90/94

MR/SH/3

Commissioner's File: CS/214/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. The decision of the Sutton social security appeal tribunal dated 3 December 1992 is erroneous in point of law. I set that decision aside and refer the case to a differently constituted tribunal for determination.

2. At the oral hearing of his appeal, the claimant appeared in person and the adjudication officer was represented by Mr Lewis Varley of the Office of the Solicitor to the Departments of Social Security and Health.

3. On 28 August 1992 an adjudication officer reviewed an earlier decision awarding invalidity benefit from 13 February 1991 and decided that from 26 August 1992 the claimant was not entitled to invalidity benefit because he was not incapable of work. The claimant appealed and on 3 December 1992 the tribunal dismissed his appeal. The chairman recorded very full reasons for the decision. It is necessary for me to set out only paragraph 3.

> " 3. Although his G.P apparently agrees with [the claimant] that he cannot undertake any of the suggested alternative jobs we do not accept this accords with the actualities. He is able to undertake lengthy walks, including yearly walking holidays. His G.P has not referred him for a consultant's opinion which indicates to us that his back problems are not as severe as [the claimant] suggests. He already does some voluntary work as an attendant at the Fairfields Hall and is able to do light DIY and gardening. The G.P's letters to his former employers do not say he is incapable of all work. They advise him to refrain from work "involving reaching to high shelves for boxes or files".

We therefore prefer the two medical officers' opinions, who having noted his impairments themselves both feel he is capable of work within limits and have suggested suitable jobs within these limits."

The claimant now appeals out of time against that decision with the leave of a Commissioner.

4. The claimant submitted that the tribunal had placed too much weight on his recreational activities and voluntary work. I do not entirely accept the claimant's submissions but there is one point which seems to me to be important. In May 1992 the claimant was asked to provide the Benefits Agency with information which was considered relevant to the assessment of his capacity for work. The relevant document appears at pages 8 to 11 of the bundle before me. On page 9, in answer to the question "Do you have any special interests or hobbies?", the claimant wrote in part:-

> "Walking (on 'good' days) - the first hour or so of the day from and including rolling out of bed determines whether I could have a 'good' day or will have a 'bad' one.
>
> When 'fit' I attend the Fairfield Halls in Croydon on 2 evenings a week as a steward (voluntary) to show customers or direct customers to their seats over a half hour period. (Only one or two duties between mid-December 1991 - end of April 1992 because of persistent back problems.)
>
> (I had to refrain from the 6/8 mile walks referred to in the RMO's report during this period.)"

On page 10, in answer to the question "Are you able to help with the housework - gardening - DIY etc at home?", he wrote:-

> "On 'good' days mow lawns with newly bought electric lightweight 'Flymo'. (Heavy gardening - bending, lifting taken over by my wife.) Potter in garden - quarter to half hour stretches with rests (sometimes floor rests) in between. Three or four sessions a day. Light shopping, eg. if run out of wheat and fibre flakes at breakfast go and buy another packet; prepare food.
>
> I tried to maintain DIY/internal decoration on limited scale but invariably finish with a heated pad applied to some part of the back and taking a course of 'voltarol'."

He also added the following information, referring to a suggestion by a medical officer that he could work as a traffic warden:-

> "Following the RMO's medical report after the 2 April examination I approached the Metropolitan Police re traffic warden. In view of the RMO's report his employment suggestion was regarded with disbelief. However, I was informed that the Metropolitan Police were equal

opportunity employers and as such employed the disabled. The disability had, however, to render attendance at work reliable but given the RMO's support and my medical history (confirmed by X-ray evidence) I would inevitably be unreliable. Thus I would be both a medical and financial liability and as such unemployable.

My local DRO, Mandy Maddock, supports the conclusion that I am unemployable because of the inevitable unreliability and also expressed concern that an RMO should displace such an absence of knowledge concerning an essential condition of employment."

5. In R(S) 9/79, it was said:-

"A person who, because of intermittent disablement, could perform the duties of a paid employment only on an average of, say, 3 days out of a 5 day working week would be virtually unemployable and in my view could rightly be held to be continuously incapable of paid work for the purposes of the Social Security Act notwithstanding that he would strictly speaking be capable of performing his duties for the rest of the time."

In my view, if the tribunal proposed to place weight on the claimant's ability to go walking and do voluntary work, the evidence on pages 9 and 10 raised a serious question as to whether any capacity for work the claimant might have was so intermittent that he could be held to be incapable of work the whole time. The tribunal's record of decision does not show that they deal with that issue. It may be that they overlooked the significance of pages 9 and 10 of the bundle of documents and that may have happened because it appears that the Benefits Agency had told the clerk to the tribunal that the claimant wished to withdraw his appeal and the tribunal were somewhat surprised when he attended the hearing to argue it. Mr Varley submitted that the tribunal had reached a decision that they were entitled to reach and their decision was therefore not erroneous in point of law. They may well have reached a decision that was open to them but I do not think that answers the point. In my view, in the circumstances of this case, the tribunal were obliged to consider whether the claimant was capable of work only intermittently and the chairman was obliged, by regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986, to record their decision in a way that showed they had considered that issue. Their decision is erroneous in point of law because the record of the decision does not show that the issue was considered.

6. The claimant also complained that the only reports from his own doctor contained in the bundle of documents were two Med 3 medical certificates, despite the fact that his doctor had furnished additional information to Dr. Peter Banky, the Divisional Medical Officer of the Department of Social Security. In particular, on 16 June 1992, she had written:-

"This patient is still having recurrent back pain. He has attended the Orpington Back School. Has attempted voluntary work but has been unable to give reliable service. He has investigated working as a traffic warden as suggested at his medical in April 1992 and would not be physically fit enough to cope with the necessary duties involved. He has asked for a further assessment and will be issued with further certificates until the matter is resolved."

That report contained information which the claimant might consider to be relevant to his appeal. The claimant became aware of its existence only because his doctor supplied him with a copy. In the light of that document I asked the adjudication officer to provide more information about the documentary evidence considered by medical officers and I asked why it was not placed before tribunals. As a result of those enquiries I received submissions from Mr Varley who placed before me a very helpful letter from Dr. Banky who is now known as a Manager (Medical Services).

7. It appears that the former Regional Medical Service was taken over by the Department of Social Security Medical Division in 1991 and has now become part of the Benefits Agency Medical Service. Under the earlier regime, the examining medical officer, known as a part-time referee, had a past history file - or back-file - in front of him. That would have contained documents relating to earlier examinations unless the last examination had been more than 18 months earlier, in which case the file would probably have been destroyed. Before an examination, the Regional Medical Service would send a form RM2 for completion by the claimant's general practitioner. The form asked whether a final Med 3 medical certificate had been issued. If one had not been issued, the doctor was asked to write a brief report on the claimant's history and present condition and to certify whether the claimant was fit to attend at a Medical Examination Centre. Finally the doctor was asked whether he or she wished to attend the examination. Having considered the past history file and the information on form RM2 and having examined the claimant, the part-time referee would complete form RM9, expressing an opinion on the question of capacity for work, and form DR 1(R), setting out findings in greater detail. Those forms would be sent to the local office and are the two documents usually included in the bundle of papers for tribunals. The part-time referee would also complete a form RM10 which was a standard letter addressed to the claimant's doctor in which the part-time referee would report his or her general findings on examination and inform the claimant's doctor of the opinion given to the local office on the question of capacity for work.

8. I can understand that it was felt unnecessary to provide adjudication officers with all the material before part-time referees. However, it seems to me to be highly unsatisfactory that that material, which is fairly readily available, should not be disclosed to a claimant when the claimant challenges the adjudication officer's decision which has been based on the part-

time referee's opinion. That opinion should not be presented as though it had been reached solely on the basis of a brief examination of the claimant. In particular, forms RM2 seem important. In many cases disclosure of those forms would merely show that the part-time referee's opinion was based on rather firmer grounds than the claimant had suspected. However, there would be some cases where form RM2 contained a reasoned assessment by the claimant's doctor with which the part-time referee had disagreed but upon which a claimant, with no other medical evidence except Med 3's, might wish to rely. There would also be cases where a claimant wished to challenge a part-time referee's opinion on the ground that it was based on factually incorrect information provided by his or her own doctor. It seems to me that tribunals are likely to be greatly assisted by having all the documents that were before the part-time referees and that without those documents they cannot properly evaluate the referees' opinions. Dr. Banky wrote:-

> "The RM2 certainly formed part of the decision making procedure, but there was never any intention of deliberately withholding it; it is more likely nobody thought of using or copying it."

I entirely accept that forms RM2 were not deliberately withheld but, in my view, they ought now to be disclosed with other material that has been before the part-time referees.

9. Mr Varley referred to the fact that forms RM2 used to be headed "in confidence", although they are no longer. I accept that confidential reports should not be freely copied. They might include harmful information such as might be withheld from a claimant under regulation 9 of the Social Security (Adjudication) Regulations 1986. However, the maker of a report can be asked by the Benefits Agency to permit its disclosure and, in any event, the general effect of the Access to Health Records Act 1990 is that a claimant who makes an application in writing to the 'holder' is entitled disclosure of any medical report made on or after 1 November 1991 unless the report includes information likely to cause serious harm to physical or mental health.

10. The claimant also relied on the advice received by him from the disablement resettlement officer. That advice was given orally. In a direction dated 2 June 1994, I indicated that I wished to hear argument as to whether, if adjudicating authorities know that a claimant has been advised by a disablement resettlement officer, there is any duty to obtain that officer's opinion. Mr Varley pointed out that a claimant would only ~~be~~ referred to a disablement resettlement officer after an adjudication officer had determined that he or she was not incapable of work. Therefore, there could be no question of the adjudication officer obtaining the disablement resettlement officer's opinion before making a decision. He further submitted that it was unnecessary for a tribunal, in the exercise of their inquisitorial jurisdiction, to obtain an opinion from a disablement resettlement officer because such an officer was not

medically qualified and, in any event, was concerned with the general likelihood of the claimant attending work. That is not the same question as the tribunal must consider because the state of the local labour market is not material to the tribunal's decision although the disablement resettlement officer cannot ignore it. Adjudication officers do obtain information about types of employment carried on in the locality from the Department of Employment and part-time referees consider that information when giving their opinions. That, argued Mr Varley, is sufficient. I accept Mr Varley's submissions on this point. A tribunal may take account of evidence obtained by the parties from a disablement resettlement officer but they are not obliged to obtain such evidence themselves.

11. Having found the decision of the tribunal to be erroneous in point of law on the ground identified in paragraph 5, I have considered whether to determine the case myself or refer it to a differently constituted tribunal. I have decided to adopt the latter course for two reasons. Firstly, contrary to the understanding of the last tribunal, the claimant had been referred to a consultant although he was not given an appointment until some time after the tribunal hearing. It seems desirable that the consultant's report should be before the body determining whether the claimant is incapable of work. The claimant did not have a copy of the consultant's report at the hearing before me but he said that he could obtain one from his general practitioner. Secondly, there is no up-to-date medical evidence and, as any decision must cover the whole period from 26 August 1992 until the date of decision, both parties should have the opportunity of obtaining such evidence. I therefore give the decision set out in paragraph 1 above.

(Signed) M. Rowland
Commissioner

(Date) 22 August 1994