

RAS/5/LS

Commissioner's File: CS/118/1986

C A O File: AO 4372/V/86

Region: Wales & South Western

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

[ORAL HEARING]

1. My decision is that -

- (a) the decisions awarding invalidity benefit from 8 May 1984 to 8 April 1985 (both dates included) are to be reviewed but not revised and there has accordingly been no overpayment of benefit;
- (b) invalidity benefit is payable in respect of the days within the periods 9 April 1985 to 13 April 1985 and 15 April 1985 to 22 January 1986 (all dates included) as on those days the claimant was incapable of work by reason of some specific disease or bodily or mental disablement.

2. The claimant, a former miner, became incapable of work on 28 October 1983. He was diagnosed as suffering from pneumoconiosis and myxoedema. He was then in his early fifties. He received sickness benefit from 28 October 1983 to 11 April 1984 followed by an invalidity pension. By a decision issued on 15 March 1985 an adjudication officer reviewed the decisions awarding invalidity benefit for the period referred to in paragraph 1(a) above and revised them so as to make invalidity benefit not payable from 1 June 1984 to 8 April 1985 (both dates included). That was because following receipt of information and after an investigation confirming that the claimant had been engaged in a certain amount of manual work the adjudication officer took the view that the claimant was not incapable of work during that period. And repayment of benefit amounting to £1,494.68 was required as the adjudication officer was not satisfied that the claimant had throughout used due care and diligence to avoid the overpayment. The claimant appealed. The adjudication officer then referred to the appeal tribunal for their decision the question whether invalidity benefit was payable from 15 April 1985 to 22 January 1986 (both dates included). The tribunal upheld the decision of the adjudication officer and confirmed the requirement to repay the sum of £1,494.68. They also decided that invalidity pension was not payable in respect of the referred period because in their view the claimant was not incapable of work in that period. This present appeal is with leave which I granted. At the oral hearing requested by the claimant he was represented by Mr D. L. Williams of the Cornwall Money Advice and Welfare Information Centre. The claimant did not attend. The adjudication officer was represented by Mr J. Latter of Counsel instructed by the Solicitor to the Department of Health and Social Security.

3. I should first of all say that when the adjudication officer reviewed the decisions awarding benefit he did so by reference to regulation 11(2) of the Social Security (Claims

and Payments) Regulations 1979. Under that provision decisions awarding sickness and invalidity benefit fall to be reviewed if the claimant does not continue to satisfy the requirements for payment of benefit. The adjudication officer now concerned with the case submits that it would have been more appropriate for the review to have been carried out under section 104 of the Social Security Act 1975 on the ground that there had been a relevant change of circumstances since the decisions were given. At the hearing both representatives agreed that nothing turned on this. The issues and outcome were the same and it would gain nothing to overturn the review on the basis that it had been carried out under the wrong provision. I do not therefore propose to go further into that aspect. I should also say that though the period referred to the tribunal by the adjudication officer was as mentioned, the adjudication officer now concerned with the case submits and I accept that the periods in question include the first period referred to in paragraph 1(b) above.

4. There is no doubt that the claimant suffers from serious illnesses. He has as I have said pneumoconiosis and myxoedema. He also has a heart condition and arthritis in his spine. The medical evidence in respect of the periods in question is conclusively to the effect that the claimant is incapable of work. That however is not the end of the matter. Cases over many years have established that medical evidence of incapacity for work may be negated by evidence of a significant amount of actual work. But the work done will not count if it was trivial or negligible. Whether it was is the first issue in this case.

5. The tribunal's findings of fact included the following.

"...in June 1984 the claimant spent a number of days aquasealing a roof in Redruth, entailing climbing to the roof by means of a ladder, and working on the roof from the ridge downwards until the job was completed. [And] from June 1984 until February 1985 when seen by Mr Thomas, the claimant engaged in a pattern of working on average about two days a week and on those days for about two to three hours a day on repointing the walls of a building in Redruth. This work entailed mixing up mortar and a certain amount of work from a ladder...Mrs Compton paid the claimant small sums of money from time to time whilst he was doing the repointing work..."

Notwithstanding that in his written submissions Mr Williams had referred to the claimant's working on average for no more than just over 3 hours a week he agreed at the hearing that the tribunal's findings which I have set out were accurate. What is not entirely plain is for whom the work was done or what was paid for it. The house on which it was done belonged to the Mrs Compton referred to in the findings. She and the claimant had a mutual friend, a Mr Barrett. She says, in a statement made in connection with the Department's investigation, that the claimant was not paid for aquasealing the roof. The claimant had done that work as a "return favour" to Mr Barrett. She also said that for the other work she had paid £1.50 per hour and had paid an average of £5 per week since June 1984. The claimant's account was that he had not been paid an hourly rate. He told the investigator that he had asked for "dinner money" at £1.35 or £1.50 a day and that though there were weeks when he got £5 it was often £2 or £3. Unfortunately the claimant did not attend the hearing before me. Mr Williams said that this was on doctor's advice. So no further evidence was put before me on these or any other disputed matters. However, whether as so much an hour or as "dinner money" plus something extra, it is plain that the claimant received no more than what the tribunal referred to as "small amounts of money" and that that money may be thought to have been quite disproportionate to the nature of the work. As to its nature the claimant's account, as reported by the investigator, was that -

"...over the previous 10 months, he had pointed the stonework on the side of the property and had completed 80% of the 2 sides of the building that needed doing. He said that he had come in with Barrett to Bodgers Lodge as and when he felt like it and spent an average of 2 to 3 days a week (sometimes no days but sometimes 4 days in a

week), pointing the outside walls. He said that he had worked on the ladder but maintained that he had no fear of heights and this was like working on the ground to him. He mixed up a couple of shovelfuls of cement and climbed slowly up the ladder to work. He stated that providing he had a good grip, he could potter along at his own pace for as long as he felt able. He argued that his capabilities were shown by the amount which he had done since the previous June and that any tradesman would not employ him as he was far too slow to be properly employed."

In R(S) 11/51 a Tribunal of Commissioners said -

- "5. A person is incapable of work within the meaning of the [relevant legislation] if, having regard to his age, education, experience, state of health and other personal factors, there is no work or type of work 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."

If the building work which he did as described by the claimant represented the full extent of his capability of doing that kind of work I doubt very much whether it could ever sensibly have been suggested that the claimant was capable of work as a builder or builder's mate or whatever designation is appropriate to describe a person who does the kind of work in question. That of course is not what I have to decide. My concern is with whether the work which the claimant in fact did demonstrated that, despite the medical evidence to the contrary, he was capable of work. Was the work he did so trivial or negligible as not to demonstrate that he was fit for work? In this connection it is worthwhile looking at the medical evidence. In May 1985 an examining medical officer of the Department of Health and Social Security described the claimant as having an irregular heart beat with an enlarged heart. He was short of breath due to the pneumoconiosis. He had gout in his left leg and arthritis in his spine. At that time his thyroid state seemed satisfactory. That same examining medical officer reported again in August 1985. He described the illnesses previously referred to as "serious complaints...which made any likelihood of him being able to undertake regular employment at that time, or the foreseeable future, most unlikely. He confirmed that another examining medical officer who had seen the claimant in January 1985 found that he was suffering from the same conditions and was incapable of regular employment. He also said that he and that other examining medical officer considered that the claimant was "a genuine, well motivated man".

6. The tribunal dealt with this case extremely thoroughly and, as I have said, they decided against the claimant in respect of all the periods that were before them. In the reasons for their decision they said -

"The Tribunal is well satisfied from the evidence that the claimant has failed to establish that he was incapable of work throughout the period 1.6.86 (sic) up to 8.4.85, and has further failed to establish incapacity for work for the following period relevant to the decisions. Bearing in mind such cases as R(S) 5/53, and R(S) 2/61, it is clear to the Tribunal that the activities engaged in such as aqua sealing a roof and repointing walls of a building, could in no way be considered to be trivial or negligible. Moreover, they were clearly work of a sort that had remunerative value, and for which individuals would certainly be prepared to pay for."

The tribunal did of course have the advantage of seeing and hearing the claimant which I did not. But in this case nothing turns on that. The essential facts are not in dispute. It was not that the tribunal did not believe the claimant as to any of his evidence. It is a question of what they made of that evidence and I see no reason why, as I have done, I should not come to a different conclusion regarding what the evidence amounts to. I do that in regard to the first period, during which the work in question was actually done, because it seems to me the tribunal put too much emphasis on the kind of work involved and did not take

sufficient account of the way the claimant went about it. He took 10 months to do the repointing. As he said in his statement he could potter along at his own pace for as long as he felt able. And Mrs Compton said that he worked as and when the weather and his health permitted. In his statement to the investigator the claimant went on to say that he believed in leading as normal a life as possible and made it plain that when he could do odd jobs for people he would. The two examining medical officers both agree that he was genuine and well motivated. The picture I get is of a man who, despite the fact that he has such serious illnesses that the doctors agree unequivocally that he is not fit for work, wants to keep as active as possible and who potters along at different tasks for a minimal financial reward as and when he can. In my view the work he actually did in those circumstances was not such as to negative the medical evidence that he was not fit for work. It was in the way he did it and the time he took and the little money he got for it trivial or negligible. It follows that I must also disagree with the tribunal with regard to the other periods during which according to the evidence the claimant did not work at all and was covered by medical certificates as to his unfitness. In fact as Mr Williams pointed out the medical evidence seems to suggest that he may have got worse in the later periods.

7. Because of my conclusion that throughout the periods in question the claimant was incapable of work I do not need to deal with the alternative submission made by Mr Williams that the claimant was entitled to the benefit of regulation 3(3) of the Social Security (Unemployment Sickness and Invalidity Benefit) Regulations 1983 under which a person who does work which would otherwise cause him to be regarded as capable of work may nevertheless be deemed to be incapable. The claimant's appeal succeeds. My decision is as set out in paragraph 1. I note from paragraph 19 of the adjudication officer's submissions that the claimant has been in receipt of supplementary benefit since March 1985. If any problem arises in this regard from my decision that the claimant is entitled to invalidity benefit during the periods in question the case can come back to me with regard to the amount payable.

(Signed) R A Sanders
Commissioner

Date: 5 June 1987