JGM/BC

COMMISSIONER'S DECISION
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Commissioner's File: CS/101/1986

C A O File: AO 4226/V/86

Region: North Western

SOCIAL SECURITY ACTS 1975 TO 1985

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that invalidity benefit is payable to the claimant for the inclusive period from 19 November 1985 to 3 February 1986. This has the effect that sickness benefit actually awarded to the claimant for a period from the end of the above period should also have been invalidity benefit. Under section 12 of the Supplementary Benefits Act 1976 any benefit payable as the result of this decision will be subject to deduction for any supplementary benefit paid in respect of the same period that would not have been payable if the present decision had been given in the first place.

2. The claimant met with an industrial accident on 6 June 1973 in which he injured primarily his right big toe, when a pallet fell on it. He was working at the time as a storeman/fork-lift driver; and his working experience has been entirely in work of this class which involved fetching and carrying stores both manually and on fork-lift trucks.

3. The injury to his toe has given him continual trouble ever since, and recently he has undergone a number of operations on it and the toe has been removed, a matter which he says affects his balance. Invalidity benefit was paid to the claimant continuously from March 1983 down to the beginning of the period before me. Further claims were then disallowed for a period to 9 December 1985 after the claimant had been twice examined by medical officers of the Department of Health and Social Security who though finding the claimant incapable of working in the occupation of fork-lift driver in the one case, and storekeeper in the other, considered him capable of work within certain limits. The second officer pointed out that the claimant was unable to wear shoes on account of his toe (he appeared before me wearing sandals) and recommended an employment rehabilitation course. After the claimant had on 28 November 1985 appealed against this decision he submitted further claims for benefit covering the period from 10 December 1985 to 3 February 1986. These were not formally referred to the appeal tribunal with the notice in writing required by section 99(3) of the Social Security Act 1975, but the tribunal nevertheless ruled on them and they dismissed the claimant's appeal and rejected the claims on the further certificates which the adjudication officer produced at the hearing. The claimant has now appealed to the Commissioner. He presented his own case at the oral hearing before me.

4. I will take first the point that has been raised by the adjudication officer now concerned about the absence of any notice in writing of a reference of the subsequent claims. In Decision R(S) 3/80 at paragraph 4 I indicated that a tribunal had jurisdiction under section 102 of the Act (where it applied) to deal with matters that might have been but had not been referred to them subject to written notice being given to the claimant under section 99(3) of the Act. Since then a Tribunal of Commissioners in the decision on file CSS/19/1985 to be reported as R(S) 43/86 decided that there is a public interest in requiring references to be in writing such that it was not permissible for a claimant to waive the requirement of a written reference and thereby give a tribunal jurisdiction to determine the question put before them without such notice. I have therefore to consider whether it would be inconsistent with that decision to allow the requirements of section 99(3) to be by-passed by invoking section 102. The adjudication officer's representative at the hearing referred me to the Commissioner's decision on file CS/75/1986 given since the above decision of the Tribunal of Commissioners, in which, without referring in terms to that decision the Commissioner simply followed what I said in decision R(S) 5/80. He must presumably have considered that it was not affected by the decision of the Tribunal of Commissioners. I agree with that view but think that I ought perhaps to state my reasons.

5. Quite apart from the statutory rules governing the matter there is the rule of natural justice (which only the most explicit statutory words can oust) that a party must be given a proper opportunity of dealing with any matter put in issue; (see the penultimate paragraph of the judgment of Lord Denning MR in Regina v Deputy Industrial Injuries Commissioner, Ex parte Howarth reported as an appendix to decision R(I) 14/68. Section 102(1) of the Social Security Act 1975 (as amended) provides as follows:

> "Where a question under this Act first arises in the course of an appeal to a social security appeal tribunal or a Commissioner, the tribunal or Commissioner may, if they think fit, proceed to determine the question notwithstanding that it has not been considered by an adjudication officer."

There is nothing in section 102 to exclude the principles of natural justice. Plainly a point so arising cannot be determined without the person affected being given an opportunity of meeting it. Where, however, the point is a further claim for sickness or invalidity benefit in continuity with that or those already before a tribunal or Commissioner and exhibits no other point of difference than the relevant period, the requirements of natural justice will often be met by securing the person's consent to the further claims being dealt with. There can be no doubt that the Commissioner can deal with a point arising in the course of an appeal to him even though there is no provision at all for questions in general to be referred to him; (cf Decision R(I) 4/75 at paragraph 12 where it was said that the provision should be liberally interpreted). I can see no reason why a tribunal should not deal with such a point even though there exists a provision for referring questions to them which has not been invoked or has not been invoked correctly. Of course the case must be one that falls within the section. There must be an actual appeal properly before the tribunal or Commissioner; it must be a point that arises for the first time in the course of that appeal (which does not just mean in the course of the hearing of the appeal); and it has to be remembered that for the present at least section 102 does not apply to supplementary benefit appeals.

6. In the present case the claimant after he had appealed put in two further claims raising in the course of the original appeal substantially the same point in relation to further periods, it not being suggested that there was any difference between them. It would I think have been wiser for the adjudication officer to have formally referred at least the earlier additional claim to the tribunal and give the claimant notice thereof in the form AT2, instead of simply mentioning it there. But I consider that the tribunal had jurisdiction to deal with the further claims under section 102; and that, they having done so, I am bound to entertain the appeals both so far as it relates to the further periods and so far as it relates to the original period.

7. It emerged at the oral hearing before me, what was not known either to the two officers of the Department or to the appeal tribunal, that the claimant, instead of getting better as the medical officers seen to have expected rather grew worse. Sickness benefit maturing into invalidity benefit was restored from immediately following the end of the period before me. A medical officer of the Department on 14 July 1986 found the claimant incapable of work generally. He has undergone another operation and has been awarded mobility allowance. In these circumstances the adjudication officer's representative very fairly submitted to me that the onus of proof had shifted on to him to establish that during the period of 11 weeks before me there had been some remission from the acknowledged incapacity that had prevailed before and after it. He rightly submitted that he had not gone any significant part of the way towards establishing this. In my judgment incapacity has been established for the periods in question and the appeal succeeds. This means that invalidity benefit (without waiting days) should have been paid to the claimant rather than sickness benefit in the periods immediately following these before me. I understand that the claimant received supplementary benefit over these periods and it may be that in consequence no very large amount will become payable as the result of this decision.

(Signed) J G Monroe
Commissioner

Date: 24 November 1986