

CHAG

DGR/MB/13

Commissioner's File: CIS/474/1990

SOCIAL SECURITY ACT 1986

**APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. My decision is that the decision of the social security appeal tribunal given on 18 July 1990 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the social security appeal tribunal of 18 July 1990

3. The question for determination by the tribunal was whether the claimant was entitled to income support in excess of the £44.19 per week awarded by the adjudication officer on 6 April 1990 on a review following the death of the claimant's wife. This in turn depended upon whether the claimant was entitled to a disability pension under Part 3 of Schedule 2 to the Income Support (General) Regulations 1987. In the event, the tribunal, upholding the decision of the adjudication officer, decided that he was not. The claimant was aged less than 60 and, pursuant to paragraph 11 of Schedule 2 he was not entitled to disability premium unless he could satisfy one of the conditions specified in paragraph 12(1)(a), (b) or (c). The only relevant condition was that set out in paragraph (b), which reads as follows:-

"12(1)(b) The circumstances of the claimant fall, and have fallen, in respect of a continuous period of not less than 28 weeks, within paragraph 5 of Schedule 1".

Paragraph 5 takes in those who are incapable of work by reason of their medical condition.

4. The tribunal decided that the claimant had not established that he had been incapacitated for a period of 28 weeks. They made the following findings of fact:-

"The claimant had not worked since 1976 due to an accident. He had submitted medical certificates from 1976 until 1978 when his wife became ill. He then took on the role of caring for his wife until she died on 9.3.90. He had been informed by the benefit office in 1978 not to submit any more sick notes as it was accepted that he was staying at home caring for his wife. After his wife's death he again submitted medical certificates in respect of himself".

5. The tribunal gave as reason for their decision the following:-

"The claimant is a single man and therefore the applicable amount due to him under the General Regulations is £34.90. In addition the claimant is entitled to a transitional addition of £9.29 weekly under the Transitional Regulations. Medical certificates had been sent in from 13.3.90 (after a lapse of about 12 years). The claimant was not therefore entitled to a disability premium for the period of 28 weeks although it was acknowledged that he had been sick for many years".

6. Technically, the tribunal dealt with the position in strict accordance with the law. The claimant had not established medical evidence to show that he had been incapacitated for work for the period of 28 weeks prior to the date of review. However, it must have been perfectly clear to the tribunal that, having regard to his history, he would have been able to provide that evidence if given the opportunity. In those circumstances, it was not, in my judgment, enough merely to determine the case on the evidence as it then was; the tribunal should have adjourned the matter to give the claimant the opportunity of presenting the necessary evidence.

7. It follows that the tribunal erred in point of law, and I must set aside their decision. I direct that the appeal be reheard by a differently constituted tribunal who will give the claimant the opportunity of providing medical evidence in support of his contention that as from the date of review he had for the proceeding 28 weeks been incapacitated for work.

8. Accordingly I allow this appeal.

(Signed) D.G. Rice
Commissioner

(Date) 3 February 1992