

MJG/SH/MD

Commissioner's File: CS/11/1985

C A O File: AO 3695/V/84

Region: London North

**SOCIAL SECURITY ACTS 1975 TO 1984
CLAIM FOR INVALIDITY BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: Albert William Tewkesbury

Appeal Tribunal: Kings Lynn

Case No: 38/1

[ORAL HEARING]

1. My decision is as follows:-

- (i) The insurance officer's decisions awarding invalidity benefit to the claimant for the inclusive period from 1 July 1983 to 1 March 1984 were properly reviewed as they were given in ignorance of a material fact, namely that during part of that period the claimant had carried out van driving activities: Social Security Act 1975, section 104(1)(a),
- (ii) The said decisions should not have been revised on review so as to make the said benefit not payable for the inclusive period from 1 July 1983 to 1 March 1984 because, despite those activities, the claimant was throughout that period incapable of work by reason of some specific disease or bodily or mental disablement and the invalidity benefit of £2,790.25 paid to him for that period was properly paid: Social Security Act 1975, section 15(1) and 17(1).
- (iii) Invalidity benefit is payable to the claimant for the inclusive period from 2 March 1984 to 24 March 1984 as the claimant has shown that throughout that period he was incapable of work by reason of some specific disease or bodily or mental disablement: Social Security Act 1975, sections 15(1) and 17(1).

The claimant's appeal against the decision of the social security appeal tribunal dated 25 July 1984 is therefore allowed.

2. This is an appeal to the Commissioner by the claimant, a man born on 23 November 1934, against the local tribunal's decision of 25 July 1984, which held the claimant not to have been incapable of work for the inclusive period from 1 July 1983 to 21 November 1983 and requiring him to repay £2,306.65 invalidity benefit attributable to that period. The tribunal also held that the claimant had shown incapacity for work for the inclusive period from 22 November 1983 to 1 March 1984 and did not therefore require him to repay invalidity benefit for that period. The tribunal further held that invalidity benefit was payable to the claimant for the inclusive period from 2 March 1984 to 24 March 1984. I confirm those two latter parts of the tribunal's decision.

3. At the claimant's request the appeal was the subject of an oral hearing before me on 17 September 1985 at which the claimant was present and gave evidence. He was represented by Miss S Robertson of the Disability Alliance and the adjudication officer was represented by Mr C R Chivers of the Office of the Chief Adjudication Officer. I am indebted to Miss Robertson and to Mr Chivers for their assistance to me at the hearing.

4. The claimant had been in receipt of injury benefit from 9 February 1982 to 23 August 1982 and invalidity benefit thereafter. The cause of incapacity given by his doctor on forms Med 3 was related to multiple injuries to his leg and foot sustained in an industrial accident when he was driving his lorry and sustained a road accident on 8 February 1982. There came to the notice of the Department a press report of an accident in November 1983, which mentioned that a removal lorry was being driven by the claimant. This caused enquiries to be made by the Department and the claimant was interviewed on 2 occasions by a Departmental investigator. The statements made by the claimant are part of the appeal papers before me. There are also statements by the owner of the removal van Mr G.C. A further statement by Mr. G.C. in the form of answers to questions was placed before me at the hearing. During the inclusive period from 1 July 1983 to 25 November 1983 (ie. part of the overall period before me) the claimant drove a removal van on some 30 occasions of approximately 2 to 3 hours each, the details of these occasions being set out in paragraph 8 of the written submission dated 23 April 1985 of the adjudication officer now concerned and broadly confirmed by Mr GC's further statement placed before me at the hearing. On those occasions it appears that removals of a local nature were effected and that the claimant had the assistance of 2 young men with him who did all the actual lifting and removing work, being superintended in that respect by the claimant. The claimant was not remunerated as but was paid amounts of £5 approximately on each occasion, as reimbursement to him for expenses of petrol etc. The claimant and Mr GC both contend that the claimant was not working or rendering services for which an employer could be expected to pay (though the petrol allowances were on the generous side). They state that at the claimant's request he was given these small jobs to do to try to recover his self-esteem and improve his mental condition, as he was suffering from depression because of the accident and injuries to his leg. There is a great deal of detailed evidence before me on the nature of the work and the claimant's motives for undertaking it.

5. I ought to say that it must be a rare case where the volume of activity that has been carried on in this case would not demonstrate a claimant to have been capable of work within the meaning of section 17 of the Social Security Act 1975. However, after very careful consideration I have come to the conclusion that these activities by the claimant did not displace the inference from the remainder of the evidence and particularly the medical evidence that the claimant was throughout this period incapable of work by reason of the injuries to his leg. I accept the claimant's evidence at the hearing that he had considerable difficulty in driving the van and that on one occasion Mr GC had had to come out and fetch the van back, and on a number of occasions he had to give up and his wife would come and take him back by car. I also accept that on other occasions the claimant had considerable difficulty and pain in attempting to drive the van.

6. The claimant's own doctor, in a letter dated 15 August 1985, has stated that the claimant should not have been doing this work (see answer 1(g) in that letter). The doctor also states of the claimant,

"He may have been capable to drive for half an hour to an hour or so but certainly not safe enough to do a full day's driving on a regular basis two or three days each week and every week. I am sure he pushed himself to do these trips on those 30 occasions, being frustrated at his condition and the limitations it imposed upon him and also the threat it represented to his being able to work for a living. I certainly do not think it would be safe or permissible for him to drive a heavy goods vehicle at all in any circumstances, or even a light van for more than a very short trip."

On the underlined words, Mr Chivers submitted that it could be implied that the claimant was capable of the work of driving a light van for short trips. However, the whole tenor of the doctor's letter is that the claimant was incapable of work not only as a heavy goods vehicle driver but also as a van driver as well. I accept Miss Robertson's point that driving a van does not imply just driving but also helping in the delivery or loading of goods. It is clear to me from the medical evidence before me, particularly the reports and advices (on special hardship allowance) of the medical boards, that the claimant was incapable of work for the entire period from 1 July 1984 to 24 March 1984. It is also to be noted that a divisional medical officer of the Department (on form RM9 dated 14 April 1983) reported that incapacity for all work was not in doubt and that there was no need to refer the claimant again for examination for 6 months. I appreciate that that was done without examination of the claimant but it would have been so done only on the strength of a report submitted to the divisional medical officer by the claimant's own doctor. The divisional medical officer, being experienced in these questions of capacity for work, would not have accepted such a report unless he were completely satisfied on the matter. Other evidence, e.g. a letter dated 20 August 1985 from the claimant's health visitor, is to the same effect.

7. In view of the above reasons for my decision, I need not rule on the arguments that were addressed to me on the question of whether, if the claimant were found by reason of the work that he had done to be capable of work for any part of the period before me, he could take the benefit of regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [SI. 1983 No.1598] and in particular whether he could show "good cause" for the work that he did. Nor need I express any opinion on the issue of "due care and diligence" (section 119(2) of the 1975 Act) or on the possibility canvassed by Miss Robertson of intermittent incapacity for work (see e.g. reported Commissioners' decision R(S)9/53).

(Signed) M.J. Goodman
Commissioner

Date: 12th November 1985