submission dated 18 April 1984) that officer submits as follows,

> "If however the Commissioner does not accept my submission [as to the decision of 21 July 1982 being ineffective because not promulgated] then my submission is as follows. The conditions for review of the [first] decision (Social Security Act section 104(1) were manifestly not satisfied when the insurance officer considered the case again on 2.11.82 [the second decision]. I respectfully submit therefore that the Commissioner should declare that the decision given on that day [the second decision] was a nullity. The effect will, I submit, be that the decision of 21.7.82 [the first decision] must stand and that the claimant is thereby entitled to the category B increments which she seeks to obtain by means of the present appeal. In this event however I further submit that the effect of the Social Security (Adjudication) Regulations 1984 regulation 89(1) which come into operation on 23.4.84 would be such as to enable the insurance officer to consider a review of the decision of 21.7.82 with a view to revising the award so as to deprive the claimant from 23.4.84 of the increments to which she considers she is entitled".

10. Regulation 89(1) of the Social Security (Adjudication) Regulation 1984 [S.I. 1984 No. 451] implements section 25 of and paragraph 3 of Schedule 8 to the Health and Social Services and Social Security Adjudication Act 1983, adding a new sub-section (1A) to section 104 of the Social Security Act 1975, as follows,

> "(1A) Any decision of an adjudication officer may in prescribed circumstances be reviewed, upon the ground that it was erroneous in point of law, by an adjudication officer or, on reference from an adjudication officer, by a social security appeal tribunal".

Regulation 89(1) of the Adjudication Regulations provides that:

> "...any decision of an adjudication officer may be reviewed at any time by an adjudication officer...on the ground that it was erroneous in point of law"

Regulation 89(2), however, limits the effect of such a review to a retrospective period of 52 weeks. At the hearing I raised with Mr. Qureshi the question whether the power to review on the ground of error of law given to an adjudication officer for the first time by the 1983 Act and the 1984 Regulations was retrospective in the sense of allowing an adjudication officer to review on the ground of error of law the decision of an insurance officer given prior to 23 April 1984 (the date the legislation came into force).

11. Mr. Qureshi felt not able to deal with such an important matter at short notice and asked for the opportunity to make a subsequent written submission on the point. That submission dated 17 August 1984 has been received and there is a written reply to it from the claimant, received on 22 August 1984. The adjudication officer submits that the effect of the 1983 Act and of regulation 89(1) of the Adjudication Regulations 1984 is retrospective to the extent that it allows pre-23 April 1984 insurance officers' decisions to be reviewed on the ground of error of law by an adjudication officer, but only as from 23 April 1984 and not up to 52 weeks' beforehand (see regulation 89(2)). In support of that contention, the adjudication officer now concerned submits,

"The general principle of statutory construction is that an enactment is presumed not to have a retrospective effect where that would affect accrued rights but that that presumption does not apply to enactments that are purely procedural (*R V Chandra Dharma* [1905] 2 KB 335 and *Gardener v Lucas* [1878] 3 App. Cas. per Lord Blackburn at page 603). The authorities were reviewed by the Judicial Committee of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553. In that case it was said that "the proper approach is not to decide what label to apply..., procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case would impair existing rights and obligations" (per Lord Brightman at page 563, and see also *Lewis v Lewis* [1984] 3 WLR 45). I submit that although to review the decision in this case for any period prior to 23.4.84 would be to apply the new provisions retrospectively to the detriment of existing rights, a review in respect of any period on or after that date would be wholly prospective and therefore legitimate".

On the point of retrospection, I accept the adjudication officer's submission. The further question, though, is whether the wording of the new section 104(1A) of the 1975 Act of regulation 89(1) of the Adjudication Regulations (see paragraph 9 above) is apt to achieve the result contended for by the adjudication officer, as both provisions merely provide that any decision of an *"adjudication officer"* may be reviewed on the ground of error of law by an "adjudication officer" and do not in terms refer to *insurance officers'* decisions. "Adjudication officer" is defined by regulation 1(2) of the Adjudication Regulations as meaning "an officer appointed in accordance with section 97(1) of the [1975] Act." Section 97(1) in its original form referred to the appointment of "insurance officers" and, in a form substituted by the 1983 Act (Schedule 8, paragraph 2) refers to the appointment of "adjudication officers".

12. Moreover, paragraph 1 of Schedule 8 to the 1983 Act provides as follows, (so far as relevant),

"1.—(1) The functions of insurance officers appointed under the Social Security Act 1975...shall be exercised by officers to be called adjudication officers.

(2) .....

(3) Accordingly—

(a) any enactment or instrument passed or made before the coming into force of this paragraph shall have effect, so far as may be necessary in consequence of the changes made by this paragraph, as if—

(i) for any reference to an officer whose functions are transferred by sub-paragraph (1) above there were substituted a reference to an adjudication officer..."

I am satisfied that the combined effect of those provisions is to allow an adjudication officer to review on the ground of error of law the decision of an insurance officer given prior to 23 April 1984, since for all relevant purposes (including the new power of review) they clearly equate an insurance officer with an adjudication officer. The review cannot be of the insurance officer's decision's effect prior to 23 April 1984, however, and there is then no infringement of the principle of non-retrospection.

13. I should perhaps add that I consider this particular question to be within my jurisdiction on this appeal and not to be hypothetical (a) because the matter was initially raised by the adjudication officer now concerned in her submission and (b) because the award of retirement pension is an 'on-

going' decision and section 102 of the Social Security Act 1975 enables me to decide a question even if it has not been considered by an insurance officer. Such a question includes the question of whether or not an existing insurance officer's decision could now be reviewed on the ground of error of law.

(Signed) M. J. Goodman
Commissioner