

MR/SH/1

Commissioner's File: CS/099/93

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This appeal is allowed. The decision of the Durham social security appeal tribunal dated 5 November 1992 is erroneous in point of law. I set that decision aside and refer the case to a differently constituted tribunal for determination.

2. The claimant had been in receipt of invalidity benefit from 27 December 1990 following a period of entitlement to statutory sick pay. On 10 August 1992, an adjudication officer reviewed the award of invalidity benefit and decided that from 29 July 1992 the claimant was no longer entitled to invalidity benefit because the adjudication officer was satisfied that the claimant was not incapable of work. The claimant appealed. The tribunal as originally constituted consisted of two men and a woman. The woman withdrew because she knew the claimant. The chairman's note of evidence records that the "Appellant agreed to continue with an incomplete and all male tribunal". The tribunal dismissed her appeal. The claimant now appeals against the decision of the tribunal, with the leave of a Commissioner, on the ground that she should have had her case heard by a complete tribunal.

3. Section 41(1) of the Social Security Administration Act 1992 provides that a social security appeal tribunal shall consist of a chairman and two other persons and section 41(6) provides that, if practicable, at least one of the members of the tribunal shall be of the same sex as the claimant. There is provision in regulation 24(2) of the Social Security (Adjudication) Regulations 1986, made under paragraph 8 of Schedule 3 to the Act, for a tribunal to proceed with a case in the absence of a member, other than the chairman, provided that the claimant consents. There is no similar statutory provision in respect of a tribunal with no member of the same sex as the claimant but I take the view that a claimant may consent to a tribunal

*Success Benefit - Cases 1990 / 1991 Cases  
with one Member Same / No  
Member of Same Sex - Claimant  
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proceeding in the absence of such a member, even if it had not been impracticable to arrange for a tribunal with at least one member of the same sex as the claimant. In R(SB) 2/88 it was held that the predecessor of section 41(6) was mandatory in its terms and that it is not to be presumed that it was not practicable to have the tribunal properly constituted. In the present case, it was doubtless not practicable to replace the woman member who withdrew on the day of the hearing but I do not know whether or not it might have been practicable for that member to have withdrawn earlier and arranged for a suitable replacement. However, it does not matter what might or might not have been practicable in this particular case because, even where a procedural rule is expressed in mandatory terms, it may be waived by the party for whose benefit it exists unless it is a matter where there is a wider public interest in compliance with the rule (Park Gate Iron Co., Limited v. Coates (1870) LR 5 CP 634). In the present case, the rule that there should, if practicable, be a member of the tribunal of the same sex as the claimant plainly exists in the interest of claimants and this claimant consented to the tribunal proceeding to hear the case notwithstanding that it consisted only of two men. While she may regret the decision she made in the heat of the moment, the tribunal's decision cannot be said to be erroneous in point of law on that account.

4. The adjudication officer now concerned with the case supports the claimant's appeal on other grounds. In paragraphs 9 and 10 of the adjudication officer's submission, it is suggested that the tribunal have failed to remember that this was an appeal against a review decision made under regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987. However, in their reasons, the tribunal made it quite clear that they realised that they were dealing with a review decision. Nevertheless, there is a legitimate technical criticism which can be made because the chairman recorded an incomplete decision in box 3 on Form AT3. The decision of the tribunal is recorded as being: "[The claimant] is not entitled to invalidity benefit from and including 29.7.92". That is to substitute an incomplete decision for the more detailed decision of the adjudication officer which dealt with the review. Where a tribunal does not allow an appeal and the adjudication officer's decision is quite long, it is better for the tribunal to say simply "the appeal is dismissed" or "the adjudication officer's decision is confirmed", thereby preserving the terms of the original decision, rather than recording an incomplete decision. That is a minor point and I would not refer this case for determination by a differently constituted tribunal on that ground alone.

5. The more substantial point made by the adjudication officer refers to the fact that the tribunal recorded evidence from the claimant as follows:-

"Have good and bad days. I am on Co-codamol 4 times a day every day. Some days have to lie down."

The tribunal accepted the evidence about the painkillers but made no findings as to the variation in the claimant's condition or her claim that she needed to lie down on some days. That is important. In R(S) 9/79, the Commissioner held at paragraph 8:

"A person who, because of intermittent disablement, could perform the duties of a paid employment only on an average of, say, 3 days out of a 5 day working week would be virtually unemployable and in my view could rightly be held to be continuously incapable of paid work for the purposes of the Social Security Act notwithstanding that he would strictly speaking be capable of performing his duties for the rest of the time."

See also decisions CS/19/87 and CS/90/86. The tribunal have not shown that they considered the specific contention made by the claimant that her condition varied and she sometimes would not be able to work at all. For that reason their decision is erroneous in point of law. The record of decision does not comply with regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 which requires a statement of reasons and findings of fact which will tell a claimant whether her contentions have been considered.

(Signed) M Rowland  
Commissioner

(Date) 4 February 1994