CS 415/1981

T/BR

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR INVALIDITY BENEFIT

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Decision CS 5/82 = R(S) 2/82

1. (1) This appeal by an insurance officer from a local tribunal's decision dated 15 January 1981 is allowed. Our decision is that invalidity pension is not payable from 17 November 1980 to 28 February 1981 (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 14(1) and 17(1)(a)(ii) of the Social Security Act 1975 ("the present Act").

(2) Our decision follows an oral hearing held on 1 December 1981 at which the appellant insurance officer was represented by Mr J P Canlin of the Solicitor's Office, Department of Health and Social Security and the claimant (whose case was supported by his association, the National Union of Mineworkers) was represented by Mr A Bano, of Counsel, instructed by Messrs Brian Thompson & Partners, Solicitors.

We are indebted to both Mr Canlin and Mr Bano for their helpful submissions.

(3) Whilst the personal concern of the claimant is naturally with the practical outcome of the appeal as distinct from the answer to any questions of law involved in reaching a conclusion as to that, an important question of law has been raised, and fully argued before us, our decision upon which is an essential pre-requisite to our ruling on the merits of the particular case; and we propose in the first place to express and explain that decision.

(4) The facts of the case are not in significant dispute, and, shortly stated, the substantial issue of law arising is as to whether or not current economic conditions adversely affecting the labour market in the area in which a claimant for invalidity benefit lives are a factor of which account is to be, or can properly be, taken in deciding whether or not he is "incapable of work" within the meaning of section 17(1)(a)(ii) of the present Act as interpreted by the case-law authorities.

2. (1) Section 17(1)(a)(ii) of the present Act materially provides as follows:-

> "17.-(1) For the purposes of any provisions of this Act relating to ..... sickness benefit or invalidity benefit -
>
> (a) subject to the provisions of this Act, a day shall not be treated in relation to any person -
>
> .....
>
> (ii) as a day of incapacity for work unless on that day he is, or is deemed in accordance with regulations to be, incapable of work by reason of some specific disease or bodily or mental disablement.
> ("work" in this paragraph, meaning work which the person can reasonably be expected to do)."

(2) Provision to the same general effect, but without reference to invalidity benefit and without the parenthesis, has existed since originally enacted as section 5(1) of the National Insurance Act 1946 ("the 1946 Act"), and the parenthesis in its present form results from the consolidation effected by the present Act of the provision, first made by section 5(1) of the National Insurance and Supplementary Benefit Act 1973 ("the 1973 Act"), that:

> "any reference ..... to incapacity for work shall be construed as a reference to incapacity for work which the person in question can reasonably be expected to do; and "incapable of work" and "capable of work" shall be construed accordingly."

(3) It was common ground at the oral hearing before us that:-

(i) in the circumstances of the present case nothing turns upon the above provision as to "or is deemed in accordance with regulations to be"; and

(ii) the presumption of law (conveniently re-stated in Barrass v Aberdeen Steam Trawling & Fishing Co 1933 A.C 402 at 446 per Lord MacMillan) applies that the legislature did not intend to alter the meaning and effect of the antecendent legislation by the consolidation which the present Act represents.

3. (1) In January 1980 the claimant was approaching 52 years of age, and although he had for some years worked as a fitter with the National Coal Board at a Yorkshire colliery he suffered a back injury at work in April 1975, and eventually retired from NCB employment on medical grounds in early March 1977. At 30 January 1980 the claimant had been in receipt successively of sickness, and then invalidity, benefit continuously since late July 1975.

(2) It was common ground before us also that by reason of the protracted period for which the claimant had been in receipt of benefit as last above indicated, it was in determining his capacity or incapacity for work appropriate to look beyond his own former regular occupation as a fitter with the NCB towards any other occupation he "might reasonably be expected" to follow - see the Commissioner's Decisions R(S) 7/60 and R(S) 2/78, which as to this principle we accept as correct in law, and the latter of which expresses in lapidary form, on which we cannot improve, the considerations bearing on the applicability or otherwise of the "alternative work test" (see paras 7 and 8 of that decision in particular).

4. (1) In the Tribunal Decision R(S) 11/51 it was held that in the context of the 1946 Act a person was "incapable of work" "if, having regard to his age, education, experience, state of health and other personal factors, there is no work or type of work which he can reasonably be expected to do. By 'work' in this connection we mean remunerative work, that is to say, work, whether part-time or whole-time for which an employer would be willing to pay, or work as a self-employed person in some gainful occupation".

The decision continues:-

> "In Decision C.S. 316/50 (not reported) it was pointed out that the fact that there was no such work locally or that owing to the state of the labour market the claimant had only a remote prospect of obtaining it, did not prove that he was incapable of work for the purpose of "[the 1946 Act]" because for those purposes he must be incapable of work by reason of some specific disease or bodily or mental disablement (see section 78(1) of that Act)" - but see now section 17(1)(a)(ii) of the present Act - "This statement of general principle appears to us to be correct."

(2) That decision has been widely followed and applied in this jurisdiction ever since, the reference to "can reasonably be expected to do" being taken as original authority for having due regard to - amongst other considerations - the consideration that it is normally unreasonable to expect a person whose capacity for work is only temporarily impaired to be judged capable of work by reference to work of some other character than his own regular occupation.

(3) The express reference to "can reasonably be expected to do" in section 5(1) of the 1973 Act (and now in section 17(1)(a)(ii) of the present Act) clearly represents a statutory recognition and hallowing of the last mentioned decision in that respect (notwithstanding the omission from the statutory version of reference to "a type of work" - which omission may we think reasonably be attributed to a conclusion that such a reference

would be surplusage, since "work" itself includes all types of work); and, we consider, to reflect also the legislature's acceptance in all other respects of the meaning of "work" already then attributed by Decision R(S) 11/51.

(4) It was submitted to us by Mr Canlin, and is certainly a tenable view, that such statutory hallowing of the phrase "can reasonably be expected to do" was needed and intended in order to override the otherwise adverse impact of the decision of Bean J in Chesterfield Football Club v Secretary of State for Social Services [1973] 1 Q.B. 583 in holding capable of work (in some other capacity) a professional footballer during temporary illness. But we prefer to say of that decision only that it appears to have been given without the learned Judge being referred to R(S) 11/51, or to any other Commissioner's decision reflecting the need for consistency between "incapacity for work" as construed for the purposes respectively of liability for contributions and of eligibility for benefits, or to the effects of his decision if applied in the latter context as distinct from the contribution context as to which the meaning of incapacity for work was alone in issue before him.

5. (1) In his submissions to us Mr Bano challenged the correctness in law of the passage in Decision R(S) 11/51 (and other decisions such as R(S) 17/51 adopting and following it) approving as a general principle the statement in C.S. 316/50 (not reported) that "the fact that there was no such work locally or that owing to the state of the labour market the claimant had only a remote prospect of obtaining it" did not prove that he was "incapable of work", as a decision applicable under and for the purposes of section 17(1)(a)(ii) of the present Act.

(2) On the point of principle so advanced it was in substance his contention (though the present wording is our own) that a person is incapable of work if taking in conjunction:

(a) those subjective circumstances of the individual which (see Decision R(S) 11/51) it is proper to take into account; and also

(b) the current economic circumstances - in particular the state of the labour market - in the area in which the claimant dwells;

there is no practical possibility of his obtaining remunerated employment in any capacity even though, in abstract contemplation, there may be some work he is capable of performing and for which (divorced from such practical realities as that there is no employer in the area currently offering remunerated employment in that postulated capacity to anyone, or that if there is such he will have and exercise his choice over many applicants more suitable from his point of view) an

employer would pay remuneration to have performed, on a normal commercial basis (i.e. not from merely philanthropic motives).

6. This point of principle Mr Bano sought to sustain on general grounds of practical realism being the required criterion rather than mere abstract theories, and he relied upon two specific decisions of Commissioners, one reported and the other neither reported nor "numbered".

The unreported and unnumbered decision is the decision on Commissioner's File C.S. 646/1979 ("the 1979 case") - and we approach our consideration of it with a recognition that it is the general practice of Commissioners to "number" decisions which they regard as dealing with any novel aspect of principle.

7. (1) The reported decision so relied upon was R(S) 10/54 - the case of an ex-miner aged 57 who suffered from a variety of disabilities, had not worked for 12 years, was considered by examining medical officers to be capable of some type of restricted employment the nature of which was not specified, had approached various employers for work without success, and was held by the learned Commissioner to be incapable of work.

(2) That decision was given in expressed reliance upon Decision R(S) 11/51, but without citation of the passage in it which we have secondly cited ("The decision continues ...") in para 4(1) above, though without disagreement from that.

And indeed such further citation was irrelevant to the true ground of that decision, as we see that to have been. For in para 4 of the decision the learned Commissioner says, after citing the passage in R(S) 11/51 firstly cited in our para 4(1) above (but with emphasis here supplied by us): -

> "On applying that test I am at a loss to know what remunerative work <u>can be done</u> by an ex-miner aged 57, unemployed for 12 years, who admittedly suffers from headache, traumatic neurosis, and a stiff and swollen left ankle. The claimant has submitted notes from five different employers stating that he is unsuitable or that they have no work to offer him. I regard those applications for employment not as evidence that the claimant considers himself to be capable of doing some kind of work, which he is seeking, but rather as <u>tending</u> to show that "there is no work which he is capable of performing".

(3) Thus, in close analysis, the learned Commissioner was basing his decision squarely upon the test of what if any, remunerative work <u>could be done</u> by the claimant - i.e. of which, having regard to the subjective factors approbated by Decision R(S) 11/51 as matters proper to have regard to, he might be <u>capable</u>.

(4) As to the final sentence above cited:

(i) it is expressed mainly in rebuttal of the employers' notes being evidence against the claimant; and so far as "intending to show incapacity"

(ii) notes expressing "unsuitability" for a vacancy might well be supportive of incapacity;

(5) Moreover, notes expressing "nothing to offer" are, without further elaboration not available from the report (but the notes themselves were before the Commissioner), as well consistent with the reason for that being the claimant's personal limitations as with any consideration stemming from the needs of the particular employer or the state of the labour market in the area.

(6) Whilst, therefore, we have no criticism of the decision itself, we cannot accept that it affords any real support for Mr Bano's contention of principle.

8. (1) The 1979 case concerned a 58 year old claimant suffering from myocardial ischaemia and cervical spondylosis, who had retired from National Coal Board employment because of those conditions.

(2) In the 1979 case the claimant had been in receipt of invalidity benefit for some 14 consecutive months before the disallowance of his claim for it which became the subject of the appeal, and had followed reports by two different medical officers of the Department in which he was considered capable of light work such as packing, bench type work, or car park attendant. His own doctor had continued to issue him MED 3 certificates of incapacity; but though the claimant also considered himself incapable, the only medical evidence was that of his own doctor and that of the two Department doctors.

(3) As indicated in paras 6 and 9 of the decision, when read in conjunction, the learned Commissioner concluded that on the available medical evidence the claimant was capable of work within certain limits, but after taking into consideration first that the claimant's whole prior employment experience had been in coal mining, secondly that whilst it was possible that packing and bench work might be suitable - but that this would depend on the nature of the work - and thirdly that the claimant might be able to manage work as a car park attendant - but that employment in the open air might subject him to extremes of temperature - went on (but with emphasis here supplied by us):

"Having regard to the claimant's age and the undisputed state of his health and taking account of all the circumstances, in my opinion it is improbable that any employer would be willing to engage the claimant in paid employment, other than from charitable motives. I regard self-employment as out of the question. On the principles stated, in my judgment the claimant has proved that he was incapable of work for the period in issue".

And the appeal was allowed accordingly.

(4) Leaving momentarily out of account the above reference to "on the principles stated" there is nothing in the passages from the 1979 decision above cited to assist the claimant in Mr Bano's argument of principle on his behalf. The decision as so expressed might readily stand as one typical of the common run of decisions by Commissioners based on the established principles deriving from R(S) 11/51 and R(S) 2/78 but in which, at the end of the day, the Commissioner has to reach his decision on the balance of probabilities, on a commonsense basis, and by reference to <u>all</u> the circumstances of the individual case.

So regarded, we are far from holding that the particular appeal was, on its own full facts, wrongly decided.

(5) However, in the course of that decision the learned Commissioner also expressed certain further views upon which Mr Bano has relied and upon which we must comment.

9. After stressing in the course of para 6 of his decision the principles for which Decisions R(S) 11/51 and R(S) 7/60 stand as authority - including expressly indicating that "the proper test is capacity for work and not availability for work" - the learned Commissioner in deciding the 1979 case continued:-

> ".... This has to be applied with regard to local conditions as the work must be of a type which is usually available in the area and not some type of work which never is available in the locality.
>
> 7. A realistic approach has to be made as to whether the claimant was incapable of work within the principles stated. Regard must I think be had not only to the claimant's state of health etc but also to the general situation having regard to the present number of unemployed and statutory provisions relating to employment and determination of employment which might deter an employer from taking on a man of the claimant's age in his medical condition."

And it is the above quoted passage in the 1979 decision on which Mr Bano has relied.

10. (1) Whilst we accept and confirm as sound in law that "a realistic approach has to be made as to whether the claimant was incapable of work ...." we cannot in our judgment uphold as sound in law the remainder of para 7 of the 1979 decision, which in our view stems from a misinterpretation of the true scope of the concept of "work which" /a claimant/" can reasonably be expected to do".

(2) No doubt a claimant could not be defeated in a claim for invalidity benefit by it being demonstrated that he would be capable of working in some exotic employment which was undertaken only by a few workers in some part of Great Britain remote from his established home - because he could not reasonably be expected to do that work.

11. (1) But in our judgment it is not right to restrict the fields of employment to which regard is to be had to such employments only as are common in his immediate home locality; for depending on a claimant's age, health, experience and so forth the standard of mobility of his labour which is properly to be expected of a claimant must widely vary in individual cases.

(2) Nor can it be proper, in determining whether or not a claimant is or is not "incapable of work by reason of some specific disease or mental or bodily disablement, to take account, in evaluating whether a claimant is capable of work - (meaning, it is true, "work for which an employer would pay remuneration") any remoteness of prospect of any employer engaged the particular claimant to do work as an employee for that employer, and paying him for doing it, which founds not upon a shortfall of capacity in the claimant to perform the duties of a postulated known character of employment but upon such other consideration as that:-

(a) there is no employer, within whatever is in the particular circumstances a reasonable distance to predicate, who has a vacancy for an employee in the predicated field of employment; or

(b) that even if there is such an employer, any vacancies he has will be filled by his engaging an applicant to whom the employer will for any reason give preference over the claimant.

For in any such case the claimant's "incapacity" will be in obtaining work, and not an incapacity for work; and, furthermore, it will in causative analysis arise "by reason of" those other considerations, and not - in correct analysis - by reason of the claimant's /specific/ disease or bodily or mental disablement.

12. (1) It is, of course, true that in particular circumstances - (of which decision R(S) 10/54 provides an apt example) the conclusion may properly be reached that a claimant is by reason of some specific disease or mental or bodily disablement incapable of any work for which any employer would pay, and that it can in such a case be said with equal force (but less than equal relevance) that the claimant's prospects of obtaining employment are remote or non-existent, and that on his applying for any vacancy the prospective employer would prefer another applicant (or not fill the vacancy, if the claimant was the only applicant).

But any such concurrence of circumstance or consequence in particular cases must not be allowed to obscure the correct causative approach to be adopted in adjudicating upon a claim for invalidity benefit.

(2) In that connection we would further mention that it may well also be that in his reference at the end of para 6 of the 1979 case to work "usually available in the area" the learned Commissioner had in mind paras 14 and 15 of Decision R(S) 17/51 where reliance is placed on a statement by the manager of the local employment exchange which included "the general set-up of industry in the area" as one of the foundations of such manager's opinion that the claimant "could not usefully fill any position either in a factory or in a domestic household".

(3) But upon our reading of those paragraphs the attributed relevance of "the general set-up in the area" was clearly in regard only to the nature of the work, if any, of which the claimant might be considered capable, and in no wise as to its availability: for - see paras 11 and 12 of R(S) 17/51 - the manager's statement had been obtained by the insurance officer, at the Commissioner's direction, to assist the Commissioner "in forming an opinion as to what work the claimant could be expected to perform in her present condition"; and the manager had been asked "as to the attitude of the authorities at the employment exchange in connection with the work that she could be expected to do".

13. (1) Accordingly, whilst we are not unmindful of the hardships occasioned by a high level of unemployment and of the additional difficulty in obtaining employment which its existence will often place upon those suffering from any specific disease or bodily or mental disablement by comparison with the wholly fit, or the higher level of benefit payable as invalidity benefit compared with unemployment benefit, we cannot accept as properly admissible any such principles Mr Bano has contended for.

(2) Shortly stated, in our judgment the law does not so provide. But it is perhaps not surprising that the law does not so provide, in view of the anomalies that would arise if the local level of unemployment were a relevant consideration in regard to invalidity benefit. For it would, given different levels of unemployment in the respective localities, then be possible as regards claimants whose state of health and personal circumstances were otherwise identical to succeed if claiming in Aberdare or Barnsley but fail if claiming in Aberdeen or Barnstaple

(3) We therefore turn next to deciding the present appeal by reference to the particular facts of the case and the well-established authorities to which we have referred.

14. In amplification of the facts already outlined in para 3 above we should here add as follows:-

(1) The diagnosis specified in the MED 3 certificates in reliance on which the claimant had claimed invalidity benefit from

early 1976 to 2 February 1980 varied between "strained back", "back pain" and "dyspepsia", but that current at 4 February 1980 was of "back pain" and had been given with a duration expressed as "indefinitely" (but treated as "until further notice").

(2) On 16 November 1979 and again on 14 January 1980 the claimant had been examined on behalf of the Divisional Medical Officer, and was the subject of Form RM9 reports by the (two different) doctors who so examined him. Each considered the claimant incapable of work at his regular occupation but capable of work within certain limits. Both regarded his main condition as "old back injury", recorded no secondary conditions, and referred to difficulty in bending. The earlier referred also to the claimant being handicapped in lifting and the later to his being handicapped by low back pain.

(3) Both reports indicated normal hearing and vision, and normal function in shoulders, arms, hands, walking, standing and kneeling. The first referred to slight impairment in climbing stairs; both considered the claimant to have substantial impairment in bending and in lifting/carrying; the first considered impairment in climbing ladders to be substantial, whilst the second graded that "nil function". Both considered as working conditions to be avoided: -

driving
working at heights

(4) The earlier RM9 report made no specific suggestion as to work of which the claimant was capable. The second indicated "He is capable of work not involving climbing, bending, heavy lifting, vigorous pulling or pushing"; and both considered that an Employment Rehabilitation Course would be of value.

(5) The claimant was in the interval between the two reports invited to attend his local Employment Office to discuss prospects of employment. He did so on 14 December 1979 but declined to register for employment on the grounds that his own doctor did not feel he was then capable of work and the claimant himself thought that his restrictions would hinder him in obtaining employment. The officer of the Department of Employment who interviewed him expressed the view that the claimant had no reasonable prospect of obtaining employment "due to his restrictions and the current economic situation".

(6) An insurance officer's decision dated 30 January 1980 disallowed the claimant's claim for invalidity benefit from 4 February 1980 until further notice, and the claimant appealed to the local tribunal.

(7) After an adjournment to enable the claimant to obtain representation and further medical evidence the local tribunal heard and decided the appeal on 20 August 1980. Intermediately the claimant's doctor had issued him two further MED 3 certificates and a four months "private" certificate as from 27 April 1980, and the claimant had been the subject of an examination and written report dated 6 May 1980 by Mr P, F.R.C.S., a Consultant Orthopaedic Surgeon; and at the adjourned hearing the claimant was represented by an officer of his trade association.

(8) In his report Mr P, after recording the earlier history of the claimant's back injury and subsequent back troubles, indicated as follows (but with emphasis here supplied by us):-

> "PRESENT COMPLAINTS: He says he has back pain much of the time, this is aggravated if he stoops forward or attempts any lifting. He also has discomfort in both thighs and the upper calves which he says develops after he has been on his feet for an hour. He says he can walk for five or ten minutes and then the pain will build up in his back and legs and he has to rest.
>
> ON EXAMINATION: He flexes forwards to touch the upper tibiae, extension is nil. He is tender over L4/5 spinous processes. SL.R. is 90/90, lower limb reflexes are normal. There is no motor, sensory or circulatory loss.
>
> OPINION: Mr Curtis injured his back in July 1975 and has not worked since that time because of continuing problems with his back and legs. I treated him at Doncaster Royal Infirmary from the time of the accident until January 1977 and was of the opinion at that time that he had had a recurrence of a previous lumbar disc lesion which in the presence of a narrow canal was giving symptoms not only in the back but in the legs as a result of spinal stenosis. He had had previous trouble with his back in 1970, he had had a typical lower lumbar disc lesion when SL.R. was 20/40, but with his previous episodes he was able to make a good recovery and return to his work as an underground fitter. The episode in 1975 was a final insult to a vulnerable spine which has left him with continuing problems in his back and legs.
>
> I consider at the present time that he is not fit for any work which involves climbing, bending, lifting, pulling or pushing.
>
> He is fit for a sedentary job spending some of the time sitting down.
>
> He is fit only for very light work on the surface which does not involve walking long distances."

(9) Notwithstanding the passages in Mr P's report (to which we have given emphasis above) the local tribunal allowed the appeal, indicating that they did so in the light of the medical evidence as it then stood and of Decisions R(S) 11/51 and R(S) 10/54, and that they found the claimant incapable of work upon applying "the tests suggested in R(S) 10/54". There was no appeal against that decision and thereafter the claimant continued at all material times to claim invalidity benefit in reliance on MED 3 certificates from his own doctor diagnosing "back pain" (that directly now material being a 12 months "open" certificate dated 28 August 1980): and for a period received payment of that benefit. But benefit was again disallowed by an insurance officer's decision of 13 November 1980, holding that benefit was not payable, by reason of failure to prove incapacity for work, for the period from 17 November 1980 to 28 February 1981 (both dates included).

(10) (i) That decision followed a further examination of the claimant on behalf of the Divisional Medical Officer on 20 October 1980, and an invitation to the claimant to visit his local Employment Office which he did not take up within the suggested time limit. The form RM9 medical report dated 20 October 1980 once more indicated that whilst incapable of work at his regular occupation the claimant was considered capable of work within certain limits, but differed from the earlier RM9 reports in mentioning "quiescent peptic ulcer" under "general description" and as a secondary condition, in adding "prolonged sitting" as a work condition to be avoided, and in grading "walking" as having slight impairment. The concluding general remarks included:-

> "Not seeking work. E.R.C. unlikely to help. Needs light semi-sedentary work with regular hours and meals";

(ii) It also followed a formal written statement by the claimant dated 11 November 1980 in which he indicated that he did not consider himself fit for any work in his then present state of health.

(11) The claimant appealed to the local tribunal against the insurance officer's decision on 13 November 1980, and they heard and decided the appeal on 15 January 1981. The claimant was again represented by an officer of his trade association, but also gave evidence himself - indicating that he "would have a go" at light jobs if any were available, and had tried to obtain light jobs but no one would take him on; also that because of his medical condition he had no chances of any jobs offered by the Unemployment Office.

(12) The claimant's representative submitted that the considerations which had been accepted by the earlier tribunal on 20 August 1980 had not varied and relied again on Decision R(S) 10/54 - but on this occasion additionally on the 1979 decision; and he indicated that the Disablement Resettlement Officer had recently reconfirmed that there was no reasonable prospect of the claimant being found employment, with his restrictions, in the current economic climate, and asked rhetorically:

> "Having regard to the claimant's age and his medical condition is it probable that the claimant will be offered a job by any employer?

15. (1) The local tribunal allowed the claimant's appeal and stated as their findings of fact material to their decision:

> "1. The medical evidence is the same as at the last Tribunal"

/We think they here meant 'was in the same tenor' and are not to be read as having overlooked the new material above referred to/.

> "2. The Resettlement Officer still has no doubts about the unemployability of the claimant.
>
> "3. The findings in "/the 1979 case/" the fact of which appear on all forms with this case".

/This is not properly a fact found, but a reason for the decision/.

(2) The stated reasons for their decision - to which we will take 3 last above as added - were:

> "Applying the tests suggested in R(S) 10/54 and bearing in mind the decision in "/the 1979 case/" we find that the claimant has proved that he was and is incapable of work".

16. (1) The present appeal from that local tribunal's decsion is brought by the insurance officer pursuant to leave granted by its chairman, the grounds of application being:

> "to seek to establish whether the time-honoured criteria for establishing incapacity for work /R(S) 11/51/ are to be modified in the light of the current employment situation."

For the reasons we have already indicated, the short answer to that question is "No".

(2) Similarly, it will be apparent from our earlier paragraphs, read in conjunction with the above cited findings and

reasons of the local tribunal, that the tribunal - quite understandably on the materials before them - have in our judgment "asked themselves the wrong question", in that whilst purporting to decide upon incapacity for work they have equated that with inability to obtain employment.

(3) Since an appeal to a Commissioner, or a Tribunal of Commissioner, is technically by way of re-hearing generally, it now falls to us to make our own determination on the substantive issues by re-appraisal in accordance with the correct criteria.

But, pursuant to a Commissioner's direction at an earlier stage in the present appeal, we have as additional evidence:

(i) a further MED 3 certificate from the claimant's own doctor, being a 13 weeks "open" certificate dated 26 February 1981 and diagnosing "Back injury";

(ii) a further RM9 report upon the claimant dated 15 May 1981;

(iii) a report from a Disablement Resettlement Officer in the claimant's area ("the DRO Report") giving particulars of the job vacancies notified to the Job Centre between October 1980 and March 1981 with particular reference to those individual job vacancies which it was considered could have been suitable and within the claimant's physical capabilities.

(4) In the light of an intimation in the DRO Report that a total of 1,000 vacancies had been so notified, the claimant's association have also submitted figures, which we accept, indicating that such total falls to be considered in the light of figures of registered unemployment in the relevant two areas of compilation in aggregate exceeding 24,000 and representing a mean level of some 16½ per cent unemployment.

And such association have also made written submissions in regard to the claimant's prospects of obtaining employment with particular reference to the individual job vacancies referred to in the DRO Report.

17. (1) We do not attach any great weight to the additional RM9 report, since it relates to the claimant's condition at a date after - though only shortly after - those in issue on the present appeal. But it had been suggested on the claimant's behalf that it supported his claim - and we should record that it in fact expresses the opinion that the claimant was "capable of work within certain limits".

(2) We note from the additional MED3 certificate in conjunction with the earlier certificates already mentioned that the claimant's own doctor has over a long period considered the claimant wholly incapable of work.

(3) However, we note also the considerable history of consistency, in RM9 reports, of opinion that the claimant has been capable of work within certain limits; and in particular - as next prior in date to the presently material period - the RM9 report dated 20 October 1980 to that effect.

(4) We also attach substantial importance to the very detailed report of Mr P, dated 6 May 1980.

(5) We observe that there is a close concurrence of views as to the claimant's capacity for work as expressed in Mr P's report and the RM9 report dated 20 October 1980:

(i) Mr P indicated that the claimant:

(a) is fit for a sedentary job spending some of the time sitting down, but only for very light work;

(b) is not fit for any work which involves climbing, bending, lifting, pulling, pushing, or walking long distances.

(ii) the RM9 report:

(a) recommends that the claimant needs light semi-sedentary work with regular hours and meals;

(b) indicates that the claimant is handicapped in bending, lifting, and climbing and should avoid as working conditions driving, working at heights, or prolonged sitting.

18. As to the medical evidence, in our judgement we prefer the last mentioned two opinions to that of the claimant's own doctor and reach at least a prima facie conclusion that the claimant was not "incapable of work" in the material period, but was then capable of some light work in nature sedentary (but not involving such prolonged sitting at one time or in one position as "bench work" often entails).

19. But, on established authority, any work of which a claimant is capable must be work which a claimant can reasonably be expected to do, and for which an employer would pay (or self-employment - but there is no suggestion of that in the present case). In many cases the nature of a claimant's impairments and his personal circumstances will be such that it is at once and by common general knowledge evident that there is work (in the above sense) of which the particular claimant must be capable, so

that any more detailed contemplation is unnecessary; but there are others (- of which the present case is in our view one -) in which it is necessary to explore more specifically whether or not medical views properly expressed in generalised terms do in fact correspond with "actualities" - not, as we again stress, as to the prospects of obtaining a particular employment, but as to capacity to meet the job requirements of an identifiable character of employment which is to be found in real life; and - in the context of "can reasonably be expected to do" - is neither so remotely situated not so rarely encountered as to put it outside the limits of practical contemplation. And it was with these considerations in mind that the DRO report was bespoken, for such guidance as it might provide.

20. The DRO Report gave details of, in all, 9 vacancies which had been notified and for the duties of which it was thought the claimant might be considered suitable. But for one reason or another - e.g. that driving was involved - 5 of those can be ruled out. The remaining 4 were:-

(a) A temporary vacancy for two weeks for a full time light bench assembler "The job involves assembling plastic toilet pan connectors and waste fittings. No previous experience required. Must have worked in a factory environment before. Wage £57 per week plus £5 bonus";

(b) A vacancy for a temporary full time assembler "to assemble components for the medical and computer industries from fibre optics. Will be trained. Needs to be dexterous. Duration - one month, could be longer. Wage £1.25 per hour whilst temporary".

(c) A part-time vacancy for a basket/changing attendant. "Accepting swimmers' clothing, issuing tickets and looking after the clothing. To live as near as possible to the swimming baths. Would suit an elderly or retired person. Wage £1.39 per hour, 8-10 hours per week".

(d) A full-time vacancy for a door person at a social club. "Checking membership cards at the door and issuing leaflets, etc, uniform provided. Must be clean and smart. Good work record and must be able to provide references. Age range preferred 30-50. Wage £1.43 per hour for weekdays and £1.55 per hour for weekends".

- And as to (d) the DRO Report further indicates "a disabled person was placed in this job".

21. Bearing in mind that the claimant was in his early 50s, a skilled fitter, and that his prior career experience had been working underground in a colliery, we assess his capacity in relation to those four kinds of work as follows:-

As to (a): We think it likely that the claimant could have done this work, but in view of:

(a) the recommendation that he should avoid prolonged sitting; and

(b) the job requirement of previous experience of having worked in a factory environment

we are not prepared to hold it work of which he was capable in the relevant sense.

As to (b): Similarly we think it likely that the claimant could have done this work also, but again are not prepared to hold it work of which he was capable in the relevant sense in view of the recommendations that he avoid prolonged sitting.

As to (c): Using general knowledge as to how changing room arrangements at public swimming pools are normally conducted we do not consider that these duties were beyond the claimant's physical capacities - a view reinforced by the reference in the specification to an elderly or retired person being suitable. But in view of the requirement as to location of residence and the absence of evidence as to the location of the baths we think it safer to leave this employment out of account.

As to (d): This appears to us a kind of work for which the claimant was well fitted and which he could on all counts reasonably be expected to do; and we do not regard the reference to "preferred" age as contra-indicative.

22. The submissions in regard to the DRO Report furnished by the claimant's association bear, as regards (d) above, only on the degree of competition for any such vacancy which the claimant could be expected to encounter from younger and fitter applicants.

But for the reasons we have sought to indicate we do not regard that as a factor material to our decision. Nor do we regard anything said at the oral hearing in regard to that serial as displacing our above indicated view.

23. Our decision is accordingly as indicated in paragraph 1 above.

(Signed) I O Griffiths
Chief Commissioner

(Signed) I Edwards-Jones
Commissioner

(Signed) M J Goodman
Commissioner

Date: 21 April 1982

Commissioners' File: C.S. 415/81
C I O File: I.O. 8082/V/81
Region: Yorks and Humberside