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SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR SICKNESS/INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [redacted]

Appeal Tribunal: Barnsley

Case No: [redacted]

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 12 May 1989 which varied a decision issued by the adjudication officer on a date which does not appear from the copy of the relevant form AT 2 which is before me and which determined adversely to the claimant three references made to the tribunal by the adjudication officer. My decision is as follows:

(1) The decision of the appeal tribunal dated 12 May 1989 is erroneous in point of law and is set aside.

(2) Pursuant to section 101(5) of the Social Security Act 1975 (as amended) the case is referred to the appeal tribunal for determination in accordance with the principles of law set out and referred to in this decision.

2. This case is of a type with which over my years as a Commissioner I have become very familiar. Indeed, in the days - prior to 6 April 1987 - when the Commissioner was at liberty (in contributory benefit cases) to retry the facts whether there had or had not been error of law on the part of the appeal tribunal, I frequently held oral hearings at which this type of case was explored from beginning to end. Despite all that experience, nevertheless, I have not found them becoming any easier! This case is no exception. However, the adjudication officer now concerned supports the claimant's appeal upon grounds which I consider to be well founded. The rehearing of the evidence is likely to be a lengthy exercise. Since the relevant witnesses are in the Barnsley area, it is clearly expedient that the rehearing should be before the appeal tribunal. In those circumstances, the less I say about the merits of the case the better. I trust that neither party will be affronted if I discharge my role in the matter relatively briefly.

3. The claimant is now aged about 56. In 1985 he was made redundant from his employment as a senior clerk of works with British Coal's civil engineering department. Preceding that

redundancy (which may well have been voluntary) he had suffered absences from work in consequence of a prolapsed intervertebral disc. He became incapable of work on 9 June 1986. From then until 20 December 1986 he received sickness benefit. That was followed by invalidity benefit until 21 May 1987. There then appears to have been a period of better health. But by 21 October 1987 he was worse again. From then he received invalidity benefit once more.

4. For many years the claimant had been the secretary of the local Working Mens's Club & Institute. (That had always, of course, been a spare-time occupation.) Whilst drawing the aforesaid benefits he continued to perform certain of the secretary's duties. I make no attempt here to go into the details of what that work involved or for how long in a week or at what intervals the claimant performed it. That will be for re-investigation by the fresh appeal tribunal. Eventually - and there is potential controversy about the year, let alone the precise date - that work was disclosed by the claimant to the Department of Health and Social Security. To anyone with any acquaintance with this corner of social security law it will by now be apparent that we are in the field (one might almost say minefield) of regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983. That regulation - and its predecessor in the amended 1975 version of those Regulations - has enjoyed its full share of discussion in decisions of the Commissioner. And there are still facets of its interpretation upon which total unanimity has not yet been attained. One such facet presents itself in this case; and in paragraph 7 below I give to the fresh appeal tribunal my own direction as to how the issue should be approached.

5. The appeal tribunal which sat on 12 May 1989 gave a decision which was, for the most part, unfavourable to the claimant. The practical outcome was a finding that the sum of £2427.40 had been overpaid to the claimant and was recoverable by the Secretary of State. (The phrase used by the tribunal was "Repayment is required ....". That, of course, was a harking back to the repealed section 119(1) of the Social Security Act 1975. The oversight is still to be found in tribunal decisions. It is not, of itself, vitiating.) It is clear from the long and careful entries on the relevant form AT3 that the tribunal approached its task conscientiously. I myself do not regard the errors of law as being in any way glaring. In any event, this was a complex case in a notoriously hazardous field.

6. Since I am not myself retrying this matter, I now resort to a measure of shorthand; for all those who are interested in this decision will either already be acquainted with the documents or will, in due course, have the documents before them. I comment upon the following paragraphs of the careful and helpful submission dated 17 April 1990 and made by the adjudication officer now concerned:

Paragraphs 6 and 7

These paragraphs do indeed identify a blemish in the tribunal's decision. However - as the adjudication officer herself agrees - that blemish is not, of itself, vitiating. The fresh tribunal will, of course, make explicit that which the former tribunal left to be implied.

Paragraph 10

The adjudication officer's observations in respect of the inclusive period from 23 March 1987 to 21 May 1987 are obviously well founded. Deeming does not enter the picture for that period. What is involved is a straightforward evaluation of the conflicting medical evidence. Such evaluation will, of course, be assisted by (a) the claimant's own evidence and (b) evidence of such work as he may actually have done in that period. Was or was not the claimant actually capable of work then?

Paragraph 13

The issue of remuneration, so far as material, is one of fact. Before the fresh tribunal the claimant's representative will, no doubt, call evidence to substantiate the matters averred at the bottom of page 2 of his observations dated 16 May 1990.

Paragraph 15

The inclusion of the 1987 Christmas bonus in the sum found to be recoverable is the least of the problems thrown up by this appeal! The fresh tribunal will take note.

Paragraph 17

This is now water under the bridge. The decision in CG/53/88 was reversed by the Court of Appeal. As I have said in paragraph 1 above I do not know exactly when the local adjudication officer gave his decision in this case; but it must have been after 6 April 1987, the date when section 53 of the Social Security Act 1986 came into force.

Paragraph 18

The date upon which disclosure of the work done as secretary was made to the Department is obviously a matter of dispute. That will have to be determined by the fresh tribunal. In his observations dated 16 May 1990 the claimant's representative seems to take May 1987 as being beyond dispute. Perhaps it is; but not by virtue of the two letters referred to by the representative. One of those letters was written by the claimant himself - in November 1988. The fourth paragraph of the Department's letter dated 25 November 1988 proves nothing and admits nothing. It seems to me to do no more than express an act

of grace on the Department's part. But all that is for the fresh tribunal.

This paragraph of the adjudication officer's decision also draws attention to the need for an express decision in respect of the period from 15 to 21 May 1987.

7. I have left to a separate paragraph of my own the vexed issues posed by the words "work .... which he has good cause for doing" (regulation 3(3)(ii) of the Unemployment, Sickness etc Regulations 1983). This is not the place for a learned review of the various interpretations and nuances which the Commissioner and the superior courts have sought to give to those apparently simple words. I have, whilst preparing this decision, looked again at each of the cases to which the adjudication officer now concerned and the claimant's representative have expressly referred. I attempt to set out my guidance to the fresh tribunal in brief, comprehensible terms:

(a) Despite views which I saw expressed in the early eighties, I have never considered - and do not now consider - that "good cause", in this context, is confined to "therapeutic" reasons. An emergency might well amount to good cause for doing work at a time when the relevant claimant's health was such that he would not <u>normally</u> be expected to work. But I cannot, for my part, see why so broad and general a phrase as "good cause" should be restricted to therapy and emergencies. Obviously (as the Commissioner said in paragraph 4 of CS/42/1987): "If the motive or predominant motive for doing the work is that of earning or making a profit there would not be good cause." But where the work is done without any such predominant motive, it seems to me that Parliament has intentionally left the field open to the sensible discretion of the adjudicating authorities.

(b) R(S) 6/86 involved an officer of the ambulance service certified as incapable of work by reason of nervous debility. Whilst off work he performed the duties of a local authority councillor. The Tribunal of Commissioners was primarily concerned with the earnings element in regulation 3(3). In paragraph 7 of the decision, however, it is recorded that the relevant adjudication officer had conceded that the claimant had had good cause for doing his councillor's work. That concession does not appear to have affronted the Tribunal of Commissioners. I know no further details other than that sub-paragraph 6 of the quotation in paragraph 3 of the decision indicates that the claimant contended that his local authority duties were "of a therapeutic nature".

(c) Among the Commissioners there has, again, been lack of unanimity as to the time when a doctor's confirmation of "therapeutic value" should be given if such

confirmation is to carry any weight. I myself agreed with CSS/5/1987 at the time when it was given - and I still do. It seems to me that the questions which fall to be answered are these:

(i) At the relevant time, did the claimant do the work in issue because he believed that it would have a therapeutic effect?

(ii) If so, was that a belief which could reasonably be held by a man without medical expertise?

(iii) Has a doctor, in possession of the full facts, subsequently confirmed that there was <u>medical</u> validity in that claimant's view?

An affirmative answer to each question will avail a claimant, subject to sub-paragraph (d) below.

(d) In all this, of course, the adjudicating authority has a discretion, indicated by the word "may" in regulation 3(3).

8. Before the fresh tribunal the claimant's representative will have the full opportunity of deploying the other points which are set out in the observations dated 16 May 1990. There will also be opportunity to ensure that there are before that tribunal all the documents which the representative regards as relevant.

9. The listing of appeal tribunal hearings is not a matter for me. It would be unfortunate, however, if this somewhat complex case could not be completed in the course of a single day of hearing. I doubt if that will be possible if only an hour or two is allotted to the hearing.

10. The claimant's appeal is allowed.

(Signed) J Mitchell
Commissioner

Date: 19 December 1991