

*Dec (1764) Review Not Appropriate if you consider it
Sund 2000 - Director Mrs. Oliver F. Peterson
Council of Cases Under Code of Employment (Case #)
RAS/1/LM - Office of Peace - SAT Case No. Transition Case
Commissioner's File: CIS/251/93
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SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. The claimant, now in her late 50s, has been in receipt of income support for some years. Because she had provided evidence of incapacity for work in accordance with paragraph 5 of Schedule 1 to the Income Support (General) Regulations 1987 she satisfied the so-called additional condition for a disability premium imposed by paragraph 12 of Schedule 2 to those Regulations. In 1989 and 1990 she was examined by two different doctors of the Regional Medical Service and was found to be fit for work within limits. There was apparently a decision to that effect with the consequence that, had it stood, she would lose entitlement to the disability premium. However the decision was overturned on appeal. In 1991 she was again examined by doctors from the Regional Medical Service and again found to be fit for work within limits. However her own doctor continued to issue medical certificates to the effect that she was not fit for work. By a decision issued on 1 October 1992, which followed a further examination by a doctor from the Regional Medical Service, an adjudication officer decided that the claimant was no longer incapable of work and that accordingly she no longer satisfied the additional condition for entitlement to the disability premium. She continued however to be entitled to the basic rate of income support because, being within ten years of pensionable age, she was not required to be available for employment: see paragraph 13 of Schedule 1. The claimant unsuccessfully appealed to the Truro social security appeal tribunal against the adjudication officer's decision. She now appeals to the Commissioner.

2. At her request I held an oral hearing of the claimant's appeal. She attended and conducted her own case. The adjudication officer was represented by Mr A. Prosser of Counsel. It appeared at the hearing that some aspects of the case namely whether a review had ever been carried out so as to allow the termination of entitlement to the disability premium and the

consequence if there had been no review had not been considered and I directed that those matters be dealt with in written submissions on behalf of the adjudication officer. Submissions have now been delivered and I have considered the claimant's comments in reply.

3. I think it is not in dispute that the award of income support at the rate which included the disability premium could be revised so as to alter the rate only after a review of that award. Such review would fall to be carried out under section 25 of the Social Security Administration Act 1992 and grounds for the review would have to be shown. The less formal kind of review pursuant to regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987 would not in my view be appropriate: see CIS/627/92 (paragraph 7).

4. Presumably the relevant ground for review in such a case as this would be that of a relevant change of circumstances since the original decision was given. The adjudication officer who made the decision dated 1 October 1992 should have identified the relevant change of circumstances and so should the tribunal. I do not propose to determine what relevant change might have been relied on. If the claimant's medical condition had not changed but there was simply a different medical opinion as to whether she was capable or not of work that would not be a relevant change of circumstances: see R(S) 6/78 and R(S) 4/86. Of course it might be that the view would be taken that, by the time of the adjudication officer's decision terminating entitlement to the disability premium, it was appropriate to consider the claimant's capacity for work in relation to a wider field of employment than her regular employment and that might be regarded as a relevant change of circumstances. This all should have been explicitly dealt with by the original adjudication officer and by the tribunal. The tribunal's decision is erroneous in law because of the failure to deal with this aspect of the case. I notice too that in the reasons the tribunal gave for their decision it is said that "... a claimant could still establish before a Tribunal complete incapacity for work ...". That statement leaves me unclear whether they appreciated that the onus of proof is on the adjudication officer and not the claimant to establish not only the grounds for review but, if there are such grounds, that the claimant no longer satisfied the additional condition.

5. In the further written submissions on behalf of the adjudication officer it is said that "the Commissioner made a finding of fact that there had been no review ...". That is incorrect. What Mr Prosser was asked to consider was the consequence if there had been no review. It is then said in those further submissions and without reference to any authority that the consequence is that the tribunal had no jurisdiction to deal with the appeal. The cases make clear that that is totally incorrect: see for example CSSB/540/89, CSB/1272/89 and CIS/35/90. These last two decisions make it clear that a tribunal should ascertain whether the necessary review was in fact carried out and if it was not they may themselves deal with the review question.

6. The tribunal's decision in this case is, as I have said, erroneous in law and I set it aside. It is not in my view appropriate for me to give the final decision. I therefore remit the case for rehearing by another and differently constituted tribunal. They must first deal with the review question. Was a review ever carried out? Were there grounds? Only if they are satisfied that there were grounds for review do they then consider whether the adjudication officer's decision awarding income support at the higher rate should be reviewed. They must keep in mind that the onus or proof is on the adjudication officer.

7. The claimant will perhaps be disappointed by this outcome as she may have been led to believe by the adjudication officer's further written submissions that she would be entitled to arrears. That however could only possibly be the case if she wins before the new tribunal. As I understand it the last medical certificate the claimant supplied was that dated 12 October 1992 - in which her own doctor said that she was fit within limits - and in any event it may be that since then she would not have satisfied the additional condition for entitlement to the premium. The new tribunal have jurisdiction to deal with all matters down to the date on which they hear the appeal and, if they conclude that the original award should not have been varied as at 1 October 1992, they may go on to consider whether it should be varied as at some later date. As to that, they will have to take account of paragraph 12(1)(b) of Schedule 2 to the 1987 Regulations and of paragraph 5 of Schedule 1 to those Regulations. That trail of course takes them to regulation 2 of the Social Security (Medical Evidence) Regulations 1976 because, to satisfy the additional condition, the claimant is required to produce evidence of incapacity in accordance with that provision; in that connection attention is drawn to regulation 2(1)(c) of the 1976 Regulations which makes clear that it is not essential for the evidence of incapacity to be produced in the form of a medical certificate.

(Signed) R A Sanders
Commissioner

Date: 21 February 1994