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Region: North Eastern

**SOCIAL SECURITY ACTS 1975 TO 1984  
CLAIM FOR INVALIDITY BENEFIT  
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 19 February 1985 which confirmed a decision issued by the adjudication officer on 13 November 1984 and determined adversely to the claimant a reference by the adjudication officer. My decision is that invalidity benefit is payable from 5 November 1984 to 4 March 1985 (both dates included) because the claimant has proved that he was throughout that period incapable of work by reason of some specific disease or bodily or mental disablement. I direct that any amount which has been paid to the claimant by way of unemployment benefit in respect of that period or any part thereof shall be treated as having been paid on account of the arrears of invalidity benefit thrown up by this decision. Moreover, in consequence of the "linking" provisions, the decision of the adjudication officer issued on or about 16 July 1985, pursuant to which sickness benefit was payable to the claimant for the inclusive period 18 March 1985 to 1 May 1985, will fall to be reviewed.
2. The claimant is now aged 54. In 1967 he had a motor-cycle accident. Back pain developed about a year later. The claimant states that such pain has continued down the years, steadily getting worse. In 1977 he sustained a knee injury in consequence of slipping. Despite the excision of a sub-cutaneous nodule from the outer aspect of his left knee, that knee has remained painful. From 1974 the claimant worked as an assistant technician for British Rail. In 1979, however, disability in his back and knee caused him to take a job as a look-out man. This relatively light job he did until, in April 1984, he was retired on the grounds of ill-health.
3. The claimant became incapable of work on 22 September 1983. From then until the events with which this decision is immediately concerned he was continuously in receipt of statutory sick pay followed by sickness benefit followed, in turn, by invalidity benefit. The cause of incapacity was certified by his doctor as arthritis in the left knee. In respect of the knee injury a medical board has assessed disablement at 3 per cent for life.
4. In accordance with routine procedures the claimant was on 23 July 1984 examined by a medical officer of the Department of Health and Social Security. In the opinion of that medical officer the claimant was not capable of working at his regular occupation but was

capable of work within certain limits. That medical officer wrote:

"His back and knees limit his physical work but he would manage a wide range of mainly sedentary jobs. ERC has much to recommend it."

He added that the claimant was of average intelligence.

5. On 26 July 1984 the claimant's doctor issued a form Med 3 for 2 weeks. Against "Doctor's remarks" was laconically written "Within limits". The claimant did not avail himself of the offer of assistance by the disablement resettlement officer.

6. The claimant's doctor continued to issue forms Med 3 - but without any qualification. Accordingly, on 5 October 1984 the claimant was examined by a different medical officer of the Department. The opinion of that medical officer was largely in line with the opinion of the medical officer to whom I have referred in paragraph 4 above. The conclusion was that the claimant was "quite able for semi-sedentary-ground work". On 9 November 1984 the claimant's doctor issued a Form Med 3 for 4 weeks - this time repeating the qualification "Within limits". He issued another 4 weeks certificate on 6 November 1984, unqualified.

7. On the evidence then before him, the adjudication officer decided that invalidity benefit was not payable for the inclusive period 5 November 1984 to 3 December 1984. The claimant appealed to the appeal tribunal. On 4 December 1984 the claimant's doctor issued a form Med 3 for 13 weeks. The diagnosis was arthritis in knee and back pain. There was no qualification. The adjudication officer referred the period 4 December 1984 to 4 March 1985 to the appeal tribunal.

8. The claimant appeared at and gave evidence to the appeal tribunal. He had, in addition, written a letter thereto dated 12 February 1985. In that letter he had stressed that it would be hard to imagine a less physical job than that of look-out - yet he had become incapable of performing that job. Between 1977 and 1984 he had been off work for a total of approximately 220 weeks.

9. The claimant produced to the appeal tribunal a report dated 8 February 1985 and made by a consultant orthopaedic surgeon. I quote from the end of that report:

"His back problem is probably related to degenerative change of the lumbar spine giving either some facet joint pain or an instability problem and probably referred pain into the right thigh. Symptoms in the left knee may be related to a degenerate lateral meniscus or some degenerative change of the articular cartilage and probably in addition a neuroma of the soft tissues on the outer side of the knee. It is difficult to be sure of the exact diagnosis of the left knee without an arthroscopy and I would not recommend an invasive investigation of the knee simply to make a diagnosis when treatment is not likely to be helpful. There is evidence that he does have a genuine disability with the left knee in the form of  $\frac{1}{2}$ " wasting of the left thigh and wasting of the left calf. I accept that he does have a genuine disability with the knee and in combination with his symptoms in the back it would be difficult for him to hold down anything more than a light sedentary job such as a job in an office sitting down 90 per cent of the time. With the labour market in its present form this would be very difficult for him."

10. The claimant told the appeal tribunal that the stooping involved in light assembly work would cause him pain. Even washing up the dishes or peeling potatoes caused severe pain in his back. If he worked at a bench he would "soon tremble". He could not sit comfortably since his back muscles went into spasms. He had tried every treatment which he could find but with no success. He is recorded as having said:

"To sit in an office would crucify me, putting it bluntly."

11. The appeal tribunal confirmed the decision of the adjudication officer and decided the reference adversely to the claimant. Later, however, the chairman granted the claimant's application for leave to appeal to the Commissioner.

12. In his grounds of appeal to the Commissioner the claimant wrote:

★ [ "Considering the many years in this type of occupation, the lack of training, education and experience in any other form of work and my current age, I feel that it is unreasonable to expect me to carry out other types of work for which I am not physically or mentally suitable, or to which I could adapt."

18 [ But the most significant development since the appeal tribunal gave its decision is that, with effect from 18 March 1985, sickness benefit was awarded by virtue of arthritis in the claimant's left knee - and such benefit was still in payment on 22 August 1985 when the adjudication officer now concerned made her submission to the Commissioner.

★ [ 13. I have not found this an easy case. The claimant did not request an oral hearing before the Commissioner. Accordingly, I have not had the advantage of seeing or hearing him - and in such circumstances I do not readily depart from the view formed by an appeal tribunal which has seen and heard a claimant. All that said, however, I consider that, on the balance of probabilities, the claimant has made out his case. I disregard altogether the current state of the employment market. I am well aware that the test is not whether the claimant can get work but whether he can do work. Indeed, I have myself stressed that many, many times. But I am not obliged to lose sight of all reality. If the statutory test is pressed to its logical extremes, there is virtually nobody who is incapable of doing any work. A man lying in an iron lung might well be capable of dictating best-selling novels; and the same might be said of a quadriplegic. I do not consider that there is before me satisfactory evidence that the claimant has either the experience or the qualifications necessary for the type of job which has been (in only the most general terms) suggested as suitable to his case. Moreover, I am entitled to consider what realistic prospects the claimant would have of holding down such a job in the event that he should obtain one. His last years of service with British Rail were characterised by frequent and prolonged absences through incapacity. There is nothing in the medical evidence before me to satisfy me that that would not be the case in respect of any future employment. Above all, however, I am influenced by the fact that by 18 March 1985 the claimant was again incapacitated to the satisfaction of the Department. In all the circumstances of this case, it seems to me to be improbable that in the period before me (which amounts to 4 months) the claimant's physical condition was materially better than it had been in the year preceding that period or has been since the end of that period. In my view, he has established his case.

14. Accordingly, the claimant's appeal is allowed.

(Signed) J. Mitchell  
Commissioner

Date: 9th January 1986