

IEJ/JAW

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.S. 12/81

1. This appeal fails. My decision is that invalidity pension is not payable from 28 November to 1 December 1979 (both dates included) because the claimant has not proved that he was incapable of work by reason of some specific disease or bodily or mental disablement: Sections 15(1) and 17(1)(a)(ii) Social Security Act 1975.

2. The claimant was in late 1979 in his middle 50's and though he had worked many years in the building trade, **was** currently employed, on shift work, as a labourer at a locomotive works. His record of claims for sickness and invalidity benefit over recent past years was clearly such as to warrant critical examination of his claims for such benefit - not as long as 13 weeks had elapsed without his making a claim for more than six years past, and a number of his claims in that period (which have been by reference to a wide range of relatively minor ailments and injuries) have coincided with public and works holidays. That is not to say that his claims record is wholly suspect - he has said, and I have no reason to doubt, that he left the building trade because of back trouble; and he says also, and there is in such record reasonable support for this, that he suffers from recurrent attacks of bronchitis. But on several past occasions visiting officers have reported doubt as to his incapacity when visited whilst claiming benefit, on one occasion he has been considered not incapacitated upon examination on behalf of the Regional Medical Officer, and on another claim earlier in 1979 his claim was disallowed.

3. (1) On Tuesday 20 November 1979 the claimant was furnished by Dr S K S with a MED3 certificate advising him to refrain from work for 2 weeks (ie 2 weeks from 20th) and specifying bronchitis as the diagnosis. The claimant claimed benefit on the MED3 claim form as from Saturday 17 November 1979 and indicated on it that he had last worked on the night shift ending at 7 am on Friday 16 November and had become unfit to work on the Saturday.

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- (2) Seven days only of those two weeks (from 20th) had elapsed when on 28 November the claimant was visited by a Visiting Officer at his home. She reported that he showed no signs of coughing, difficulty in breathing, or shortness of breath - indeed that he looked fit and well and showed no signs of discomfort at all; but that he said he had a pain in his chest and was worried in case it was heart trouble.
- (3) When making her report (but not as a recommendation expressed by her to the claimant, which is what he has since interpreted her as having asserted) the visiting officer accordingly recommended that the claimant be examined on behalf of the Regional Medical Officer.

That recommendation was not in fact implemented because before such an examination could be arranged the claimant had obtained and sent in by hand on 30 November a "final certificate" from Dr P.S. which he obtained on 28 November - i.e. the very same day as the Sick Visitor's visit. That "final certificate" advised the claimant to refrain from work until (Monday) 3 December 1979. Thus 3 December itself was a day embraced within the period of the previous certificate but not this one.

- (4) Benefit was paid for the period 17 to 27 November and that period is not in issue on this appeal. But on 4 December an insurance officer's decision was given disallowing benefit (on the ground of failure to prove incapacity) for the period 28 November to 1 December 1979 (both dates included). 1 December was a Saturday, and 2 December was Sunday (and **thus** a date for which invalidity pension is not paid, **independently** of any issue as to incapacity).

4. The claimant appealed against that disallowance to the local tribunal, who heard the appeal on 22 January 1980 - **when the claimant** attended, conducted his own case, and gave evidence. By then the insurance officer had additionally referred for decision by the tribunal whether invalidity pension was payable for (Monday) 3 December 1979.

5. In his grounds of appeal dated 10 December 1979 the claimant said:

"I feel that the visitor was wrong in stating I was fit for work. I do not feel I was fit for work until 3.12.79 when my doctor signed me off the sick.

I feel that the visiting officer should have sent me for a medical if she thought I was fit for work".

The device of a claimant preventing an RMO examination by obtaining and lodging a "final certificate" as soon as he knows or surmises that one is impending is frequently encountered in this jurisdiction; but I do not on the evidence in this case impute to the claimant his having employed that device on 28 November. His obtaining of a final certificate on 28 and lodgment of it on 30 November is, however, a sufficient answer to his criticism that the visiting officer "should have sent me for a medical".

6. In further submissions to the local tribunal in advance of the hearing the claimant took issue with another observation in the visiting officer's report - she stated that the claimant was when visited "watching television". The claimant denies that and has given an explanation, which I accept, as to how that misimpression arose; and my decision in no way founds upon his having been watching television when visited.

7. The local tribunal saw and heard the claimant and by unanimous decision dismissed his appeal; and I see no ground upon which to take a different view from theirs - they found that he had not proved that he was incapable of work, and refused his appeal.

With a claims record such as his it may be thought that he is fortunate that his claims for 17 and 19 November, unsupported as they were by medical evidence, went unchallenged. But if, as I am prepared to do, I accept that the claimant did suffer from a bout of bronchitis for a period which included 20 November and a few days following, I am nevertheless unpersuaded that his incapacity for work on that account continued beyond 27 November.

8. (1) The local tribunal omitted to express any decision upon the referred question as to 3 December 1980. The insurance officer now concerned has taken the view that none was needed because that was not a day of claim for benefit under the MED3 certificate of 28 November 1979. But that **overlooks** that it was a day of claim for benefit under the MED3 certificate of 20 November 1979.

(2) Under the practice prevailing in 1979 the MED3 certificate of 28 November would generally have been regarded as superseding as from that date the previous certificate, so that no decision as regards 3 December would be needed. But from the inclusion in the summary of facts to the local tribunal of the statement (paragraph 3 document 14) "The claimant claimed from 17 11 79 to 3 12 79 but the insurance officer omitted to give a decision for 3 12 79. The claim for that date is therefore referred to the tribunal for decision" I must, it seems to me, infer that - for whatever reason - that practice was not followed and the decision given on 4 December 1979 was a decision given in respect of the balance (less 3 December)

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of the claim period under the certificate of 20 November 1979 remaining after earlier allowance of the claim for 17 - 27 November as well as a decision in respect of the entire claim period under the certificate of 28 November.

This inference is material in the light of the Tribunal decision R(S)5/80 and the unreported decisions C.S. 13/80 and C.S. 3/81 whereunder:

- (A) a decision or decisions upon the whole claim period under each MED3 certificate is required; and
 - (B) whilst the insurance officer was entitled to proceed (as it is to be inferred he did) by initially allowing the claim under the certificate of 20 November 1979 for an initial period ending 27 November 1979, he was not entitled then to disallow part only of the balance of that claim period leaving any undisposed of future residue, though he could - in my judgment - properly decide as to part of the balance period (favourably or adversely to the claimant) and refer the residual balance to the local tribunal. And I consider that the insurance officer is now to be regarded as having so proceeded.
- (3) It seems to me possible that the local tribunal did decide as regards 3 December 1979 and that by accidental error the record of their decision does not at present so record.

Accordingly I refer that query for their further consideration in the context of regulation 2 of the Social Security (Correction and Setting Aside of Decisions) Regulations 1975.

- (4) But if it transpires that they did not decide as regards 3 December 1979 then I refer the case back to the local tribunal for their decision to be given upon it as a question already referred for their decision by the insurance officer but not yet decided - it is not in the circumstances of the case a question over which I have jurisdiction.

9. My decision is as stated in paragraph 1 above.

(Signed) I Edwards-Jones
Commissioner

Commissioner's File: C.S. 243/1980
C I O File: I.O. 1223/V/80
Region: East Midlands and East Anglia

Date: 8 July 1981