

JM/JAW

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

ORAL HEARING

Decision C.S. 14/81

1. This is a claimant's appeal against a decision of the local tribunal dated 3 December 1979 which -
 - (a) confirmed two decisions of the insurance officer dated, respectively, 6 September and 2 October 1979; and
 - (b) determined adversely to the claimant the insurance officer's reference dated 22 October 1979.

My decision is that invalidity pension is payable to the claimant from 13 September 1979 to 24 October 1979 (both dates included) because the claimant has proved that throughout that period he was incapable of work by reason of some specific disease or bodily or mental disablement.

2. I held an oral hearing of this appeal on 15 July 1981. The claimant appeared and presented his own case with a vigour which never went beyond the bounds of good humour. By and large he struck me as being a frank and candid witness. I am also indebted to the insurance officer's representative for the fair and helpful way in which he presented the other side of the matter.

3. The claimant is now aged 43. In his time he has done a variety of jobs. I gather, however, that the majority of his working life has been spent as a miner in the coal industry. He injured his back in July 1973. He made attempts to return to work thereafter but eventually realised that he was no longer physically capable of working in the pits. Until the events with which this decision is

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immediately concerned he had been in continuous receipt of invalidity pension since 7 May 1975, the diagnosis being low back pain. During this period he was, of course, the subject of regular references to the regional medical officer of the Department of Health and Social Security. On 2 March 1978, for example, the examining medical officer reported:

"Severely handicapped due to low back pain and gross obesity. Is awaiting further X-rays and ?? operation."

This medical officer considered the claimant incapable of work and advised that there was no need to refer again for 6 months. On 11 September 1978 it was recorded that incapacity was not in doubt and that there was no need to refer again for 3 months; and on 19 January 1979 a like conclusion was recorded, save that the reference period was put at 6 months.

4. The turning point came on 10 August 1979. The medical officer who examined the claimant on that day wrote:

"This very obese man continues with back symptoms. He hopes for an operation but there is little real likelihood in foreseeable future. I see no reason why he should not do light to moderate labouring."

The claimant was acquainted with this conclusion and advised to consult the local unemployment benefit office. On 17 August 1979 he called at the job centre but refused to register for employment, stating that his general practitioner was of the view that he (the claimant) was unfit for any work and would remain so until he had had an operation. It is not without significance that the disablement resettlement officer formed the view that the claimant had no reasonable prospect of obtaining employment. He wrote of the claimant:

"He has been tried on a light job at the pit, one of the lightest you could find in the area, and found to be unfit for that by the NCB doctor. I doubt whether an employer would pay for his services."

5. On 24 August 1979 the claimant was, at his own request, interviewed at the local office of the Department of Health and Social Security. He gave a detailed account of his working life and experience. He spoke of his medical condition. He is recorded as having said: "I am nearly at the top of the hospital waiting list for an operation". In his evidence to me he said that he told the interviewing officer that (as was the case) he had an appointment to enter hospital on 26 October 1979 for a myelogram. He himself did not then know how long he would be in hospital. In the event, he was in hospital for only one day. In fairness to the interviewing officer, I ought to say that I am in considerable

doubt as to whether the precise purpose and likely duration of this impending visit to hospital were clearly explained to her. A myelogram is, in fact, an X-ray examination of the spine which involves the injection of a coloured fluid into the spinal column. It may be the precursor to an operation - but it was not itself the operation for which the claimant was hoping. I do not think, however, that this was made plain to the interviewing officer. Be that as it may, the interviewing officer advised the claimant to send in further medical evidence. The claimant, accordingly, continued to submit forms Med 3 signed by his general practitioner.

6. It has, of course, often been said by Commissioners that a bare form Med 3 carries little evidential weight when set against the specific and particularised findings of a medical officer of the Department. Forms Med 3 are generally - and quite reasonably - made out in the context of the claimant's normal occupation. The general practitioner has no call to consider the possibility of alternative employment until such time as someone asks him to direct his mind thereto. Moreover, forms Med 3 are customarily laconic and unparticularised. A claimant who seeks to challenge the effect of an adverse report by a medical officer of the Department is well advised to ask his general practitioner for a letter which deals specifically with that claimant's capacity for limited work. Such a letter, even if brief, will often carry considerable weight with the determining authorities - for the very good reason that the general practitioner will normally be drawing upon a much longer and closer knowledge of the claimant's medical condition than is available to a medical officer in consequence of a single examination. Unfortunately, however, the average claimant is wholly unaware of these important considerations - at any rate until he has lost his claim! The Department, fairly and conscientiously, advises him to submit "further medical evidence"; but the only "further medical evidence" within his contemplation consists of "a doctor's line" (i.e. a form Med 3) and this is of very little use to him. In my view a claimant ought to be told specifically that if he wishes to assail the findings of the Department's medical officer, he should seek from his general practitioner (or from some other medical expert) something more expansive than a further form Med 3.

7. I return to the narrative. On 6 September 1979 the insurance officer disallowed the claim for invalidity pension in respect of 13 September 1979 - the last day covered by the claim then before him. On 13 September 1979 the claimant's doctor signed a form Med 3 which recited that the claimant had been advised to refrain from work for 4 weeks by reason of low back pain. A further examination by a different medical officer of the Department was arranged for and held on 27 September 1979. The report of this examination is the high-water mark of the insurance officer's case. I quote:

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"There is a gross functional overlay present. He is fit for work avoiding much bending and lifting. Motivation is not noticeable. His hands show signs of toil."

On 2 October 1979 the insurance officer disallowed the claim for invalidity pension from 14 September to 10 October 1979. The claimant registered for light work on 3 October 1979. (He told me - and I believe him - that he did this simply because he could not afford to be without any benefit at all.) The claimant appealed against both decisions of the insurance officer. On 22 October 1979 the insurance officer referred to the local tribunal the period 11 October to 24 October 1979 - thereby disposing of the claim constituted by a form Med 3 signed on 11 October and reciting that the claimant had been advised to refrain from work for two weeks.

8. The claimant made a lengthy written submission to the local tribunal. He also appeared thereat and gave evidence thereto. Supporting evidence was given by one of his sons and by a neighbour. The relevant form LT3 sets out a detailed record of this evidence, which was largely directed to what the claimant could and could not do in and around the house. The findings on questions of material fact are more tersely recorded:

"Whilst accepting that claimant has history of back pain and still suffers with it his condition is aggravated by being overweight. Having regard to all the evidence we accept the medical views expressed that the claimant is capable of work within certain limits; i.e. light labouring work avoiding bending and lifting."

9. That the claimant was at the material time much overweight has never been in dispute. He is a naturally large man. He told me that his working weight as a miner was about 14 stones. When he ceased active work his weight crept up to 17 stones. That was its level in the Autumn of 1979 and, although he has made efforts to diet, it is its level to-day. He is a teetotaller, but it is obvious that the foods which he enjoys are not those which feature upon a typical diet sheet. They do, however, feature regularly upon a typical English dining-table. There are to-day in England many claimants in receipt of sickness and invalidity benefit whose physical condition would have been significantly better had they adopted a more prudent method of life; e.g. had they smoked fewer cigarettes or had they taken more exercise. For the purposes of benefit the law takes such claimants as it finds them. I cannot think that the claimant in the instant case falls to be treated any differently. If the first sentence of the passage which I have quoted in paragraph 8 above means that the local tribunal felt entitled to disregard all such incapacity as was caused or contributed to by the claimant's obesity, then, in my view, the local tribunal misdirected itself in law.

10. For the rest, it seems to be clear that the local tribunal founded upon the reports of the medical officers made on 10 August and 27 September 1979; and that it was not disposed to take at face value the evidence of the claimant and his witnesses. This was a course which the tribunal was fully entitled to take. Indeed, it is a course against which it would not normally be possible successfully to appeal. Subsequent events, however, have put this case in a somewhat different light.

11. In the first place, the claimant has been in receipt of invalidity benefit almost without interruption since his admission to hospital on 26 October 1979. After the myelogram he was told that the doctors were against an operation. It might well leave him worse than he already was. Instead, he was fitted with a stronger corset. Since then his condition has remained virtually unchanged - neither better nor worse than before his admission to hospital. His incapacity has been accepted by the Department. The position is, then, that -

- (a) from 7 May 1975 until 12 September 1979 the claimant's incapacity was not in doubt;
- (b) since 26 October 1979 to the present day (with the exception of a few short periods in respect of which no form Med 3 was submitted) the claimant's incapacity has not been in doubt; and
- (c) there is no cogent medical evidence to undermine the claimant's assertion that over the whole period from May 1975 until the present day there has been no material change in his condition.

In my view these facts considerably reduce the weight to be put upon the reports of 10 August and 27 September 1979, which stand out as anomalies among 6 years of reports to the contrary effect. This is in no way to impugn the competence or good faith of the medical officers who made these two reports. It is notorious that the severity of disablement in "back" cases is almost impossible to assess by objective clinical means. I have to weigh a series of reports made upon essentially subjective findings. I am entitled to throw into the scales my own impression of the claimant's credibility. At the end of the day I think it more probable than not that the claimant remained incapable of work throughout the whole of 1979.

12. It must be borne in mind, too, that if the claimant had been able to obtain light work in the second half of September 1979 he would only have served his employer until 25 October 1979, whereafter he relapsed into (unchallenged) long-term incapacity. I regard this as ex post facto confirmation of the disablement resettlement officer's view that the claimant could not realistically be regarded as employable.

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13. In evidence before me the claimant identified a substantial number of potential employers to whom he had made application for light work. He explained that the invariable reaction was: "You're not capable of working for us." I consider that these attempts to get work were sincere. I do not regard them as proof that the claimant considered himself fit for light work. On the contrary, I regard them as confirmation that he was not so fit.

14. It follows that the claimant has made out his case and that his appeal is allowed. Pursuant to section 86 (as amended) of the Social Security Act 1975, I direct that all sums paid to the claimant by way of unemployment benefit in respect of the period 3 October to 24 October 1979 (both dates included) shall be treated as having been paid on account of the invalidity benefit payable to the claimant by virtue of this decision.

(Signed) J Mitchell
Commissioner

Date: 11 August 1981

Commissioner's File: C.S. 755/1980
C I O File: I.O. 1279/V/80
Region: East Midlands and East Anglia