

CS 287/1981

IEJ/GJH

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision CS 7/82

1. (1) The claimant requested an oral hearing of his appeal but I have refused that request because I am satisfied that the appeal can properly be determined without one (other considerations apart, the matters he indicated he wished to raise at the hearing, if granted, were not matters affecting the issues arising on the present appeal).
- (2) The appeal is allowed. My decision is that invalidity pension is payable from 22 April 1980 to 13 September 1980 (both dates included) because the claimant has 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) of the Social Security Act 1975 and regulation 3 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975.
2. (1) The claimant, who was in April 1980 54 years old, underwent in April 1974 an arthrodesis of his left ankle. His benefit history sheet by then already showed a formidable record of both short and long periods "on benefit" due to physical ailments and injuries - particularly the latter, which had apart from lesser injuries included fractured ribs, fractured ankle and fractured fibula. But prior to 1975 no claim appears to have been supported by diagnosis of any condition of the mind.
- (2) However, the same record shows a long period of incapacity in 1975 and a short period of incapacity in 1976 attributed respectively to "depression" and "neurosis", and as a result of inquiries made by my direction it is now clear that the claimant underwent in the period between November 1974 and September 1976 five separate periods of psychiatric treatment as an in-patient and on a number of further occasions down to March 1979 was seen as an out-patient in regard to problems not of the character of physical illness

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or disability, and also that a course of assessment he commenced at a day hospital in March 1979 ended not by reason of his discharge on medical grounds but by reason of his having ceased to attend.

- (3) In summary, the claimant had - for one reason or another (to use a neutral phrase)-by April 1980 not been "off benefit" for more than 13 weeks at a time since 1973.
- 3.
- (1) For the period of claim in issue on this appeal - 22 April to 13 September 1980 - the claimant was the subject of a 6 months' MED 3 certificate from his own doctor dated 14 March 1980 and giving "arthrodesis L ankle" as the diagnosis of disorder causing absence from work.
 - (2) However, in the light of an examination and report dated 25 February 1980 by an examining medical officer of the DHS^s (at which date the claimant had been the subject of a similar certification) and a further such examination and report (by a different medical officer) on 14 April 1980, both of which reports expressed the opinion that the claimant was capable of work within certain limits, the insurance officer disallowed the claim as from 22 April for the unexpired balance of the certificate dated 14 March 1980.

I pause here to interpose that both such reports indicate that nothing abnormal was detected as to the condition of the claimant's neuro-psychiatric system - but also that it would appear that neither officer's attention had been specifically directed to the claimant's medical history in that context, the current basis of claim being referable, as I have indicated, to the condition "arthrodesis L ankle" alone.

4. The claimant appealed to the local tribunal from the insurance officer's decision, and they heard and determined the appeal - upholding such decision - on 23 June 1980, the claimant attending and submitting oral and additional documentary evidence.

His written evidence included reference to hospitalization in a named hospital in November 1977 following "attempted suicide - overdose", which is a period as an in-patient not embraced in the five I have earlier mentioned, and many references to various attempts made by him to obtain work, and the difficulties which in his circumstances militated against success in obtaining it.

5. In his written submissions upon the present appeal the claimant refers to many matters of past history clearly the subject of grievance on his part, but also complains of the conduct of the local tribunal in hearing and determining his appeal. None of the former category of complaints are material to the present appeal, and I do not regard the latter complaint as substantiated.

However, in view of the tenor of his written submissions and his references in the course of them to his history of psychiatric

hospitalization over the period 1974-1977, I thought it appropriate to obtain further information on this aspect.

6. Accordingly, and with the claimant's consent, a report was obtained from Dr E J Salter, MRCP (Psych), a Consultant Psychiatrist who had personal knowledge of the claimant's medical history in the psychiatric context dating from 1976, and his report dated 8 December 1981 is now in evidence before me.

7. (1) Dr Salter's report commences with confirmation of five periods between November 1974 and September 1976 in which the claimant received psychiatric in-patient treatment for conditions the diagnoses in respect of which concern as regards the first two periods matrimonial difficulties and thereafter "personality disorders".
- (2) Dr Salter goes on to indicate that:
 - (i) he discharged the claimant from in-patient treatment in September 1976 as he "did not consider he needed to be there".
 - (ii) he subsequently saw the claimant again on two occasions in December 1978.
 - (iii) he did not again see the claimant (by reason of a missed appointment), and though subsequent Day Hospital treatment 5 days a week was commenced in March 1979 it was not continued by reason of the claimant not attending.
- (3) In his assessment of the claimant's condition Dr Salter indicates as follows:-

"I considered that he suffers from a severe personality disorder but is not mentally ill. He is likely to prove difficult and a manipulative individual. There is no psychiatric reason why he cannot work, though in practice it would be very difficult to force him to do this, and he might well prove unsuitable for any kind of gainful employment because of his personality. From the psychiatric point of view I do not consider that any further examination would be necessary. I would have no objection to any other psychiatrists examining him if you felt that this was necessary."

8. There is also now in evidence a report by the doctor who became the claimant's GP in October 1980 but has, and has referred to, the claimant's case records with his previous GP covering the period 1976/1980. Such records included reference to ischaemic changes found on ECG in 1978. The successor GP's report concludes "After some discussion, on forming out list, we agreed to consider this man as unfit for work due to the combination of an ankle that precludes casual manual labour and a personality disorder that precludes any other work".

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9. Whilst to be taken into my consideration with the reserve attributable to all medical evidence which relates to later times than those in issue, I have also now in evidence before me reports of further examinations of the claimant by examining officers of the Department:

- (i) The first of these dated 16 December 1980, states the claimant's occupation as "porter", recognizes the existence of both locomotor and neuro-psychiatric abnormalities and expresses the opinion "is incapable of work at the above occupation - No need to refer again for 6 months", and also states "Unfortunately his mental attitude to life in general seems to preclude his ability to settle to any form of work. At the moment I do not see that even a limited work opinion is appropriate just yet".
- (ii) The second, by the Divisional Medical Officer and dated 23 June 1981 briefly indicates "incapacity is not in doubt - no need to refer again for 6 months".
- (iii) The third, dated 5 August 1981 recognizes abnormality in both locomotor and neuro-psychiatric systems, and - in reference to the stated occupation "Shed attendant - poultry farm" expresses the opinion "is incapable of work at the above occupation. No need to refer again for three months". And under "General Description" it states "The claimant has an arthrodesis of his L ankle with some wasting of his calf and thigh muscles of the L leg. He also has a personality disorder".
- (iv) The fourth and latest before me, dated 7 January 1982, detects abnormality only in the claimant's locomotor system, expresses the view that the claimant is "incapable of work" at "the above occupation" - specified as "unemployed" - but also expresses the opinion "is capable of work within certain limits". In addition to reference to the arthrodesis the general description expressed stated:

"Has had matrimonial and maintenance problems.

Physically and mentally there is no reason why he should not be doing semi sedentary work".

This is amplified in Part II of the report, which after mention of the same problems and that the claimant "did attend a Psychiatrist" continues:

"but these problems are now behind him and he is perfectly capable, both physically and mentally, of semi sedentary work".

10. (1) One of the requirements for eligibility for sickness and invalidity benefit being that the claimant was at the

material times "incapable of work by reason of some specific disease or bodily or mental disablement", it is well-settled that the burden of establishing such to have been the case rests with the claimant.

But whilst it is in the majority of cases a simple matter to determine what in the circumstances of the case a claimant must establish, there are cases - particularly in the field of the mind - where this is no easy matter.

And I regard the present case as clearly within the latter category.

- (2) As it has been aptly put in Ogus & Barendt's "The Law of Social Security", 1979, p 150:-

"As medical science has shown greater awareness of different types of psychological disorder, so there has been a natural tendency to extend the certification for 'mental disablement' "

And the learned authors go on to opine :-

"Any condition which incapacitates a claimant from work and which is accepted as such in a doctor's statement should be sufficient. But the legislation must necessarily assume some principle of moral responsibility, or 'workshy' persons might claim to be mentally disabled. Of course the distinction between a 'disease' and a 'defect of character' is sometimes very difficult to draw".

11. (1) To my mind, there is in the present state of medical knowledge no simple yardstick by which a non-medical adjudicator can evaluate the difference between "can't" and "can but won't" in the material contexts. He must rely to a very substantial extent upon the medical opinions expressed - though not bound by any individual opinion expressed, and obliged to select between conflicting opinions.
- (2) The need to pay close regard to expert psychiatric evidence is particularly acute where the claimant manifests behaviour patterns which must be recognised as capable of identification in different individual cases either as symptoms of some specific mental disablement, or as manifestations of "malingering" - see, for example, the medical evidence relied upon by the learned Commissioner in decision C.S. 1/81 (unreported).
- (3) However, the adjudicating authorities (of which a Commissioner is one) must, at the end of the day, rely upon their own judgment in regard to the overall picture which is presented by all the evidence before them.

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12. In the present case it is, of course, true that the MED3 certificate in reliance upon which the claimant has claimed benefit for the period in issue states no diagnosis other than "arthrodesis L ankle" - and true also that neither of the Form RM9 medical reports referred to in paragraph 3 above has made reference to any abnormality of the claimant's neuro-psychiatric system.

Thus an argument can be advanced that it was common ground between all three of the doctors so concerned that the only medically recognised condition bearing on the claimant's capacity or otherwise for work in the material period was his ankle condition, that the sole area of difference between them lay as to whether such condition incapacitated him for work or not; and that the majority view as to that should prevail.

13. But in the light of the additional evidence now before me I regard it as quite unrealistic to decide this appeal upon so narrow an approach.

For the claimant's condition at the material dates must in my view be considered within the broader framework of evidence of his previous medical history and, to the extent that it is properly admissible, his subsequent medical history. So regarded, the period in issue falls between a substantial past history of psychiatric treatment which had terminated in March 1979 by the claimant ceasing to attend and a substantial subsequent history, commenced only a few months after the material period, in which it has been accepted on medical evidence that the claimant was incapable of work on grounds which clearly included conditions of mind as well as of body.

And, bringing to bear even a layman's knowledge of the general nature of the conditions so described as having antecedently subsisted, and subsequently subsisted, it appears to me remotely unlikely that the claimant was unaffected by "personality disorder" in the material period also, although it may well not have been readily apparent without knowledge of his medical history in point.

14. I have no hesitation in concluding that by reference only to his ankle condition the claimant was not incapable of work in the material period. The time had long passed at which it was proper to have regard only to any former normal occupation, and within the broader field of occupation "at large" there were clearly a number of occupations he was quite capable of performing and could, in reference only to that condition, reasonably be expected to work at.

15. I regard the proper evaluation of the claimant's condition of mind in the material period, and in reference to the statutory formula "by reason of some specific disease or physical or mental disablement" as a more difficult question.

16. One preliminary aspect of that question I can, however, resolve at once. Although the formula is framed in the form of alternatives linked by the word "or", it is to my mind quite clear that by necessary implication of intentment they are to be read as admitting of incapacity for work arising from a combination of more than one only of the specified grounds - e.g. a combination of bodily disablement and mental disablement.

17. Although Dr Salter's report makes it clear that he had not personally seen the claimant since 1978 I am satisfied that I should accept his intimation that the claimant suffered from no mental illness and so exclude from the field any contemplation of "specific disease" in ruling upon the claimant's capacity or incapacity for work - leaving "specific mental disablement" for consideration below.

18. (1) "Disablement" is not defined in the Social Security Act 1975, and in my judgment thus bears, as used in the material formula, its "everyday" meaning - which in the shorter Oxford English Dictionary follows from the verb "to disable", which materially means "to render unable or incapable; to deprive of ability, physical or mental, to incapacitate".

Thus "disablement" can be paraphrased as "a state of deprivation or incapacitation of ability, physical or mental".

- (2) I understand that in DHSS usage disablement is taken to mean "such impairment as entails measurable repercussions". I do not consider this as embracing any significantly different meaning as regards mental disablement, at least, since that will frequently not admit of the precision of antimetrical assessment customary, in social security benefit contexts in assessing disablement. But if there is any material distinction I must in my view prefer the dictionary sense in the absence of any specially attributed meaning expressed in the statute or to be inferred.

19. (1) The concept of deprivation of or incapacitation in, mental ability necessarily involves in practical application the postulation of a 'normal' or 'fully endowed' person as the yardstick of comparison by which the existence or otherwise, and if existing the extent, of any deprivation or incapacitation, is to be assessed.
- (2) Whilst there are certain areas within which there are recognized canons of assessment as to that - e.g. accepted tests and standards as to educational normality and sub-normality - there are others, such as behaviour and motivation, in which individual medical opinions may significantly differ and for which the techniques of assessment are less precise and clear-cut.

However, since I am required to embark upon those seas I take the view that I must navigate by the chart afforded by the medical evidence before me.

20. Taking into contemplation the claimant's substantial history of investigation and treatments in the neuro-psychiatric field prior to the commencement of the period now in issue, the views of the general practitioners who accepted the claimant to their list in October 1980, and the three subsequent RM9 reports referred to in para 9 above, I consider it quite unrealistic to conclude that the claimant had no neuro-psychiatric abnormality during the material period, notwithstanding

the absence of reference to any such condition in the material MED3 certificate or the two RM9 reports referred to in para 3(2) above. To my mind his "personality disorder" must have subsisted as well during the material period as before and after it.

But then I come to the crucial issue as to whether or not such condition constituted a "specific mental disablement" which alone or in combination with his physical ankle condition rendered him incapable of work over the material period.

And I have in this context to decide what is meant by the term "personality disorder" as used in relation to the claimant.

21. (1) It is convenient to interpose at this point that whilst the statutory formula "some specific disease or bodily or mental disablement" clearly imports attributing "specific" so as to qualify "bodily or mental disablement" no less than "disease" the expression "specific mental disablement" to my mind draws from the word "specific" no more stringent qualification than that the mental disablement must be of a kind known to medical science and identified by appropriate terminology. In particular I do not consider it to import a requirement of aetiological attribution, and have in mind in that regard that in the parallel field of physical disease such precision is often impracticable in circumstances in which no one could doubt the condition to be one qualifying the sufferer as regards incapacity for work - e.g. "pyrexia of unknown origin". See also as to this the recent decision CS4/82 (not reported) holding 'dyslexia' a specific disablement.
- (2) However, it is to my mind clear that there is scope for divergent opinions as to the demarcation line between what is in the case of a particular claimant to be regarded, in the social security benefits context, as a voluntary attitude in the character of "work shyness" and what is to be regarded as an involuntary condition - the immediate and overt manifestations of which may be indistinguishable - which qualifies as a specific mental disablement, and is constituted by an original or supervened condition of mind representing a deprivation of, or incapacitation in, mental capacity by comparison with a to-be-postulated "normal" ability.
- (3) However, it appears to me that in proper usage - and I do not overlook that the compound term may on occasions be employed as a euphemism for mere "work shyness" - one must take the component words in their normal dictionary senses.

So proceeding, "personality" bears the meaning "distinctive individual character" and "disorder" the meanings "irregularity, disturbance of mind".

Thus, it seems to me, "personality disorder" must ordinarily convey the sense of disability of mind, gauged by the yardstick of a predicated normal state of "personality order".

22. I do not propose to attempt myself any precise identification of the borderline, for it seems to me sufficient for the purposes of the present case that where, as is here so, a number of responsible doctors rendering medical reports in respect of the claimant have referred to his having a 'personality disorder', several of whom have coupled that condition with his physical impairment in expressing conclusions of incapacity for work, I should abstain from inferring any innuendo as to euphemism and accept that term as descriptive of a condition of specific mental disablement which in the material period and in conjunction with his physical impairment, if not alone, rendered the claimant incapable of work.

23. I should for completeness add that:

- (1) I have not overlooked the intimation in Dr Salter's report "there is no psychiatric reason why he cannot work". I am inclined to regard that observation as, in close analysis, begging the critical question: he does not say "there is no psychiatric reason why he will not work" or explain why (as he goes on to indicate as likely) no-one could be expected to employ the claimant, and may have been contemplating only the absence of any diagnosed phobia or inhibition which operated to preclude the claimant from undertaking work.
- (2) But if Dr Salter is to be read in the alternative and broader sense of regarding the claimant as "voluntarily 'work shy'" - then his evidence is in my judgment in this respect outweighed by the later medical evidence to which I have referred.

24. But whilst appreciating the discretion and delicacy with which doctors must often express themselves in the best interests of their patients perhaps I may in conclusion record that it would be of invaluable assistance to the adjudicating authorities if in the context of capacity or otherwise for work as relevant to claims for sickness or invalidity benefit terminology could be adopted as standard which clearly differentiated between what was considered as "voluntary work shyness" and what is an involuntary specific mental disablement.

25. My decision is as stated in para 1 above.

(Signed) I Edwards-Jones
Commissioner

Date: 7 May 1982

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Region: East Midlands and East Anglia