

Incapacity for work - while claimant has provided proof of incapacity in relation to a claim for IVB, the AO dealing with that claim must determine capacity before terms of claimant's entitlement to IS can be entered.
JGMi/HJD
Commissioner's File: CSIS/61/93 *34/9A

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Ian MacDONALD

Social Security Appeal Tribunal: Hamilton

Case No: 558 55549

1. My decision is that the decision of the social security appeal tribunal dated 3 March 1993 is erroneous in law and is set aside. The decision which I give in its place is that the claimant's appeal is allowed. The decisions of the adjudication officer made on 1 December 1992 were wholly invalid for the reasons stated below.
2. This is an appeal by the claimant with leave on a question of law against the above-mentioned decision of a social security appeal tribunal on 3 March 1993.
3. The claimant is a 40 year old former railway guard who in 1992 was in receipt of income support and invalidity benefit. He was diagnosed as suffering from cervical spondylosis, a duodenal ulcer and hiatus hernia. The claimant was not required to be available for employment as a condition of his entitlement to income support because he was in receipt of invalidity benefit as a person who was incapable of work. On 1 December 1992 the claimant was informed of a decision that from 26 November 1992 he was not entitled to income support on the basis of incapacity for work. The claimant appealed and pointed out that no decision had been made regarding his entitlement to invalidity benefit. The decision under appeal to the tribunal was stated in box 1 of form AT2 to be:-

"The claimant is required to be available for employment as a condition for receiving Income Support. This is because he does not fall within any of the exceptions provided within Schedule 1 to the Income Support (General) Regulations 1987."

The adjudication officer in his submission to the tribunal narrated that the claimant had been examined by a medical officer of the regional medical office on 22 April 1992. The doctor concerned reported that in his opinion the claimant was fit for work within certain limits. The claimant continued to submit medical evidence from his own general practitioner of his incapacity for work. A further medical report was obtained from a different medical officer on 16 November 1992 who agreed with the conclusion of the previous doctor. According to the adjudication officer's submission the Secretary of State decided that the claimant was not incapable of work and not entitled to contributory benefit or credits. That was stated to be the foundation of the adjudication officer's decision under appeal.

4. At the tribunal hearing the tribunal merely accepted the adjudication officer's summary of facts to the above effect. They proceeded to examine the question of the claimant's capacity for work and in a brief decision held that the claimant was capable of work within limits and refused the appeal.

5. The decision of the tribunal is manifestly erroneous in law. They did not note the irregularity and incompetency of the procedure narrated to them and adjudicated directly on the question of the claimant's capacity or otherwise for work. They upheld the adjudication officer's decision which plainly proceeded upon a flawed basis. The Secretary of State had no jurisdiction to pronounce upon the claimant's capacity or otherwise for work. Where, as here, the claimant had been in receipt of invalidity benefit based upon a decision accepting his incapacity for work the primary decision on capacity for work fell to be made by an adjudication officer dealing with the claimant's entitlement to invalidity benefit. I return to this point in paragraph 7 below. As the claimant had pointed out in his grounds of appeal no such decision had yet been made or intimated to him. Once such a decision had been made there could of course be grounds for review of the terms upon which the claimant was entitled to income support.

6. On further investigation in response to directions by the nominated officer and by myself the adjudication officer now concerned with the case has produced further documents which make it all too deplorably clear that the terms of the adjudication officer's decision narrated on form AT2 as the decision under appeal did not accurately reproduce the actual decisions made. The adjudication officer explains that these documents show that the claimant was issued with a letter on 1 December 1992 informing him that due to a change of circumstances he was no longer entitled to income support from 26 November 1992. They also show that an altered decision was made having effect from that date finding the claimant entitled to income support without the disability premium previously included. It is not stated that that altered decision was intimated to the claimant and none of the records show any reference to a process of review. The adjudication officer now concerned with the case has also agreed, contrary to a previous submission, that the decision appealed against could not have been made as a result of an adjudication officer's decision disallowing invalidity benefit since no such decision was made until 10 December 1992. It is all too clear that the procedure leading to the decision of the adjudication officer under appeal and the decisions themselves were invalid and the tribunal erred in approving them.

7. The decision of the tribunal is erroneous in law and I set that decision aside. It is appropriate for me to exercise the power to give the decision which the tribunal should have given. For the reasons set forth above the decisions of the adjudication officer terminating the claimant's income support on its former basis of incapacity for work and substituting a lower award subject to the condition of availability were invalid and the claimant's appeal to the tribunal ought to have been upheld. As the adjudication officer now concerned points out the claimant's entitlement to income support without being required to be available for employment rested upon his satisfaction of the conditions of paragraph 5 of Schedule 1 to the Income Support (General) Regulations 1987, that is, that the claimant was:-

"A person who provides evidence of incapacity .. in support of a claim for .. invalidity pension .., provided that an adjudication officer has not determined that that person is not incapable of work .."

It is clear that where such a person has provided evidence of incapacity for work in support of a claim for invalidity benefit and invalidity benefit has been awarded it is for the adjudication officer dealing with that benefit to make a determination, if the circumstances have altered, finding the claimant no longer incapable of work. An adjudication officer dealing with income support will then make a consequential decision in reliance upon that decision. In the event of a challenge by the claimant on the issue of incapacity, that challenge will properly fall to be made against the decision of the adjudication officer dealing with his invalidity benefit. In any event an adjudication officer dealing with income support who wishes to alter the terms of a claimant's entitlement to that support in such circumstances will require to make his decision upon review of the previous decision awarding income support.

8. It is suggested by the adjudication officer that, notwithstanding the faulty decisions already made, the adjudication officer's decision of 10 December 1992 disallowing invalidity benefit from 26 November 1992 has effect to establish that "from 10 December 1992 at the latest" the claimant did not for income support purposes satisfy the provisions of paragraph 5 of Schedule 1 to the General Regulations. This however overlooks the fact that although the claimant has not appealed against that decision the issue of his capacity or otherwise for employment must, as a result of the erroneous procedures followed in this case, have appeared to him to have been directly under appeal in the present process. Since I have now decided that this was not the proper forum for adjudicating upon that issue, fairness would seem to require that the claimant be given an opportunity to consider applying for leave to appeal late against the invalidity benefit decision. That opportunity should be given to the claimant before any question arises of a fresh review of the claimant's income support.

9. The appeal of the claimant is allowed.

(signed)

J G Mitchell
Commissioner

Date: 23 March 1994