RAS/6/LS

Commissioner's File: CS/42/1987
C A O File: AO 4496/S/86
Region: London North

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

Name: [redacted]
Appeal Tribunal: Oxford
Case No: [redacted]

[ORAL HEARING]

1. My decision is that -

(a) the decisions of the adjudication officer awarding sickness benefit from 26 November 1985 to 29 April 1986 (both dates included) should be reviewed and revised so as to make sickness benefit not payable during that period because the claimant was not incapable of work by reason of some specific disease or bodily or mental disablement and in the circumstances was not to be deemed to be so incapable: sections 104(1)(a), 14 and 17 of the Social Security Act 1975 and regulation 3 of the Social Security (Unemployment, Sickness, and Invalidity Benefit) Regulations 1979;

(b) the sum of £465.76 paid in respect of sickness benefit from 26 November 1985 to 18 March 1986 is required to be repaid because it would not have been payable if the decisions on the review had been given in the first instance and it has not been shown that in the obtaining and receipt of benefit the claimant throughout used due care and diligence to avoid overpayment: section 119 of the Social Security Act 1975.

2. The claimant, a van-driver/salesman employed by Currys, the electrical goods retailers, had an accident at work on 27 April 1985. As a result of the accident in which he seriously injured his ankle he became unfit for work and received sickness benefit from 26 November 1985. Before then he had tried to get back to his old job but his ankle would not stand up to it and he could not continue. During the whole of the period in issue in this case there were medical statements issued by the claimant's doctor confirming that he should refrain from work. When he filled out his claim form for sickness benefit on 19 December 1985 the claimant declared that he had not worked during the period of sickness which he had stated and he was paid benefit on the basis of the medical statements issued from time to time. Then on 11 March 1986 the Department sent the claimant a form to fill out in connection with invalidity benefit which would be payable if the claimant was still sick after 14 April 1986. On that form in which the claimant was asked to list all the work he did between 6 April 1985 and 5 April 1986 he said that he was developing a small business which was not expected to be profitable for approximately 2 years. Following inquiries in the course of which the claimant gave a more detailed statement concerning the business to which he had referred an adjudication officer reviewed the decisions awarding sickness benefit from 26 November 1985 to 29 April 1986 and required repayment of benefit amounting to £470.62 (the correct amount is apparently £465.76) paid down to

17 March 1986. The claimant appealed. The tribunal upheld the adjudication officer's decision. This present appeal is with leave of the tribunal chairman. The claimant attended the oral hearing which he had requested. He was not represented. The adjudication officer was represented by Mr J. Latter of Counsel instructed by the Solicitor, Department of Health and Social Security.

3. The first matter for consideration is whether the claimant was incapable of work during the period in question by reason of some specific disease or bodily or mental disablement: section 17(1)(a)(ii) of the Social Security Act 1975. The section defines "work" for this purpose as work which the claimant could reasonably be expected to do. I have mentioned that the claimant was covered by medical statements issued by his doctor throughout the period. That however is not conclusive. If the claimant actually did a significant amount of work during the period that may negative the medical evidence: R(S) 2/74. Part-time work counts for this purpose: R(S) 13/52. In his statement to the Department the claimant said "I also have a small part time job as a distributor of Amway products. I purchase goods from a distributor and then redistribute to other distributors whom I have found. I earn bonus on a points system. I run this business in partnership with my girlfriend...I have been running the business with her since 8 May 1985...on average I would spend 6/8 hours a week with Amway certainly no more than 10 hours...". Now it seems to have been the case that after taking account of expenses in running the business the claimant made little or nothing out of it. But he certainly hoped to in the future. Necessarily the first few months or so were spent in learning the business and building up a clientele. In my view, notwithstanding the relatively few hours involved and the minimal if any profits, the claimant's activities in connection with the business did amount to work which was not so trivial or negligible that it could be ignored in deciding whether he was capable of work. I agree with the adjudication officer and the tribunal that the claimant was not incapable of work during the period in question.

4. That is not the end of the matter. Regulation 3(3) of the Social Security (Unemployment, Sickness, and Invalidity Benefit) Regulations 1979 provides that -

> "(3) A person, who is suffering from some specific disease or bodily or mental disablement but who, by reason only of the fact that he has done some work while so suffering, is found not to be incapable of work by reason thereof, may be deemed to be so incapable if that work is -
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> (i) work which is undertaken under medical supervision as part of his treatment while he is a patient in or of a hospital or similar institution, or
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> (ii) work which is not so undertaken and which he has good cause for doing,
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> and from which, in either case, his earnings do not ordinarily exceed £20.00 a week."

This means that if the claimant has worked (which he did) and satisfies either sub-paragraphs (i) or (ii) and has not exceeded the earnings limit (which he did not) there is a discretion for incapacity to be deemed: R(S) 3/86. There is no evidence in this case which would make (i) applicable. If (ii) is to apply it must be shown that the claimant had "good cause" for doing the work. There is very little case law on the meaning of good cause in this context. In R(S) 4/79 and R(S) 4/83 it was accepted that good cause in sub-paragraph (ii) and its predecessor provision was made out where the work in question was encouraged by the claimant's doctor for therapeutic reasons; so that sub-paragraph (ii) becomes a somewhat diluted version of sub-paragraph (i). But whether good cause can be made out for other than therapeutic reasons does not seem to have been decided. R(S) 3/86 concerned a different point with regard to the construction of regulation 3(3). The case went to the Court of Appeal (the transcript of the judgment is reproduced in R(S) 3/86) and

Lord Justice Kerr (at pages 7(G) and 8(A)) seemed, while not expressing any view on what might or might not be comprised within "good cause", to suggest that there could be good cause whether work was done other than on medical advice or for a therapeutic reason. Now in the present case the evidence, putting the best interpretation on it from the claimant's point of law, seems to come to this. He was fed up and a bit depressed because he could not do his pre-accident work. He saw a possible future with Amway which, if it worked out, would get him off sickness benefit and into something useful and eventually profitable. So could that amount to good cause? In answering that it seems to me that two points in particular need to be made. The first is that there is nothing at all in the words of sub-paragraph (ii) which suggests any limitation on what might constitute good cause. The second is, as Mr Latter contended, that regulation 3(3) must be read in its context and effect must be given to it in such a way as not totally to undermine the basis of the sickness and invalidity benefit scheme. That basis is that benefit is in principle paid only if the claimant is incapable of work. And regulation 3(3) operates as an exception so as to allow benefit where a person is found not to be incapable of work because he has in fact done some work. It seems to me to follow that while sub-paragraph (ii) is expressed broadly it should be applied narrowly. In my judgment good cause in (ii) is seldom likely to be established in circumstances other than those where the work is done for therapeutic reasons. But there may be cases say of emergency where work has to be done or other cases where the claimant is the only person who can do a particular thing which needs to be done which would come within good cause. It would be wrong if not impossible to try and delimit all the cases which are or are not within good cause. The principle however seems to me to be this. If the motive or predominant motive for doing the work is that of earning or making a profit there would not be good cause. That would just be the ordinary case where work done by the claimant negatives the medical evidence of his incapacity. But if the motive is other than that, and I have instanced therapy and necessity, the circumstances may amount to good cause. Applying that approach to the facts of this case I necessarily come to the conclusion that the claimant did not have good cause for doing the work in question. While at the hearing before me the claimant's father stressed the therapeutic value of the work to his son, I do not doubt and the son more or less confirmed that his real purpose was to turn his enterprise into a profitable business. And while it may be that during the period in issue the business was on little more than an experimental basis that it seems to me does not help. In this connection it is to be noted that there is no provision in relation to sickness and invalidity benefit for trial periods of work similar to regulation 17 of the Social Security (General Benefit) Regulations 1982 which applies in relation to special hardship allowance (now reduced earnings allowance).

5. The claimant as I have mentioned did not when he first claimed sickness benefit disclose the work he was doing with Amway products. Thus, the decisions awarding benefit were given in ignorance of the material fact of the claimant's work and were rightly reviewed under section 104(1) of the Social Security Act 1975 and then revised. The question then arises whether the claimant can escape the requirement to repay by establishing under section 119(2) of the Act that in the obtaining and receipt of benefit he throughout used due care and diligence to avoid overpayment. The claimant has all along maintained that when he declared on the claim form that he had not worked during his period of sickness he did not realise that this could refer to self-employment. I might have had some sympathy with that had that been the whole of the matter. However there is evidence that on 30 December 1985 Form BF11(Notes) was issued to the claimant which told him quite clearly that "You must notify the local social security office if you do, or intend to do, any work of any kind while claiming benefit. If you are self-employed you must report any duties however small in extent which you undertake in connection with your work". And when he was asked to list on the invalidity benefit form all the work he had done he mentioned what he referred to as "a small business" and in his subsequent written statement which he gave to the Department he referred to that work as "a small part-time job". In the circumstances I agree with the adjudication officer and the tribunal that there was a failure to use due care and diligence at least until the claimant disclosed his business activities to the Department on the form which they received on 21 March 1986. I take the

view, as the original adjudication officer and the tribunal did that that marks the end of the claimant's want of due care and diligence and that, contrary to the submission of the adjudication officer now concerned with the case, the period of overpayment should end there. The consequence is that the amount required to be recovered is limited to £465.76.

(Signed) R A Sanders
Commissioner

Date: 28 August 1987