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SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 10 July 1991 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 the tribunal chairman, against the decision of the social security appeal tribunal of 10 July 1991. The claimant asked for an oral hearing, a request which was acceded to. At that hearing the claimant, who was not present, was represented by Mr R Bowles of the Sheffield City Council, Family and Community Services Department, whilst the adjudication officer appeared by Miss S Spence of the Solicitor's Office of the Department of Social Security.

3. The claimant had been in receipt of invalidity benefit from 17 October 1989, by reason of "back pain", or "severe back pain" when on 22 August 1990 he was examined by an examining medical officer of the Divisional Medical Office, who expressed the view that, although the claimant was incapable of his normal occupation, he was nevertheless fit for work within certain limits. He should not drive or engage in work involving heights. On 7 September 1990 the claimant was advised of the outcome of the examination, and invited to consult his own doctor to discuss

the results. He was also informed that the disablement resettlement officer at the Job Centre/Employment Office would be available to help him in finding suitable employment. However, the claimant did not take up this opportunity. He visited his GP, who issued a further medical statement dated 19 September 1990, advising him to refrain from work for eight weeks, again by reason of severe "back pain".

4. Investigations were put in hand as to the type of work that the claimant might be able to undertake, having regard to his age, education and experience, and the limitations described by the examining medical officer. In the event, the adjudication officer considered that the claimant was able to undertake the duties of various types of manager, or of a routine clerk. On 3 December 1990 the claimant was examined by a different medical officer who likewise was of the view that the claimant was capable of work within certain limits. Whilst confirming the limitations previously defined, he stated that the claimant's condition was now thought to be due to ankylosing spondylitis, but provided that he did not work in a fixed postural position for prolonged periods, he was fit for work within the broad description of all the jobs suggested by the adjudication officer. On 16 January 1991 the adjudication officer reviewed the original award of invalidity benefit under regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987, [S.I. 1987 No 1968] and his revised decision was to the effect that the claimant was not incapable of all work as from 21 January 1991. However, he proceeded on the basis that the claimant had not proved that he was incapable of work by reason of some specific disease or bodily or mental disablement. He placed the burden of proof squarely on the claimant. In due course, the claimant appealed to the tribunal who in the event upheld the adjudication officer.

5. Mr Bowles attacked the tribunal's decision on various grounds. First, he contended that the adjudication officer had no jurisdiction to apply regulation 17(4). That provision reads as follows:-

> " 17. (4) In any case where benefit is awarded in respect of days subsequent to the date of claim the award shall be subject to the condition that the claimant satisfies the requirements for entitlement; and where those requirements are not satisfied the award shall be reviewed."

Mr Bowles argued that this provision could only apply where the claimant ceased to satisfy the relevant requirements in the interval of time between the date of award and the first receipt of benefit. He reached this remarkable conclusion in accordance with the following reasoning. Section 51(1)(d) of the Social Security Act 1986 [now section 5(1)(d) of the Social Security Adminstration Act 1992] provided as follows:-

> " 51. - (1) Regulations may provide -

....

(d) for permitting an award on [an invalidity] claim to be made .... subject to the condition that the claimant satisfies the requirements for entitlement when benefit becomes payable under the award."

Invalidity benefit is payable weekly, and according to Mr Bowles, by reason of section 51(1)(d) regulations made pursuant to that section - and regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987 is such a regulation - cannot operate, so as to impose the condition that the claimant continue to satisfy the relevant requirements, for any period after the first weekly benefit has been paid. According to this construction, provided only the claimant's condition remains the same between the date of award and the due date for payment of the first weekly benefit, regulation 17(4) cannot be invoked thereafter to enable the award to be reviewed, notwithstanding that the claimant after the initial payment ceases to be incapable of work. If the award has been made for an indefinite period, the claimant will continue to receive benefit, notwithstanding he is capable of work, and, if benefit is to be terminated, resort has to be made to section 104(1) of the Social Security Act 1975 [now section 25(1) of the Social Security Administration Act 1992].

6. In support of his construction, Mr Bowles drew my attention to section 79(3) of the Social Security Act 1975, which was replaced by regulation 51(1) of the Social Security Act 1986. That particular provision read as follows,

" 79. (3) Regulations may make provision -

(a) for permitting, in prescribed circumstances, a claim for ..... invalidity benefit ..... to be made or to be treated as if made, for a period falling partly after the date of the claim;

(b) for permitting an award on any such claim to be made for a period after the date of the claim of not more than 26 weeks (or such shorter period as the Secretary of State may in case direct) subject to the condition that the claimant continues during that period to satisfy the requirements for the benefit in question;

(c)-(d) ...."

Mr Bowles contended that the old provision expressly required the claimant to satisfy the relevant requirements during the period of the award. The fact that different language had now been used, where there had been no such express provision, entitled him, he argued, to adopt the narrow interpretation he had. I reject his construction.

7. The effect of Mr Bowles' approach is to render section 17(4), for all practical purposes, otiose. I would be slow to reach that conclusion in the absence of the clearest of language. There is nothing in section 51(1)(d) requiring any such approach. The old section 79(3) restricted claims to a period not exceeding 26 weeks, and used language naturally appropriate to that restriction. Since the introduction of regulation 17 of the Social Security (Claims and Payments) Regulations 1987 awards are permissible for an indefinite period. Necessarily, the language of the section in the relevant Act enabling the making of regulations had to be adjusted accordingly. The change in itself could not be considered as suggesting that it was intended that claimants who ceased to satisfy the medical conditions after the first payment of an award of invalidity benefit should escape a review of their award. Section 51(1)(d) proceeds on the basis that invalidity benefit would, in respect of the relevant days of invalidity, be paid weekly in arrears, and when it says "subject to the condition that the claimant satisfies the requirements for entitlement when benefit becomes payable under the award", it clearly contemplates that the claimant must satisfy such requirements, in respect of the relevant days, as and when each week the benefit becomes payable. In other words, there is a continuing obligation to qualify, which subsists so long as benefit is payable i.e. throughout the duration of the award. In the present case, the adjudication officer did not consider that the claimant satisfied the requirements as from 21 January 1991, and he was fully entitled to invoke regulation 17(4).

8. Mr Bowles then went on to suggest that regulation 17(4) was inapplicable on another ground. He argued that review was not possible under that regulation unless the adjudication officer was satisfied that from the relevant date the claimant had ceased to qualify for benefit, but before he could be so satisfied, he had to put into effect a review, and a review was the very thing that could not be instituted unless and until it was established that the claimant had ceased to qualify. In short, by its very terms regulation 17(4) could not be used. I think the short answer to this absurdity is that in this context the word "reviewed", as used in the regulation, is equivalent to "revised". The words "review" and "revise" are nowhere defined in the statutory provisions. In the English language they are interchangeable, but a convenient convention has developed in this legislation of referring to "review" when a particular matter is to be looked at again and "revise" when an actual alteration is to be made. The terminology is often useful, but there is nothing sacrosanct about it. Indeed, even under section 104(1) of the Social Security Act 1975 [now section 25(1) of the

Social Security Administration Act 1992] the word "reviewed" appears, but not "revised". But, manifestly, the language of regulation 17(4) contemplates that in appropriate circumstances not only will a decision be "reviewed" but it will also be "revised". "Review" carries with it in that context the concept of "revise". Any other interpretation would lead to the further absurdity that regulation 104 itself could never be resorted to. For an adjudication officer could never determine whether any of the events there stipulated as triggering a review had in fact occurred without first reviewing the matter, something which he was prevented from doing because at that stage he would not know the outcome.

9. In my judgment, an adjudication officer is at liberty at any time to review an award in the sense of "look at it again". He needs statutory authority only when he wishes to "revise" it, in the sense of altering it. Accordingly, where an adjudication officer thinks that a claimant, who is in receipt of invalidity benefit, is no longer incapable of work, he is at liberty to look at the matter afresh, and if the claimant no longer satisfies the requirements for entitlement, he is under a duty to "review" the award, in the sense of revising or changing it. Accordingly, there is nothing to prevent the operation of regulation 17(4).

10. Mr Bowles then proceeded to make his final submission. He contended that the tribunal should have had before them the original awarding decision of the adjudication officer. The significance of this was, he argued, that the award might have been allowed on the basis that the claimant was incapable of all work, and not merely of his current occupation. If the award had been made on that basis, then it was incumbent on the tribunal to explain why it was that the claimant originally satisfied the requirement that he be incapable of work, but subsequently the adjudication officer was entitled to take the view that the claimant had ceased to qualify. I also reject that submission.

11. This jurisdiction is complex enough without calling upon a tribunal to consider aspects of the case which have never been in contention. Normally, an adjudication officer will make an award on the basis that the claimant is unfit to carry on his usual occupation. After the expiry of six months or so, he will enlarge the field of employment, and consider not merely the claimant's fitness for undertaking his usual occupation, but his fitness for all other occupations suitable in his case. The claimant in this instance suffered from a bad back. He was not, for example, a paraplegic, i.e. someone whose capacity for work of all sorts was clearly in doubt. There was nothing to suggest that the original adjudication officer had not followed the normal course, and considered the claimant's capacity for work solely by reference to his usual occupation. Certainly, there was no indication at the hearing that the adjudication officer had departed from normal practice, nor was Mr Bowles able to suggest to me that there was any realistic possibility of this situation having arisen. In those circumstances, there was no

need for the tribunal to direct their minds to the exact format of the original award. They were not to be entangled in a minefield of technical subtleties which had no relevance to reality. The system has to work. Tribunals have to hear many appeals during a session; they are concerned with ensuring that justice is done in real situations; they are not to be exposed to intellectual niceties of academic interest only, something which only serves to retard the hearing of cases with real issues.

12. But even if there had been in the present instance a serious contention that the adjudication officer who had made the original award had adjudged the claimant's capacity for work by reference to all occupations suitable in his case, and he had in fact adopted this course in awarding invalidity benefit, it must still be remembered that what the tribunal were concerned with was the claimant's capacity or incapacity for work from the date under consideration, and this must depend fundamentally on the medical evidence. It would be open to a tribunal, notwithstanding that an award had previously been made on the basis of unfitness for all work suitable in the claimant's case, nevertheless to say that, from the relevant date, the claimant's condition simply did not justify continued receipt of benefit. If the medical evidence so dictated, that would be the end of the matter. The past award may have been mistaken, or it may have been justified in the light of the claimant's condition at that time. But it could do nothing to override the medical evidence before the tribunal relating to the claimant's condition at the date from which his satisfaction of the requirements for an award was in doubt. In the present case, the tribunal were persuaded that the medical evidence on balance supported the view that the claimant was from 21 January 1991 not incapable of work. Although the claimant's own GP advised him to refrain from work, it is well established that the average GP may not realise that the criterion is not solely the claimant's normal occupation, which is what the GP usually has in contemplation, but all forms of work suitable to the claimant's abilities.

13. Although I reject the submissions of Mr Bowles, there is, nevertheless, one matter which does worry me in this case. As I said at the beginning, the adjudication officer misplaced the burden of proof. He considered that it was up to the claimant to establish his incapacity for work, when in the case of an indefinite award - and it is not in dispute that the award in this instance was indefinite - it was up to the adjudication officer to establish that from the relevant date the claimant had ceased to qualify for benefit. Moreover, in his submissions to the tribunal the adjudication officer repeated his error, and again misplaced the burden of proof. In the record of the tribunal's decision, there is nothing to show that they too misplaced the burden of proof. However, there was nothing likewise to show that they necessarily got the position right. Although it may be a gross unfairness to the expertise of the tribunal to suggest that they also misplaced the burden of proof, it is difficult to avoid the suspicion that they might have done so. In those circumstances, I think that the justice of the case

requires me to set aside the tribunal's decision, and to direct that the matter be determined by a differently constituted tribunal who will make the position perfectly clear that they have applied the burden of proof correctly. This way there will be no risk of the claimant's feeling a sense of injustice that his appeal may have been decided on a wrong basis.

14. Accordingly, I allow this appeal.

(Signed) D.G. Rice
Commissioner

(Date) 2 February 1993