

15 JUN 1988

TOC/2/LM

Commissioner's File: CS/9/1988

Region: North Western

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

Name:

Appeal Tribunal:

Case No:

1. Our decision is that the award of invalidity benefit to the claimant for the inclusive period 27 May 1986 to 13 October 1986 was not to be reviewed because the requirements for payment during the period 12 August 1986 to 13 October 1986 did not cease to be satisfied, as provided for by regulation 11(2) of the Social Security (Claims and Payments) Regulations 1979, and invalidity benefit is payable from 12 August 1986 to 13 October 1986 (both dates included). The adjudication officer's appeal fails.

2. This is an appeal by the adjudication officer against the decision of the Liverpool social security appeal tribunal given on 9 July 1987. The appeal initially came before the Chief Commissioner who adjourned the oral hearing and directed that the appeal was to be argued before a Tribunal of Commissioners. The appeal was the subject of an oral hearing before us on 1 and 2 November 1988. The adjudication officer was represented by Mr N. Butt of the Solicitor's Office in the Department of Health and Social Security and Ms Mary Heery of Merseyside Welfare Rights Advice Centre represented the claimant.

3. Section 17 of the Social Security Act 1975 (the Act) deals with the determination of days for which benefit is payable, and in relation to the present appeal it is section 17(1)(a)(ii) which is material. It reads as follows:

"(1) For the purposes of any provisions of this Act relating to unemployment benefit, sickness benefit or invalidity benefit -

(a) subject to the provisions of this Act, a day shall not be treated in relation to any person -

...

(ii) as a day of incapacity for work unless on that day he is, or is deemed in accordance with regulations to be, incapable of work by reason of some specific disease or bodily or mental disablement,

('work', in this paragraph, meaning work which the person can reasonably be expected to do);"

In so far as the machinery governing the forward allowance of invalidity benefit is concerned, section 79(3) of the Act is material and regulation 11 in Part II of the Social Security (Claims and Payments) Regulations 1979 [SI 1979 No. 628] (the Regulations) deals with the award of such benefit and made provision for its review. We set out the section and the regulation later in the course of this decision. It is to be observed that the Social

Security (Claims and Payments) Regulations 1987 (SI 1987 No. 1968) revoked Part II of the 1979 Regulations. Section 79(3) was repealed by the Social Security Act 1986 with effect from 11 April 1983. It is to be noted, however, that regulation 17(4) of the later regulations replaces the rule contained in regulation 11(2) of the earlier regulation. Section 104 of the Act provided at the relevant time:

"104.- (1) Any decisions under this Act of an adjudication officer, a social security appeal tribunal or a Commissioner may be reviewed at any time by an adjudication officer or, on a reference from an adjudication officer, by a social security appeal tribunal, if -

- (a) the officer or tribunal is satisfied and, in the case of a decision of a Commissioner, satisfied by fresh evidence, that the decision was given in ignorance of, or was based on a mistake as to, some material fact; or
- (b) there has been any relevant change of circumstances since the decision was given; or
- (c) the decision was based on the decision of -
  - (i) a question for determination by the Secretary of State under section 93 or 95, or by the Attendance Allowance Board under section 105(3), or
  - (ii) either of the disablement questions (section 108) in relation to industrial injuries benefit or severe disablement allowance,

and the decision of that question is revised under section 95(2) or 95(3) (Secretary of State) or section 106 (Attendance Allowance Board) or section 110 (medical board).

4. The claimant, who was born on 4 September 1940, is a fireman by occupation. He worked as such since he was 23 years of age. He has a history of back pain extending back to 1974. He sustained an injury to his right wrist in about 1968. He became incapable of work in 1984 following an industrial accident on 17 June 1984, and he received statutory sick pay until 15 August 1984. This was followed by sickness benefit from 16 August 1984 to 2 January 1985 and invalidity benefit from 3 January 1985. His incapacity was given variously on his sick notes as prolapsed intervertebral disc, slipped disc, back injury and arthritis of the back. On 28 May 1986 the adjudication officer awarded invalidity benefit for the period 27 May 1986 to 13 October 1986. By a decision on review issued on 26 August 1986 another adjudication officer reviewed that decision and his revised decision was that invalidity benefit was not payable from 12 August 1986 to 13 October 1986 (both dates included) because the claimant had not proved that he was incapable of work by reason of some specific disease or bodily or mental disablement. As appears from paragraph below, this review was clearly under regulation 11(2) of the Regulations. There had been an earlier purported review on 22 August 1986 under section 104(1)(b), but reliance on that was abandoned by the adjudication officer in his written submission to the social security appeal tribunal at box 6 paragraph 1. On 9 September 1986 the claimant appealed to the tribunal.

5. At the hearing of the appeal before the tribunal on 9 July 1987 the members found as a fact that the claimant on or about 27 August 1986 had been awarded invalidity benefit from 13 October 1986 on his doctor's certificate, and further that two different medical officers of the Department of Health and Social Security who examined the claimant on 2 July 1986 and 11 August 1986 respectively found him not unfit for work within limits. The tribunal allowed the claimant's appeal on the ground that the adjudication officer was not entitled

review the decision awarding invalidity benefit for the period 27 May 1986 to 13 October 1986 and that benefit was payable for that period. The reasons for the tribunal's decision were stated in the following passage:

"We consider this appeal was precisely similar on the facts, to those in decision R(S) 4/86 and therefore accept the argument of M/s Williams that the A/O was not entitled to review on either of the specified grounds. We do not understand the apparent conflict between R(S) 4/86 and what is precisely stated in Reg 11(2) of the C and P Regs but assume that the Commissioner in R(S) 4/86 must have taken that Reg into account."

The chairman of the tribunal granted the adjudication officer leave to appeal against the decision.

6. Mr Butt has argued that the initial award was capable of review under regulation 11(2) of the Regulations. He pointed to the provisions of regulation 11(1) which enables the adjudication officer to make a forward allowance in respect of a benefit which is a day to day benefit and to the power to review such an award contained in regulation 11(2). He has referred us to the enabling power in section 79(3)(c) of the Act. He submitted that section 104 has nothing to do with such circumstances. Ms Heery submitted that section 79(3) does not envisage a separate power of review and that the reviews provided for by section 79(3) and the regulations made thereunder are reviews under section 104. She further argued that if Mr Butt's interpretation of section 79(3) is correct, then the principle of finality in an award is broken, and she referred to section 117 of the Act, which deals with finality of decisions. She also submitted that no provision is made, either by section 79 or the regulations made thereunder, as to who is to carry out the review. On this question Mr Butt has referred us to the provisions of section 98 of the Act. We have heard argument also as to whether the adjudication officer correctly reviewed and revised the initial decision on the assumption that he had jurisdiction so to do. Both Mr Butt and Ms Heery have addressed us on the question of whether or not it was open to the adjudication officer in any event to exercise the right of review conferred on him by section 104 of the Act in the circumstances of this case.

7. It is important to emphasize that the initial decision awarded a forward allowance in respect of invalidity benefit. It was this award which was the subject of the review decision issued on 26 August 1986. Such review decision read as follows:

"I have reviewed the decision of the adjudication officer awarding invalidity benefit from 27.5.86 to 13.10.86 (both dates included) because the decision awarded benefit for a period after the date of claim and the claimant did not continue to satisfy the requirements for payment of that benefit, and in respect only of the period 12.8.86 to 13.10.86 (both dates included) my revised decision is as follows:- Invalidity benefit is not payable from 12.8.86 to 13.10.86 (both dates included) because the claimant has not proved that he was incapable of work by reason of some specific disease or bodily or mental disablement."

It is to be observed that the adjudication officer referred to the initial decision having awarded benefit for a period after the date of claim and then went on to say

"... the claimant did not continue to satisfy the requirements for payment of the benefit".

The words which we have quoted clearly refer to regulation 11(2) of the Regulations

(3) Regulations may make provision -

- (a) for permitting, in prescribed circumstances, a claim for unemployment benefit, sickness benefit, invalidity benefit, or severe disablement allowance to be made, or to be treated as if made, for a period falling partly after the date of the claim;
- (b) for permitting an award on any such claim to be made for a period after the date of the claim of not more than 26 weeks (or such shorter period as the Secretary of State may in any case direct) subject to the condition that the claimant continues during that period to satisfy the requirements for the benefit in question;
- (c) for the review of any such award if those requirements are found not to have been satisfied at some time during the period of the award;
- (d) for the disallowance of a person's claim for unemployment benefit, sickness benefit, invalidity benefit or severe disablement allowance on any grounds to be treated as a disallowance of any further claim by that person for that benefit until the grounds of the original disallowance have ceased to exist."

Regulation 11 as amended so far as is material provided:

"11.-(1) Subject to the following paragraphs, where a medical certificate has been issued in respect of the person named therein ("the claimant") -

- (a) a claim for sickness or invalidity benefit or severe disablement allowance based on the medical certificate shall, unless in any case the Secretary of State otherwise directs, be treated as if made by the claimant for the period specified in that certificate;
- (b) on any such claim the benefit may be awarded for the whole or part of that period after the date of the claim but not exceeding 26 weeks or such shorter period as the Secretary of State may in a particular case direct;
- (c) if on any such claim the benefit is awarded for part only of the period in respect of which the claim is treated as if made further decisions in accordance with paragraph (1)(b) awarding such benefit may be given on the same claim.

(2) Any decision awarding benefit by virtue of paragraph (1) shall be subject to the condition that the claimant continues to satisfy the requirements for the payment thereof during the period to which the award relates and if these requirements are found not to have been satisfied at some time during the said period the award shall be reviewed."

Section 79(3) and the Regulations conferred power on an adjudication officer to make forward award, but subject to the condition that the claimant continued to satisfy the requirements for the payment of benefit during that forward period, and it required the award to be reviewed if the requirements were found not to have been satisfied some time during the period. Regulation 11 afforded a method of dealing with forward allowances in respect of sickness and invalidity benefit and severe disablement allowance and provided for the machinery by which such forward allowance was made and controlled. The review

as long as he satisfies the conditions for the payment thereof. A similar safeguard in respect of a forward allowance of unemployment benefit was provided for by regulation 12(4) of the Regulations (also since replaced).

8. The question for the tribunal on appeal from the review decision was whether or not the adjudication officer had correctly exercised the jurisdiction under regulation 11(2) as to whether the claimant had or had not continued to satisfy the requirements for the payment of the benefit from 12 August 1986. If the claimant had done so then the adjudication officer could not review the award. The members of the tribunal did not address their minds to that question at all. Instead they decided the case on the basis that the requirements of section 104 of the Social Security Act 1975 had not existed at the time of the review. In doing so they accepted the argument of the claimant's then representative that the adjudication officer could only review if he was satisfied that the initial decision was given in ignorance of, or was based on a mistake as to, some material fact, or that there had been a relevant change of circumstances. In the opinion of the tribunal there could only be a review when one or other of the pre-conditions for a review specified in section 104(1) had been satisfied. In holding as they did they followed the principle of law enunciated by the Commissioner in R(S) 4/86. In that case the adjudication officer purported to review the original decision on the ground that it was based on a mistake as to some material fact and the Commissioner decided the case by reference to the provisions of section 104. There is nothing in the decision to show that the Commissioner's attention was drawn to section 79 of the Act or to regulation 11 of the Regulations. Reviews of this kind were again dealt with by the same Commissioner in CS/131/1986, where he considered the inter relationship between section 104(1) and regulation 11(2). He said at paragraph 7:

"7. There can be no question of the adjudication officer's having any power to review the original award covering the period from 31 October 1985 to 25 December 1985 in reliance on section 104(1) of the Social Security Act 1975. As regards section 104(1)(a) there was no primary fact as to which the adjudication officer was either ignorant or mistaken (see R(S)4/86 paragraph 4; R(I)3/75 paragraph 9; and the observations made by Brown J in Regina v. Secretary of State for Social Services, Ex parte Loveday cited in the Appendix to the decision on Commissioner's file CM/170/1985, to be reported as R(M)5/86). Moreover, there can be no question of different medical opinion constituting a relevant change of circumstances within section 104(1)(b) (see R(S)4/86 paragraph 6; R(S)6/78 paragraph 3). However, the adjudication officer seeks to rely on regulation 11(2) of the Social Security (Claims and Payments) Regulations 1979 [S.L. 1979 No.628]."

He then set out regulation 11(2) and referred to the adjudication officer's contention that although there was no power to review under section 104(1), it was open to him to review under regulation 11(2). The Commissioner said:

"9. Manifestly, the extent of the power to review is contained in the enabling provision, namely section 104(1) of the Social Security Act 1975. There is no provision in that particular section, or for that matter elsewhere in the Act, enabling those powers to be extended by regulation. It follows that regulation 11(2) must take subject to the exhaustive definition of the power of review contained in section 104(1). If a decision cannot be reviewed under section 104(1), it cannot be reviewed under any subordinate legislation. In other words, regulation 11(2) cannot enlarge the adjudication officer's power to alter his original decision. If, as in the case here, a new medical opinion does not constitute grounds for review under section 104(1), it is of no avail under regulation 11(2). It follows from this that the adjudication officer had no power to review or revise his original award."

In our judgment that passage does not represent a correct statement of the law, clearly it

review of the award if the requirements for benefit were found not to have been satisfied during the period of a forward award. In our judgment the jurisdiction under regulation 11(2) of the Regulations was independent of section 104 of the Act and required review when the requirements for entitlement ceased to be satisfied. The jurisdiction exercised by virtue of the regulation was independent of, but concurrent with and alternative to the power of review under section 104. This was recognised by the Commissioner in R(S) 6/78, a review case on the basis of medical opinion. Our conclusion is that the tribunal based its decision on an approach which was erroneous in law, namely that the adjudication officer's jurisdiction under regulation 11(2) was dependent on the requirements of section 104(1) being satisfied. Such is an error of law upon which we set aside the decision.

9. Both Mr Butt and Ms Heery have agreed that the instant case is one where it is desirable that we should exercise the power conferred by section 101(5)(a)(ii) of the Act. We considered it expedient to make findings of fact and to give the appropriate decision in the light of them. The tribunal did not make any findings as to whether the claimant continued to satisfy the requirement for benefit. This is the factual question upon which the case turns. The requirement is that provided for by section 17(1)(a)(ii) of the Act, namely whether the claimant was incapable of work by reason of some specific disease or bodily or mental disablement during each day in the relevant period. The finding on that question finally disposes of the case. The claimant was present. Ms Heery desired that he should give evidence, and it was rightly accepted by Mr Butt that there was no bar to our taking evidence from the claimant. In the particular circumstances of this case we thought it right to do so. We accept him as a witness of truth. In addition to the testimony of the claimant we have the material which was before the tribunal, in particular the medical reports and certificates. We also have all the earlier medical reports which were neither before the adjudication officer at the time of the review nor the tribunal. For the purpose of regulation 11(2) we are required to find on that evidence whether during the relevant period the claimant continued to satisfy the requirement as to incapacity. If he did not then the condition requiring a review of the award operated. It is rightly accepted by Mr Butt that in the circumstances the burden of proving that the claimant ceased to satisfy the requirement is on the adjudication officer.

10. We have before us a medical certificate issued by the claimant's general practitioner on 11 October 1985 (page 11 of the case papers) advising the claimant to refrain from work for one year on account of arthritis. We also have evidence that for a number of years before that the claimant suffered from back trouble variously described as a slipped disc prolapsed intervertebral disc and arthritis of the back. It was on the basis of the medical certificate of 11 October 1985 that the adjudication officer made a forward award of invalidity benefit up to 13 October 1986. On 2 July 1986 the claimant was examined by a medical officer of the Department of Health and Social Security and we have the report of the doctor of that date. His opinion was that the claimant was incapable of work at his regular occupation of a fireman but that he was capable of work within certain limits. It is to be noted that the doctor was of opinion that there was substantial impairment in relation to kneeling, bending, lifting/carrying and that there was a nil function as to climbing ladders; in addition there was a slight impairment in the claimant's ability to walk and stand. He then went on to say that in his opinion the claimant could not do heavy work or work involving prolonged sitting, standing or walking. However he thought that the claimant could do "semi-sedentary light work". It was further stated by the doctor that the claimant could not stand, sit or walk for long. On 11 August 1986 the claimant was examined by a different medical officer of the Department of Health and Social Security. He also was of opinion that the claimant was incapable of his regular work but capable of work within certain limits. He found the claimant to be handicapped because he could not bend or sit for long, and like the first medical officer he was of the view that working conditions which involved prolonged sitting should be avoided. He further stated that outdoor work in wet weathers should be avoided. He also found that the claimant was substantially impaired in kneeling, bending and lifting/carrying. He said that the claimant wore a surgical corset and had limited movement in his spine but with these constraints the claimant could do light

work. The evidence of the Department's doctors is not unfavourable to the claimant's case. While it is true that both doctors expressed the view that he is capable of light work or, as described by one of them, "semi sedentary light work", both state that he has substantial impairment in relation to kneeling, bending and lifting/carrying and slight impairment in climbing stairs, and the view was expressed that he could not stand or sit for long. Whether or not the claimant was incapable of work is a question of fact to be determined by us on all the evidence, not just the medical evidence. It is not in dispute that the claimant was incapable of his usual work, nor is it disputed that the time had come when it was reasonable to measure his incapacity against a wider field of work. We have to ask ourselves whether there was any work which the claimant could reasonably be expected to do at the material time, and "work" in this context is remunerative part-time or full-time work for which an employer would be willing to pay. The Department's doctors were of opinion that the claimant was capable of light work or "semi sedentary light work"; but in view of their findings as to his impairment, it is difficult to envisage his being able to engage in work for which an employer would be willing to pay. The adjudication officer put forward suggested occupations for consideration by the tribunal and Mr Butt has relied on these. It was submitted that the claimant could work as a gate keeper, or as a security officer, or be employed on general reception duties or work as a weighbridge attendant. When deciding on this aspect of the case we must have regard not only to the claimant's state of health but also to his age, education and experience.

11. The claimant in evidence told us that he had pain in his back all the time, it varied in degree and when it became bad he had to go to bed. He said that he would have difficulty in actually travelling to work and was unable to sign on at the unemployment exchange unless his wife drove him in her motor car. In addition to the pain in his back he had pain in his right wrist and even when it was supported by a strap there was little strength in it. It had been suggested at one time that he should have a plastic wrist fitted, this was early on and when he was still employed as a fireman. He told us that he left school when he was aged 15 years. He worked as a moulder at a foundry until he was 23 years of age. He then became a fireman and had worked as such for twenty two years. He had no experience of clerical work other than making entries in a log at the fire station. The claimant maintained that he was incapable of doing the work involved in the occupations suggested by the adjudication officer. He was adamant that it would not be possible for him to either sit or to stand for very long, and he emphasised that it was necessary for him to change his position to lessen pain. In answer to Mr Butt he said that it would not be possible for him to bend to look under vehicles. He could not carry parcels. He would be unable to apprehend or restrain a person. He could not sit outside for any length of time and the length of time he could so sit would depend upon the weather. His wrist would not allow him to do much writing. He was right handed. He understood that the duties of a weighbridge attendant involved sitting all day in a box.

12. Ms Heery told us that she had made enquiries in Liverpool concerning the occupations suggested by the adjudication officer. We heard her in evidence as regards these. The work of a gate keeper was in the main outdoor work and involved carrying parcels. The work of a security officer involved handling aggressive people on occasions and checking vehicles and the loads thereon. General reception duties entailed considerable sitting and telephonic duties. There was only one public weighbridge in the area and in order to be employed there an applicant had to pass a test. The work was outside and involved an amount of sitting. The private weighbridges in the area, at the docks and garages, involved duties other than those for weighbridge attendant and in any event was outdoor work. We have no hesitation in accepting the evidence of Ms Heery in its entirety.

13. We have examined the job descriptions in the appendix to the adjudication officer's submission to the tribunal with care, and we have had regard to the evidence of the claimant's representative which supplements such descriptions; and in our judgment none of the occupations suggested by the adjudication officer is such as the claimant was

experience was that of a fireman, and that he is now and was at the material time unable to do manual work or work which involves climbing, or sitting or standing in the one position for any length of time. We have further taken account of the fact that he cannot bend or do heavy work and that his condition would be aggravated by outside work in the cold weather. It is of significance that the medical reports, in so far as they relate to the claimant's ability to function, corroborate his evidence of what he can and cannot do. While each of the Department doctors was of opinion that the claimant could do light work it is to be noted that neither report was directed towards any specific category of work, and the medical reports of the doctors were not directed towards the categories of work which were suggested to the adjudication officer. It seems to us that the claimant's medical condition, coupled with his limited education, rules out his doing during the material time any of the categories of work now suggested. In our view the claimant continued to satisfy the requirements for payment of invalidity benefit during the period 12 August 1986 to 13 October 1986 (the dates included) and the award to him was not to be reviewed.

14. In so far as the concurrent jurisdiction provided for by section 104(1)(b) of the Act is concerned it suffices to say that the facts as found reveal no change of circumstances, therefore the alternative jurisdiction could not have properly been exercised by the adjudication officer.

15. Our decision is as set out in paragraph 1 hereof and accordingly the adjudication officer's appeal fails.

(Signed) Leonard Bromley  
Chief Commissioner

J B Morcom  
Commissioner

J J Skinner  
Commissioner

Date: 29 November 1988