

## SOCIAL SECURITY ACTS 1975 TO 1986

## CLAIM FOR INVALIDITY PENSION

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [REDACTED]

Appeal Tribunal: Durham

Case No: [REDACTED]

1. This is a claimant's appeal, brought by leave of a chairman of the social security appeal tribunal, against a decision of that tribunal dated 8 November 1989 which confirmed a decision issued by the adjudication officer on 19 April 1989. My decision is as follows:

- (1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.
- (2) The case is referred to a differently constituted appeal tribunal for determination in accordance with the principles of law set out in this decision.

2. The appeal is supported by the adjudication officer now concerned upon a ground which I consider to be well based. Pursuant to a procedure which has been relatively recently introduced in the Office of the Social Security Commissioners, it has been afforded a substantial measure of priority. The object is, of course, to speed upon their way to ultimate determination those cases in which all parties are agreed that the sole function of the Commissioner is to set aside the relevant tribunal decision, so that the matter can go back to the adjudicating authority to which Parliament has entrusted the basic fact-finding function. I shall, accordingly, be as brief as possible. There are, however, certain aspects of the case in respect of which some comment by me may be of assistance to the fresh tribunal before which this case comes.

3. The case is of a type which is very familiar to the adjudicating authorities. Until the events with which I am directly concerned, the claimant had been since 19 April 1986 continuously in receipt of sickness benefit followed by invalidity benefit. It is common ground that he is no longer - and never again will be - fit for his erstwhile occupation of semi-skilled machinist; but it is also incontrovertible that by 1989 the time had come when the adjudicating authorities were entitled to enlarge the field of employments which could be considered as suitable (subject to physical and mental capacity) for the claimant. On 19 April 1989

the adjudication officer issued a decision which reviewed and revised the "indefinite" decision pursuant to which the claimant had been awarded invalidity benefit from 9 August 1989 - and decided that invalidity benefit was not payable from and including 20 April 1989 because "[the claimant] has not proved that he was incapable of work by reason of some specific disease or bodily or mental disablement". (It will be noticed that the decision took effect as from the day after it was issued. The past tense - "was incapable" - seems somewhat incongruous; but the incongruity is hardly of the essence of this appeal!) On 8 November 1989 the appeal tribunal confirmed the adjudication officer's decision.

4. The claimant was born in September 1947. He has stated that he acquired no educational qualifications whatsoever. After leaving school he worked for three years as a general labourer in a brick-yard. He then served for eight years as a stoker in the Royal Navy. For four years thereafter he worked as a hod carrier on a building site. It was not until 1977 that he obtained employment as a machinist - milling and drilling various iron castings. He had to give up that work on 21 March 1986. He has not had employment since then.

5. I do not wish to waste time by going into too much detail. The claimant's disabilities can, however, be summarised thus:

- (a) Bilateral tennis elbow, for which he wears elbow supports.
- (b) Well controlled diabetes mellitus.
- (c) Dermatitis of the hands.
- (d) Pain and cramp in the fingers. (There is a diagnosis of early Dupuytren's contracture of the right hand.)
- (e) Deterioration of hearing.

6. To those of us who have spent much of our lives working, in essence, with our minds, that may not seem a very inhibiting list of disabilities. But during the ten years for which I have been a Commissioner it has been borne in upon me that there are members of our society who really have nothing to offer on the labour market other than their physical strength and stamina. (Our society still urgently requires such persons.) When disabilities intervene so as to undermine such physical strength and stamina, such persons can become, from the practical point of view, unemployable. I am not to be taken for one moment to be suggesting that the claimant in this case falls into that category - for I have neither seen nor heard him. But the general consideration is one which will, I hope, be borne in mind by the tribunal which rehears this case - which will, I anticipate, both see and hear the claimant. The papers by themselves can give an inadequate impression. As the Commissioner has emphasised more than once, we are in the world of reality. I have had before me claimants who -

- (a) were once robust, cheerful and strong;
- (b) have lost their physical prowess through accident or degeneration; but
- (c) have been adjudged to be employable in some less physically demanding job (doorman, storekeeper or the like).

But after seeing and hearing such claimants for 15 or 20 minutes it has become quite obvious to me that no employer with the slightest regard for the reputation and smooth running of his business would employ the relevant claimant in any of the suggested jobs. And in reaching that conclusion I have, of course, ignored the current climate of unemployment. I have sought to imagine a situation where, in the labour market, supply was balanced by demand.

7. In the present case at least eight medically qualified experts have commented upon the claimant's condition. I particularise:

- (a) On 13 May 1988 and 28 September 1988, respectively, the claimant was, in the direct context of his entitlement to invalidity benefit, examined by two different medical officers of the Department of Health and Social Security. Each considered him to be incapable of working at his regular occupation but capable of work within certain limits. The second of those medical officers specifically accepted as suitable four types of work which had been put forward by the adjudication officer, namely fee collector, gate-keeper, radio telephone operator and security officer.
- (b) It appears that the claimant obtained an award of disablement benefit, assessed at 5% for life from 6 September 1987, in respect of prescribed disease D5 (non-infective dermatitis of external origin). On 11 July 1988 an adjudicating medical authority reviewed that assessment on the grounds of unforeseen aggravation - and increased the assessment to 8% from 17 February 1988 for life. The papers contain nothing which bears directly upon those adjudications; but they do contain a copy of the advice completed by the adjudicating medical authority on 11 July 1988 in the context of an initial claim for reduced earnings allowance. The two members of the adjudicating medical authority were satisfied that the claimant would be permanently incapacitated from following his regular employment. But they laconically answered "Yes" to the question "Is the claimant capable of remunerative employment?". Since, as I have indicated, I have not seen the full findings of the adjudicating medical authority (which had on that day raised the assessment from 5% to 8%), I cannot

usefully speculate upon the degree to which that authority was aware of the disabilities to which I have referred in sub-paragraphs (a), (b), (d) and (e) of paragraph 5 above.

(c) Apart from a slight hiccup in May 1988 (just after the earlier of the examinations to which I refer in sub-paragraph (a) above), the claimant's own doctor has consistently signed "open" forms Med 3, almost invariably for periods of 13 weeks. The relevant diagnosis has almost always been "tennis elbow", although "arm injuries" and "dermatitis of hands" also appear. On 2 December 1988, in answer to a letter written by a medical officer of the Department, the claimant's doctor indicated that -

(i) he considered the tennis elbow to be the principal factor preventing the claimant from getting back to work; and

(ii) there seemed little prospect of the tennis elbow's further responding to treatment.

(d) On 7 December 1988 the claimant's consultant orthopaedic surgeon also answered a letter which had been written to him by the same medical officer of the Department. The surgeon's report makes no explicit comment upon the claimant's capacity for work. It is factually objective. It is pessimistic in respect of the prospects of improvement in the elbows. I quote:

"He was seen again on 27 May 1987 when the left elbow remained almost the same after his previous surgery and had not improved, in fact it was worse. It was decided that the right elbow will not be operated on .... At the last outpatient visit, he was still having pain over the outer side of the elbows radiating down the forearms indicating that in addition he had some traumatic inflammation of his tendons of the forearms, as a result of lifting and constant use of his right hand and fingers caused him increased pain."

(e) In the summer of 1988 the claimant was interviewed by what the local adjudication officer describes as "the ASSET Team of the Department of Employment" - adding that the resulting report was forwarded to the local office by the disablement resettlement officer. I have to confess that, despite my long experience of this type of case, the ASSET Team is as unfamiliar to me as it appears to have been to the local adjudication officer. By way of assistance, however, the local adjudication officer adds:

"Enquiries of the Disablement Resettlement Officer have established that the ASSET Team is

a mobile team comprising in this case of an occupational psychologist, a state registered nurse, a doctor from the Employment Medical Advisory Service and technical instructors. This team does similar work to an Employment Rehabilitation Centre but assesses the person in his home environment. The report indicated that [the claimant] was incapable of manual work and should have his invalidity benefit reinstated."

I return to the report below. At this stage, however, I quote from a letter dated 4 October 1988 which was written to the claimant by the doctor who had represented the Employment Medical Advisory Service on the ASSET Team:

"Furthermore, you also developed repetitive strain injuries of both elbows and forearms, and this developed over a period of time whilst lifting large castings onto a rotary milling machine. Surgical intervention has been necessary to alleviate the symptoms but with limited success ....

Examination revealed a healed Dermatitis and considerable weakness in grip of both hands, forearms and arms. Please find attached a copy of your set Action Plan which also confirms that you would be unable to carry out manual operations in the future, and that the only possibility of work would be in a communicative manner [my underlining], and I therefore commented that I would find you virtually unemployable at present. Furthermore I could see no value in an ERC type course as had previously been suggested."

I make two comments:

- (i) The ASSET Team is quite clearly a limb of the Department of Employment - and must be presumed to have specialised knowledge of who is employable and in what capacity.
- (ii) I have in the past frequently said that if the disablement resettlement officer (with the specialised knowledge which I have presumed the ASSET Team to have) regards a particular claimant as unemployable, that view should be accorded considerable weight. It must be borne in mind that the medical officers of the Department normally see the respective claimant for a mere 15 or 20 minutes; and they cannot be expected to share the disablement resettlement officer's knowledge of the type of person that employers will, in practice, consider employing.

(f) Before the appeal tribunal which gave its decision on 8 November 1989 was a letter dated 15 June 1989 written, on Health and Safety Executive writing-paper, by a doctor who signed herself as "Employment Medical Adviser". The letter was addressed to the local disablement resettlement officer. It was primarily directed to the claimant's medical suitability for a full course of rehabilitation. I quote therefrom:

"I noted that [the claimant] had been assessed at Durham ASSET Centre on 8 8 88 ....

He was judged to be unfit for manual work. He was advised to develop his counselling skills while retaining his invalidity benefit ....

He has pins and needles in his left hand. Rotating his forearms is painful.

He cannot lift heavy weights because of pain and cramp in his fingers.

He has reduced sensation in his hands so that he cannot use hand tools. Often he drops things, including a pen when he writes. He cannot fasten his own shoelaces and he cannot dig his garden....

Shortly before this he had developed a rash on the backs of his hands.

Despite medical treatment the rash has persisted. It now affects the whole of both hands. The rash fluctuates in severity. When it is active his fingers swell and are stiff. [The claimant] has early Dupuytren's contracture of his right hand. This is not particularly disabling at present ....

[The claimant's] hearing is beginning to deteriorate. He now needs to turn up the sound on his TV. He was distressed by using a telephone during his work assessment.

In short, I found that [the claimant's] health has not improved since last year.

I agree that he is unfit for any form of work involving manual handling, either at a workbench or in an office.

Certainly he is able to converse but I doubt whether this skill could be developed during a course at Billingham ERC.

[The claimant] told me that he had lost his

invalidity benefit seven weeks ago. Quite rightly he is appealing for the restoration of his benefit ....

In the circumstances I can see no point in offering [the claimant] further assessment or rehabilitation at Billingham ERC."

All that, of course, was written less than five months before the appeal tribunal held its hearing - and almost nine months after the second, and last, examination of the claimant by a medical officer of the Department.

8. In the preceding paragraph I have gone to some trouble to indicate the several views of the eight medically qualified experts who have, in the papers, commented upon the claimant's condition. Only four of those eight have expressed a clear view that the claimant is capable of some sort of remunerative work. Two of those four were the members of the adjudicating medical authority which gave the advice, dated 11 July 1988, in respect of reduced earnings allowance; and I have in paragraph 7(b) above indicated both the terseness of the adjudicating medical authority's view and the total lack (in the papers) of any findings or grounds in support thereof. The other two of the four were the examining medical officers of the Department. Their views are certainly not to be ignored; but the later of the two reports was made almost seven months before the local adjudication officer gave his decision and more than a year before the appeal tribunal gave its. What is, in my view, striking about this case is the degree to which the claimant derives support from the two doctors to whom I refer in sub-paragraphs (e) and (f) of paragraph 7 above, those being doctors who were discharging their duties to the Department of Employment.

9. Before I leave this aspect of the case, I say a word more about the report made on 10 August 1988 by the ASSET Team. The second paragraph thereof reads thus:

"[The claimant] has been advised to avoid frequent lifting and carrying, climbing ladders, working at heights, grease, dirt, and the usual industrial solvents. Discussion of his physical condition elicited one possible area of future employment for him, namely that of caring work, in particular advising people of benefit entitlements. With this in mind a plan of assessment was devised and carried out." (My underlining)

Tests were carried out - and the report proceeds thus:

"On a test of practical reasoning ability and potential to learn new skills, [the claimant] scored average for 31 to 45-year olds in the general population. Verbal, numerical and symbolic reasoning was below average."

I do not wish to be taken to be in any way deriding the efforts

of the ASSET Team. I am sure that it approaches its work with conscientious sympathy. I do feel, however, that my comments in paragraph 6 above are apposite. Entitlement to social security benefits is a matter with which I am not unfamiliar. I repeat that I have neither seen nor heard this claimant; but it does seem to me that to consider him as a potential adviser in respect of benefit entitlement is to depart altogether from the real world. In fairness both to the local adjudication officer and to the appeal tribunal, let me stress at once that they did not so consider the claimant.

10. In the event, the local adjudication officer considered the claimant to be capable of working at any of the four jobs (ie fee collector, gate-keeper, radio telephone operator and security officer) which had been specifically mentioned by the medical officer of the Department who had examined the claimant on 28 September 1988 (cf paragraph 7(a) above). The decision or decisions awarding invalidity benefit from 9 August 1988 were reviewed - and revised so as to make that benefit not payable from and including 20 April 1989. The claimant carried his case to the appeal tribunal. He attended the hearing thereat, being represented by a lady from the local Welfare Rights Unit. His appeal was disallowed.

11. From the chairman's note of evidence, as recorded on the relevant form AT3, it is clear that the claimant's representative made individual submissions in respect of each of the four types of job which were under consideration. Unfortunately, however (as the adjudication officer now concerned points out in paragraph 10 of her submission), the appeal tribunal recorded neither adequate findings of fact nor adequate reasons directed to the claimant's capacity for any specific job. There is a comment to the effect that the deterioration in the claimant's hearing would not prevent him from doing the work of a radio operator. But there is no further comment upon his capacity for doing such work; and no specific reference whatsoever to any of the other jobs. Such a generalised approach might well have sufficed in the days before the decisions in R(S) 6/85 and R(S) 7/85; but it will not suffice now. There is clear error of law. In the light of the medical views which I have summarised in paragraph 7 above, this can certainly not be regarded as a case in which it is virtually self-evident that there is some kind of remunerative work of which the claimant is capable.

12. Further submissions are made in the grounds of appeal to the Commissioner which were furnished under cover of a letter dated 11 January 1990. Since the issue which I have discussed in paragraph 11 above of itself justifies the setting aside of the appeal tribunal's decision, I need not here to enter into those further grounds. In so far as they contain matters which go to the merits of the claimant's case in general, those matters will, I am sure, be fully deployed before the fresh tribunal.

13. There is, however, one further aspect of the case upon which comment is called for - and it is not a mere technicality. The



Social Security (Claims and Payments) Regulations 1987 came into operation on 11 April 1988. I quote from regulation 17 thereof:

"(1) Subject to the provisions of this regulation and of section 20(6) of the Social Security Act 1986 (family credit) a claim for benefit shall be treated as made for an indefinite period and any award of benefit on that claim shall be made for an indefinite period.

....

(4) In any case where benefit is awarded in respect of days subsequent to the date of claim the award shall be subject to the condition that the claimant satisfies the requirements for entitlement; and where those requirements are not satisfied the award shall be reviewed."

In the days before 11 April 1988 a fresh claim was made - and adjudicated upon - each time that the relevant claimant submitted a form Med 3. Since he had, on each such occasion, to prove his incapacity for work, the burden of proof was always upon him. But when the adjudication officer is considering whether to review and revise a subsisting decision, it is upon him that the burden lies to establish that such course is justified. (This is made clear in paragraph 6 of decision on Commissioner's file CS/154/1989 - to be reported as R(S) 3/90.) As I have indicated, this shift in the burden of proof is of more than merely technical significance. It was lost sight of by the appeal tribunal whose decision is before me. I quote from the (somewhat jejune) record of the findings of fact:

"The issue before the Tribunal was whether, in the light of the medical evidence and the submissions made at the hearing, the claimant had proved incapacity for all work."

And the recorded reasons ended thus:

"The Tribunal decided that the claimant had failed to prove incapacity for work."

The fresh tribunal must be careful to treat the burden of proof as lying upon the adjudication officer.

14. Before the fresh tribunal will also be -

(a) the further claim submitted by the claimant on 2 May 1989, and

(b) the potential offsetting of unemployment benefit.

(Paragraphs 15 and 16 of the submission of the local adjudication officer refer.)

15. The claimant's appeal is allowed.

(Signed) J Mitchell  
Commissioner

Date: 24 September 1990