RAS/16/LM

Commissioner's File: CS/104/87

Region: North Western

SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR INVALIDITY BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. The claimant had an accident at work on 16 April 1985 when she fell and fractured her left ankle. She received sickness benefit followed by invalidity benefit from 17 April 1985 to 5 November 1986 when an adjudication officer decided she was no longer entitled to benefit because in his view she was no longer incapable of work by reason of some specific disease or bodily or mental disablement: sections 15(1) and 17(1)(a)(ii) of the Social Security Act 1975. She appealed against the adjudication officer's decision to a social security appeal tribunal. They said the weight of medical evidence was against her and disallowed her appeal. She now appeals to the Commissioner. She attended the oral hearing of her appeal which I had directed. She was not represented. The adjudication officer was represented by Mr K. Turner of the Office of the Chief Adjudication Officer. It quickly became apparent at the hearing that clarification was needed from the claimant's own doctor, Dr Giles, (who has supported her case throughout) of the doctor's opinion that the claimant was not fit for work. And it was also apparent that there were or might be difficulties with regard to what periods could be dealt with by this appeal. The hearing was then adjourned so that a further report could be obtained from Dr Giles and a further submission could be made as to the periods. Two brief reports have now been received from Dr Giles and submissions have been made with regard to the periods that are in issue. Both parties have made in writing whatever observations on the outstanding matters that they wish to. Neither party has asked for a resumption of the hearing and I see no reason to resume it.

2. With regard to the periods that are before me, the tribunal's decision related to the periods 6 November 1986 to 25 November 1986 and 26 November 1986 to 28 February 1987. There is, as the adjudication officer who is now concerned with the case points out, some doubt as to whether the tribunal had jurisdiction in respect of the second of those two periods. However they did deal with it and I take the view that both the periods mentioned are now before me. Next is the period 26 March 1987 to 29 May 1987. That was the subject of a further decision by the adjudication officer given after the tribunal's decision. And there has been no separate appeal in respect of that separate decision. I agree with the adjudication officer that I cannot deal with that period under section 102 of the 1975 Act (matters first arising) because the question of entitlement in respect of that period did not first arise before me. It arose before the adjudication officer who gave the decision in respect of it. The claimant continued to submit medical statements which covered the period 30 May 1987 to 9 January 1989. No decisions have been given in respect of that period. It is quite plain from her observations in reply to the adjudication officer's submissions that the claimant wants a decision in respect of all the time for which she has not been paid and I see no reason why I should not deal with the period 30 May 1987 to

9 January 1989 pursuant to section 102. In R(I) 4/75 the Commissioner said that that provision - then in the National Insurance Act 1966 - should be liberally construed and he gave a decision that an accident in 1965 was not an industrial accident when what had been the subject of the insurance officer's and then of the local tribunal's decisions was an accident in 1962. The later accident had not been referred to by the claimant in that case until the appeal to the Commissioner in respect of the decision relating to the earlier accident. The adjudication officer who is now concerned with this claimant's case submits that section 102 enables a tribunal or Commissioner to decide a question first arising in the course of an appeal only in respect of the period before them by way of the appeal. I do not see why, particularly having regard to what happened in R(I) 4/75, that limitation should be imposed and I do not accept it. In my view I can deal with the later period under section 102 and I exercise my discretion to do so.

3. Was the claimant incapable of work within the meaning of section 17(1)(a) of the 1975 Act during the periods with which I am concerned? That is a question of fact to be determined on the evidence. The matters to be kept in mind in dealing with that evidence are summed up in R(S) 7/60 - the classic statement of those matters - where the Commissioner said (paragraph 10) -

> "In approaching a decision in this case it is necessary to bear in mind the meaning of the expression "incapable of work" in the National Insurance Acts. In decision R(S) 11/51, a Tribunal of three Commissioners explained that "a person is incapable of work within the meaning of the National Insurance Act, 1946, section 11(2)(a)(ii) [now re-enacted in section 17(1)(a)(ii) of the Social Security Act 1975] if, having regard to his age, education, experience, state of health and other personal factors, there is no work or type of work which he can reasonably be expected to do. By "work" in this connection we mean remunerative work, that is to say, work whether part time or whole time for which an employer would be willing to pay, or work as a self-employed person in some gainful occupation". I would be quite prepared to agree that, in a case of temporary illness of short duration, a claimant's capacity for work should be judged by reference to his normal field of employment because he could not in such circumstances reasonably be expected to embark on a new career, but, when a claimant's disabilities last for a long period, the field of employment to be taken into account must be enlarged. Further, the fact that a claimant's past experience and means discincline him to consider many forms of work as appropriate for him does not enable it to be said, in relation to a claim for sickness benefit, that he cannot reasonably be expected to do that work, if, taking into account the facts named by the Commissioner, it is a type of work he could do, if willing to try it. Again, it must be borne in mind that the work need not be full time work."

On the evidence in this case, notwithstanding the opinions to the contrary, I take the view that the claimant was not in the periods in question fit for her former occupation of kitchen assistant. But this is a case where in my view it is reasonable to measure the claimant's incapacity against a wider field of work. And, in accordance with the usual practice, the adjudication officer has put forward a number of jobs with their descriptions which she says the claimant could reasonably be expected to do. Those jobs are toilet attendant, launderette assistant and ticket issuing clerk and what they are said to have in common so far as the claimant's work capacity is concerned is that they do not involve too much standing or walking. And that arises because two medical boards in connection with her claim for special hardship allowance said, in July 1986 and April 1987, that the claimant was then capable of remunerative employment which did not involve standing or walking for long periods. Against that the claimant's own doctor has throughout said that the claimant should refrain from work and in brief reports given in August 1988 and February 1989 has said that as a result of her injury in 1985 the claimant was "unable to work" and "unfit for any regular employment". It is I think fair to take the doctor as referring to the whole of the period in issue. And, the doctor had before her, at least before she wrote the second report, the jobs which the adjudication officer said the claimant ought to be capable of

doing. It ought also to be mentioned that the claimant has herself said repeatedly and at length that she is not able to work at all. I should also mention that when she was examined by medical officers of the Department of Health and Social Security in July and then in August 1986 both doctors reported that in their view the claimant was not only fit for work but fit for her former occupation. That view not only conflict with the view of the two medical boards but also with the medical advice obtained by the Health Authority in whose employment the accident happened - according to their letter of 13 March 1987 it was necessary to terminate the claimant's employment because that medical advice was that the claimant was "permanently unfit to return to [her] duties as General Kitchen Assistant".

4. As I have said the tribunal concluded that the weight of the medical evidence was against the claimant. It is however fair to say that they did not have before them either the letter of the health authority or the last two and more explicit reports from the claimant's own doctor. There is no doubt that the claimant had a nasty injury. It was of course accepted that she was unfit for work for eighteen months or so. And since then the doctors have been divided as to the claimant's state of fitness. On the one hand the examining medical officers who reported in 1986 seemed to think then that there was nothing wrong with the claimant. The two medical boards, in 1986 and 1987, agree with the claimant's employer's doctor that she was not fit for her former occupation and the boards go on to say that she could work if she could avoid long periods of standing or walking. The claimant's own doctor who has given statements to cover the whole of the period in issue to the effect that the claimant should refrain from work during those periods confirms, as I interpret her reports, that throughout that whole period the claimant has been unfit for all work. This is not an easy case but on balance and having regard to the relevant factors as explained in R(S) 7/60 on balance I come down on the side of the claimant's own doctor. That is because she has had the closest and most continuous contact with the claimant and also because she is the only one of the doctors who has given her opinion with reference to the whole of the period that is before me. I also of course take account of what the claimant herself says about her condition and as to whether she could do the jobs put forward by the adjudication officer. That means that I allow the claimant's appeal. Invalidity pension is payable from 6 November 1986 to 28 February 1987 (both dates included) and from 30 May 1987 to 9 January 1989 (both dates included). As I have explained I cannot deal with the period 2 March 1987 to 29 May 1987. The claimant may wish to consider whether she should apply to the chairman of her local appeal tribunal for leave to bring a late appeal in respect of that period.

(Signed) R A Sanders
Commissioner

Date: 5 May 1989