THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: CSA/0387/2019
[2020] UKUT 57 (AAC)

HT
v
SECRETARY OF STATE FOR WORK AND PENSIONS

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference: SC091/19/00552
Decision date: 17 June 2019
Venue: Edinburgh

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: an additional amount for severe disability is to be included in the claimant's weekly entitlement to state pension credit, because she receives Dodatek Pielęgnacyjny, which is in her circumstances equivalent to attendance allowance.

REASONS FOR DECISION

1. The claimant is Polish and was in receipt of attendance allowance from 2009. This award was terminated in 2017 with effect from 31 October 2011 on the ground that, as she was in receipt of a pension from Poland, that was the competent State for the payment of cash sickness benefits. That was correct and is not in dispute on this appeal.

2. On 16 October 2018, she applied for an additional amount in accordance with regulation 6(4) of the State Pension Credit Regulations 2002 (SI No 1792):

(4) Except in a case to which paragraph (3) applies, an amount additional to that prescribed in paragraph (1) shall be applicable under paragraph (5) if the claimant is treated as being a severely disabled person in accordance with paragraph 1 of Part I of Schedule I.

Paragraph 1(1) of Part I of Schedule I is relevant:

1 Severe disablement

(1) For the purposes of regulation 6(4) (additional amounts for persons severely disabled), the claimant is to be treated as being severely disabled if, and only if—

(a) in the case of a claimant who has no partner—

(i) he is in receipt of attendance allowance, the care component of disability living allowance at the highest or middle rate prescribed in accordance with section 72(3) of the 1992 Act or the daily living component of personal independence payment at the standard or enhanced rate in accordance with section 78(3) of the 2012 Act or armed forces independence payment; and

(ii) no person who has attained the age of 18 is normally residing with the claimant, nor is the claimant normally residing with such a person, other than a person to whom paragraph 2 applies; and

(iii) no person is entitled to and in receipt of an allowance under section 70 of the 1992 Act (carer's allowance) in respect of caring for him; …

As the claimant was not entitled to an attendance allowance, this provision does not apply as a matter of domestic law and the Secretary of State refused application.

3. However, Article 5 of Regulation (EC) 883/2004 provides:

Article 5

Equal treatment of benefits, income, facts or events

Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;

(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

So, if the claimant had an equivalent benefit from Poland, she would qualify for the additional amount.

4. The European Court of Justice considered the interpretation and application of Article 5 in *Vorarlberger Gebietskrankenkasse and Kauer v Landeshauptmann von Vorarlberg and Mathis* (C-453/14 EU:C:2016:37):

> 27. According to settled case-law of the Court, in determining the scope of a provision of EU law, in this case Article 5(a) of Regulation No 883/2004, its wording, context and objectives must all be taken into account (see, inter alia, judgment in *Angerer*, C-477/13, EU:C:2015:239, paragraph 26 and the case-law cited).
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> 28 The wording of that provision does not give any indication of the way in which the words 'equivalent benefits' should be interpreted. However, as the Advocate General has argued in point 54 of his Opinion and contrary to what is suggested by the Commission, the concept of 'equivalent benefits' within the meaning of Article 5(a) of Regulation No 883/2004 does not necessarily have the same meaning as the concept of 'benefits of the same kind', to which Article 53 of the regulation refers. If the EU legislature had intended to apply the criteria developed by the case-law for interpreting the concept of 'benefits of the same kind' in the context of the application of the rules to prevent overlapping, it would have used the same terms in connection with the application of the principle of equal treatment.
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> 29 As regards the context of Article 5(a) of Regulation No 883/2004, it is true, as the Austrian Government asserts, that other provisions, such as Article 30 of Regulation No 883/2004 and Article 30 of Regulation No 987/2009, are to govern the conditions in which the institution of a Member State may, in circumstances such as those at issue in the main proceedings, request and recover contributions for sickness benefits. However, that fact does not, of itself, prevent Article 5(a) from also governing those conditions.
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> 30 Moreover, it is clear from Article 30 of Regulation No 883/2004 and Article 30 of Regulation No 987/2009 that those articles place certain specific restrictions on the right of Member States to request and recover contributions for, inter alia, sickness benefits. Thus, those articles are not intended to regulate such requesting and recovery in such a way that, under the introductory sentence of Article 5 of Regulation No 883/2004, that requesting and recovery are excluded from the field of application of Article 5(a).

31 As regards the objective of Article 5(a) of Regulation No 883/2004, it is clear from recital 9 of the regulation that the EU legislature sought to include in the regulation the principle, deriving from the case-law, of equal treatment of benefits, income and facts, in order that that principle might be developed in keeping with the substance and spirit of the Court's rulings.

32 Thus, it should first be stated that two old-age benefits cannot be regarded as being equivalent within the meaning of Article 5(a) of Regulation No 883/2004 merely because they are both within the scope of that regulation. Apart from the fact that the Court's case-law does not support an interpretation to that effect, such an interpretation would render nugatory the requirement for equal treatment, laid down in Article 5(a) and intended by the EU legislature, given that that provision is, in any event, intended to apply only to benefits falling within the scope of the regulation.

33 Next, as regards more particularly old-age benefits such as those at issue in the main proceedings and in view of the case-law of the Court to which the EU legislature refers in recital 9 of Regulation No 883/2004, the concept of 'equivalent benefits' within the meaning of Article 5(a) of that regulation must be interpreted as referring, in essence, to two old-age benefits that are comparable (see, to that effect, judgment in *Klöppel*, C-507/06, EU:C:2008:110, paragraph 19).

34 As regards the comparability of such old-age benefits, account must be taken of the aim pursued by those benefits and by the legislation which established them (see, by analogy, judgment in *O*, C-432/14, EU:C:2015:643, paragraph 33).

35 So far as the case before the referring court is concerned, it is clear from the actual wording of the question that the aim of both the old-age benefits paid under the Liechtenstein occupational pension scheme and those paid under the Austrian statutory pension scheme is to ensure that the recipients of the benefits maintain a standard of living commensurate with that which they enjoyed prior to retirement.

36 It follows that old-age benefits such as those at issue in the main proceedings must be regarded as being comparable. In that regard, as the Advocate General has observed in point 60 of his Opinion, the fact that there are differences relating, inter alia, to the way in which the rights to those benefits have been acquired, or to the fact that it is possible for the insured to obtain voluntary supplementary benefits, does not give grounds for reaching a different conclusion.

> 37 Finally, there does not appear to be any objective justification for applying differential treatment, in circumstances such as those at issue in the main proceedings, to the old-age benefits in question. There might in some circumstances be such justification if, as the EFTA Surveillance Authority has rightly pointed out, contributions for sickness benefits were levied in Austria on the old-age benefits provided under the Liechtenstein occupational pension scheme, even though such contributions had already been levied in Liechtenstein. However, it does not appear from the documents before the Court that that was the situation in the case before the referring court.

5. The claimant receives a Dodatek Pielęgnacyjny from Poland. The First-tier Tribunal decided that this was not equivalent to an attendance allowance, but the Secretary of State's representative has conceded that that was wrong:

> 5. The Secretary of State considers that the aims of the two qualifying benefits (AA and Dodatek Pielęgnacyjny) are comparable. As already stated, AA is paid to help with the additional cost where a person has a disability severe enough so that someone is needed to look after that person.
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> 6. The Secretary of State accepts that Dodatek Pielęgnacyjny is paid in two distinct sets of circumstances: (a) where a person is incapable of independent living; and (b) automatically to those over the age of 75, regardless of health needs. Clearly, when paid in scenario (b), it could not be treated as equivalent to the highest or middle rate of Disability Living Allowance, Personal Independence Payment (daily living component) or Attendance Allowance.
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> 7. As according to the claimant's evidence, she has been receiving Dodatek Pielęgnacyjny since before she turned 75, this suggests that it was awarded to her on the grounds of her disability, and therefore, adopting a flexible, fact-sensitive approach, the Secretary of State accepts that in this particular case it does fall to be treated as equivalent to GB AA.

6. I accept that submission, have allowed the appeal and re-made the tribunal's decision accordingly.

Signed on original
on 20 February 2020

Edward Jacobs
Upper Tribunal Judge