INVALIDITY BENEFIT

Absence abroad—effect of EEC Regulations on medical assessments made abroad and on disqualification

Following 14 years employment in England the claimant returned to Italy where he became incapable of work He received sickness benefit which was succeeded by invalidity benefit under the legislation of the United Kingdom. A medical examination arranged by the Italian authorities on behalf of the authorities in the United Kingdom assessed the claimant's invalidity for heavy work at 50% and for light work at 30%. The insurance officer disallowed the claim from 10 8 77 to 24.2.78 and referred the period 25.2.78 to 16.6.78 to the local tribunal for decision They disallowed the claimant's appeal against the disallowance but gave no decision on the period referred to them.

Held that:—

1 When a local tribunal omits to deal with a claim referred to them on the occasion of an appeal it should be put back to them immediately for decision (paragraph 4).

2. It is for the competent institution of the Member State from which the benefit is claimed to interpret the findings of the medical examinations carried out under the Regulations of the Council of the European Communities in accordance with its own legislation (paragraph 7 and Appendix).

3. Article 10 of Regulation (EEC) No 1408/71 provides relief from disqualification only in respect of "residence clauses" which deprive a person of the right to payment even though the general conditions of entitlement are satisfied (e.g. section 82(5)(a) of the Social Security Act 1975) (paragraph 11)

4. Article 10 can exclude disqualification for receiving invalidity benefit under section 82(5)(a) even though the right to invalidity benefit had not been acquired before the claimant went abroad (paragraph 12).

5. The claimant was incapable of work from 10.8.77 to 24 2.78 and was not disqualified for this period (paragraphs 1, 8 and 12).

6 The UK benefit thus payable does not fall to be adjusted adversely to the claimant by virtue of the process of aggregation and apportionment contained in Articles 40, and 44 to 51 of Regulation (EEC) No 1408/71 where the right to that benefit has been acquired otherwise than by that process (paragraph 13).

1. My decision is that invalidity benefit is payable to the claimant for the inclusive period from 10 August 1977 to 24 February 1978.

2. The claimant is an Italian national who was employed in England for 14 years as an agricultural worker and labourer and returned to Italy seemingly on account of ill-health in August 1973. He claimed sickness benefit followed by invalidity benefit. He was, it seems, saved from disqualification on account of absence from Great Britain in relation to sickness benefit by Article 19 of Council Regulation (EEC) No 1408/71 and in relation to invalidity benefit by, I think, Article 10 of the same regulation. I shall return to this question.

3. Sickness followed by invalidity benefit was paid to the claimant down to 9 August 1977. But by that time the insurance officer had given consideration to the question whether the claimant's capacity for work ought to be assessed by reference to a wider field of employment than that of his previous occupation and he had the claimant referred to the medical authorities in Italy in accordance with Article 87 of Council Regulation (EEC) No 1408/71 (Regulation 1408/71) and Article 115 of Council Regulation (EEC) No 574/72 (Regulation 574/72). This resulted in the issue on EEC form E 213 of a medical report dated 10 August 1977 by an Italian doctor. The diagnosis included chronic asthmatic bronchitis, modest varices to the legs, point of left inguinal hernia and lumbar pains. There was an assessment of 50 per cent invalidity for heavy work and 30 per cent invalidity for light work.

4. On the basis of this report the insurance officer decided that invalidity benefit was not payable for the period from 10 August 1977 to 24 February 1978. The claimant appealed against this decision to the local tribunal who dismissed the appeal using the phrase "Appeal disallowed" without making any express reference to a further claim for the period from 25 February to 16 June which had been referred to them. It has been held in a case where the local tribunal were concerned only with a reference that a decision to the effect that the appeal was dismissed can if the intention is clear be interpreted as a decision dismissing the claim referred (see Decision C.U. 5/74) (not reported). I do not think that I can apply this to the present case where there was an appeal before the local tribunal (to which the words "Appeal disallowed" apply) as well as a reference. There is thus no appeal before me relating to this further period, nor is the claim in relation to this further period a matter which has first arisen in the course of an appeal to the Commissioner which I have power to deal with under section 102 of the Social Security Act 1975. The matter, having been referred to a local tribunal cannot, I think, now be dealt with by an insurance officer and will have to be remitted to a local tribunal. In my judgment the proper course where a local tribunal omits to deal with a claim referred to them on the occasion of an appeal, is for the matter to be immediately put back to the local tribunal for decision. So long as the evidence is taken again from the start it need not consist of the same persons who heard the appeal. In this way, if there is to be a further appeal to the Commissioner, the whole matter can be placed before him at one time.

5. The claimant has been assisted in connection with his appeal and represented before the local tribunal by the Italian Workers' Social Services in London. He has furnished certificates from his doctor in Italy to the effect that he is incapable of work. A further reference has been made to the medical authorities in Italy which has resulted in the issue of a further form E 213 dated 8 November 1978 in which invalidity both for the claimant's last work and for work generally was assessed at 45 per cent.

6. Under the British system of social security a person is either incapable of work or not incapable of work, and the concept of, say, 45 per cent invalidity or incapacity is unfamiliar. In relation to industrial disablement

the concept of different degrees of disablement is however quite familiar and for instance a person who has lost 4 fingers of one hand in an industrial accident will on that account in conformity with Schedule 1 to the Social Security (Industrial Injuries) (Benefit) Regulations 1975 [S.I. 1975 No 559] be given a 50 per cent assessment of the degree of his disablement. But this does not settle the question of the claimant's incapacity for work, and a person with a low assessment of disablement may nevertheless be incapable of work and a person with a high degree of disablement may still be capable of work. The question of the effect of the assessments of the Italian medical authorities in accordance with their practice on the claimant's title to British invalidity benefit has been raised by the claimant's representatives, who requested replies to certain questions bearing on the proper method in cases like the present of resolving the differences in procedure to the Administrative Commission on Social Security for Migrant Workers constituted under Article 80 of Regulation 1408/71.

7. The Administrative Commission expressed the opinion that it was for the competent institution of the Member State from which the benefit was claimed to interpret the findings of the medical examinations carried out under Article 87 of Regulation 1408/71 and Article 115 of Regulation 574/72 in accordance with its own legislation. Decisions of the above Administrative Commission are not binding on national courts and tribunals (see Decision R(I) 1/75 at paragraph 13). But they have some persuasive value and I entirely agree with the above opinion, as it follows, in my judgment, from the replies given by the Administrative Commission to the specific questions asked them, which I accept as correct. I have set out the requests and replies in an Appendix to this decision.

8. Two medical officers of the Department of Health and Social Security have, since the local tribunal gave their decision in this matter, been invited to sum up the effect of the medical evidence. In the first report (dated 5 July 1979) the medical officer concerned expressed the view on the evidence that the claimant, though incapable of heavy work or work involving stooping or long standing, was capable of light work which did not involve much respiratory effort and was in a warm dry and clean atmosphere. I have no evidence whether there is any such work that the claimant could reasonably be expected to do. In the second report (dated 24 March 1980) the medical officer concerned has on the same evidence it seems, expressed the view that on balance the opinion of the claimant's own doctor that he is incapable of work is the view to be preferred. On this basis the insurance officer now concerned has submitted that it is for consideration whether the claimant has proved incapacity for work. I accept that he has, and thus satisfies the medical conditions of title to the benefit.

9. There remains the question whether the claimant is disqualified on the ground of absence from Great Britain under section 82(5)(a) of the Social Security Act 1975. On this question Articles 10 and 37 to 43 of Regulation 1408/71 (as amended) are or may be relevant. Article 10(1) so far as material provides as follows:—

> "Save as otherwise provided in this regulation, invalidity, old age or survivors' cash benefits,.....acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated."

In relation to United Kingdom benefits this has (as was pointed out in paragraphs 13 and 14 of Commissioner's Decision C.S. 7/76 (reported only

in [1977] 1 CMLR 5) been extended to cases of stay as well as residence in another Member State by paragraph 14 of what is now point J of Annex V to Regulation 1408/71 as amended.

10. In Decision R(A) 4/75 it was indicated that rights to benefit had to be acquired before they could be "exported" under this provision. But no indication of what was meant by "acquired" was given beyond the conclusion that a right to attendance allowance, a non-contributory benefit, was not acquired before the medical conditions for an award were satisfied. The European Court of Justice had been invited in Case 51/73 *Sociale Verzekeringsbank v Smieja* [1973] ECR 1213 to state the meaning of the word "acquired" in the Article 10 but did not find it necessary to do so. More recently in Case 32/77 *Giuliani v Landesversicherungsanstalt Schwaben* [1977] ECR 1857 that Court (in paragraph 6 of their decision) stated that "the waiving of residence clauses pursuant to Article 10 of Regulation No 1408/71 has no effect on the acquisition of the right to benefit". This I think points to a simple way of ascertaining without defining the word "acquired" in what circumstances a claimant can rely on Article 10 and incidentally of supporting the conclusion (if not the reasoning) in Decision R(A) 4/75.

11. The *Giuliani* decision draws a distinction between the conditions for the acquisition of a right to benefit (such as the conditions as to residence and presence commonly found to be applicable to non-contributory benefits) and "residence clauses" which deprive a person of the right to payment even though the general conditions of entitlement are satisfied, such as the disqualification under section 82(5)(a) of the Social Security Act 1975. Relief from the latter class of provision and from that class only is afforded by Article 10.

12. Contributory benefits are not normally subject to residence conditions except indirectly in so far as there may be residence conditions for becoming a contributor. If a claimant for such a benefit satisfies the contribution conditions, and the only obstacle to the award of a contributory benefit is section 82(5)(a) of the Act and the benefit in question is like invalidity pension one of those mentioned in Article 10(1) of Regulation 1408/71 that Article will avoid the disqualification and make the benefit payable. For this purpose invalidity benefit is a contributory benefit because, although there are strictly no contribution conditions for it the requirement of 168 days' previous entitlement to sickness benefit makes it in effect a contributory benefit. Article 10 can thus be applied so as to exclude disqualification for receiving invalidity benefit under section 82(5)(a) even if a person has gone abroad before first becoming entitled to the benefit (cf paragraph 16 of the judgment of the European Court in Case 41/77 *Regina v National Insurance Commissioner, Ex parte Warry* [1978] QB 607 at page 623 [1977] ECR 2085 at page 2093). It follows that subject to any other provisions of the Regulation the claimant is entitled to benefit to which he qualifies by virtue of contributions made by him or credited to him in respect of periods before he left the United Kingdom.

13. The rights under Article 10 however are expressly made subject to the other provisions of the Regulation, which include Articles 37 to 43 thereof. These Articles refer to two types of invalidity legislation referred to in the judgment of the European Court in *Ex parte Warry* as Type A and Type B. Articles 37 to 39 deal with the case of workers who have been successively or alternatively (sic) subject to the legislations of two or more Member States all with Type A legislation, and Article 40, which incorporates by analogy the provision relating to retirement in Articles 44 to 51 deals with the case of workers who have been successively or alternatively subject to the

legislation of two or more Member States not all of which have legislation of Type A. Annex III to the Regulation (which has more than once been amended) lists the legislations of Type A and it is clear from that Annex that, while United Kingdom legislation on invalidity is of Type A, Italian legislation is not. Article 40, applying Articles 44 to 51 by analogy, thus applies. These Articles and in particular Articles 45 and 46 prescribe an elaborate process often referred to as aggregation and apportionment under which a person may become entitled to an apportioned pension in each of the two or more relevant Member States. It was laid down by the European Court of Justice however in Case 24/75 *Petroni v ONPTS* [1975] ECR 1149 and other cases that these provisions could not take away from a claimant benefit to which he was entitled under national law alone. In *Giuliani's* case that Court held that this principle applied to prevent the regulation from taking away rights acquired otherwise than by the process of aggregation and apportionment such as rights acquired partly under Article 10. The Advocate General has recently suggested in Case 733/79 *Caisse de Compensation des Allocations Familiales des Regions de Charleroi et Namur v La Terza* [1980] ECR 1915 at page 1932 that the Court's decision in the *Giuliani* case was difficult to reconcile with other decisions, but it remains the law for the present at least. It follows that the United Kingdom benefit payable in accordance with this decision does not fall to be adjusted adversely to the claimant by virtue of the process of aggregation and apportionment.

14. The claimant's appeal is allowed.

(Signed) J. G. Monroe
Commissioner

APPENDIX (see paragraph 7 of Decision)

REQUESTS TO, AND REPLIES OF, THE ADMINISTRATIVE COMMISSION ON SOCIAL SECURITY

REQUESTS

1. to examine the content of Art. 87. Particularly we would like to know whether the sentence of paragraph 2, "shall be considered as having been carried out in the territory of the competent State", does include the opinion and judgement given on the invalidating state of the claimant by a Medical Officer of an institution whose legislation on conditions relating to the right to invalidity benefits is not recognised by the Regulation as concordant with that of the competent State;

2. to examine Art. 115 of the implementing Regulation. In particular, we would like to know whether the sentence, "shall act in accordance with the procedures laid down by the legislation which it administers", does include the opinion and judgement that the Medical Officer of the institution of stay has to give in relation to the invalidating state of the claimant, when the legislation on conditions relating to the right to invalidity benefits of the place of stay is not recognised by the EEC Regulation as concordant with that of the competent State;

3. to examine the procedure of the British and Italian institutions concerned and to express your opinion on whether such procedure is right.

REPLIES

Question 1: Article 87(2) of Regulation 1408/71 is intended to avoid any question of legal actions where medical reports are obtained from one Member State for the purposes of the legislation of another Member State and to ensure that such reports are given the same weight as if they had been made in the State requesting them.

Question 2: Article 115 of Regulation 574/72 provides that the institution of the place of stay or residence required to carry out a medical examination "shall act in accordance with the procedures laid down by the legislation which it administers". In the Administrative Commission's view the word "procedures" refers to the arrangements for medical examinations. It is for the Member State requesting the examination to decide entitlement to benefit by reference to its own legislation.

Question 3: It was agreed that where any general difficulties were encountered in the assessment of invalidity the Italian and United Kingdom authorities should meet and discuss the problems to see if solutions might be found.