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DGR/EC

SOCIAL SECURITY ACTS 1975 TO 1982

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: ~~XXXXXXXXXXXX~~ (Mrs)

Local Tribunal: Southampton

Case No: 50/6

[ORAL HEARING]

1. My decision is as follows:-

(i) that invalidity benefit is not payable for the inclusive period from 23 August 1981 to 16 September 1981 or for the inclusive period from 4 October 1981 to 14 February 1982 but

(ii) that invalidity benefit is payable for the inclusive period from 17 September 1981 to 3 October 1981 and sickness benefit for the inclusive period from 15 February 1982 to 2 November 1982.

2. This is an appeal by the claimant against the majority decision of the local tribunal, confirming the insurance officer's decision shown in box 1 of form LT2 and disallowing the claim for the period referred. The claimant asked for an oral hearing, a request to which I acceded. At that hearing the claimant was represented by Miss F J Wooldridge, a Solicitor of the Supreme Court, and the insurance officer by Miss C M Warry of the Chief Insurance Officer's Office. I am grateful to them both for their submissions.

3. On 2 September 1981 the insurance officer decided that the claimant, who had been in receipt of sickness benefit for the inclusive period from 3 October 1977 to 15 April 1978 and invalidity benefit thereafter up to and including 22 August 1981, was no longer incapable of work, and accordingly he disallowed benefit for the inclusive period from 23 August 1981 to 29 October 1981. The claimant appealed against this decision, and the opportunity was taken to refer to the local tribunal for determination the further period from 30 October 1981 to 2 November 1982. The local tribunal upheld the insurance officer and disallowed benefit for the period referred. It is against that decision that the claimant now appeals to the Commissioner.

4. Section 17(1) of the Social Security Act 1975 provides that it is a condition of entitlement to invalidity benefit that the claimant is, or is deemed in accordance with regulations to be, incapable of work by reason of some specific disease or bodily or mental disablement.

Moreover, work is defined as meaning work which the person concerned can reasonably be expected to do. Whether a person is incapable of work is a question of fact (R(S)1/53). The burden of proving that he or she is incapable of work rests on the claimant (R(S)13/52). A doctor's statement is not conclusive evidence of incapacity, or, for that matter, of the advisability of refraining from work; it represents a particular doctor's opinion, which is to be weighed with all other relevant evidence in forming a judgement on the case (R(I)13/55; R(S)4/60).

5. A person is incapable of work, if having regard to his or her age, education, experience, state of health and other personal factors, there is no work or type of work which he or she can reasonably be expected to do. Whilst work in this connection means remunerative work (R(S)11/51), in decision R(S)7/60 it was stated that in the case of a temporary illness of short duration a claimant's capacity for work should be judged by reference to his or her normal field of employment, because he or she could not reasonably in such circumstances be expected to embark on a new career. When a claimant's disabilities last for a long period, however, the field of employment to be taken into account must be enlarged, and it must be borne in mind that the work need not be full-time work. Part-time work is permissible. Just at what stage the enlargement of the field of employment should take place must depend upon the circumstances of the particular case (R(S)2/78).

6. In the present case, the claimant had been in receipt of sickness/invalidity benefit for many years prior to the commencement of the period now before me, and clearly her capacity for work must be judged with reference to any kind of work suitable in her case. Since 1979 the claimant has been a councillor of the Southampton City Council and has been able to perform, notwithstanding her condition, the duties of a councillor. She has had the misfortune to have during the relevant period very bad health, and, amongst other things, has suffered from spondylitis or lumbar spondylosis. To complicate the issue, the claimant also sustained an industrial accident during the relevant period, and it is not in dispute that throughout the inclusive period from 17 September 1981 to 3 October 1981 she was incapacitated for all forms of work, and is therefore entitled to invalidity benefit for that particular period.

7. However, although the medical evidence establishes beyond any doubt, and it is in any event not in dispute, that the claimant was throughout the entire period with which I am concerned suffering from spondylitis or lumbar spondylosis, it is nevertheless clear that she was able to perform adequately the duties of a councillor, albeit the extent of her activities was perhaps not as great as that of other councillors who were not suffering from any disabling condition. Her hours of attendance at council meetings varied from week to week, but it must be remembered that a person is capable of employment if he or she is able to work part-time. Moreover, it is quite clear on the evidence - and the claimant quite frankly confirmed this in her oral evidence - that she spent a great deal of her time in seeing her "constituents" and in advising them. She would often take their cases to the appropriate officials of the council, and all this was relevant

to the various committees of which she was a member. Accordingly, I am quite satisfied that the claimant was capable of work as a councillor, and possibly, work generally, if it were of a sedentary character. In other words, she has failed to prove that she was incapable of work within the meaning of section 17(1)(a)(ii) for the period from 23 August 1981 to 2 November 1982 except for the period from 17 September 1981 to 3 October 1981.

8. However, this is not the end of the matter. It is open to the claimant to pray in aid, if she can satisfy the relevant conditions, regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 [S.I. 1975 No. 564]. This regulation provides as follows:-

"(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 -

(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

(ii) work which is not so undertaken and which he has good cause for doing,

and from which, in either case, his earnings do not ordinarily exceed £a specified figure each week".

The specified figure was £15.00 a week during the period from 29 November 1980 to 22 November 1981, £16.50 per week from 23 November 1981 to 21 November 1982, and thereafter £20.00 per week.

9. In the present case, it is not in dispute that the claimant suffers from some specific disease or bodily or mental disablement, and, of course, did so during the relevant period, and the only reason for supposing that she was not incapable of work during the period under consideration is the fact that she actually did work as a councillor. Accordingly, she satisfies the opening words of regulation 3(3). However, on the facts there can be no question of her also satisfying paragraph (i), nor has it been so contended. The issue is whether or not she can satisfy paragraph (ii). It was argued by Miss Wooldridge that the claimant had good cause for doing work within that paragraph because of the therapeutic consequences. In my judgment, the term "good cause" should be given the same meaning as was attributed to it when used in regulation 7(1)(g) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975, which had effect up to 18 October 1979. In R(S)4/79 it was decided that for the purposes of regulation 7(1)(g) "if the claimant was encouraged by his doctor to work, for therapeutic reasons, that can be accepted as good cause" (paragraph 11). In the present case, the good cause relied on by Miss Wooldridge was the therapeutic value of the claimant's activities as a councillor. She did not rely on any other matter as constituting good cause.

10. Miss Warry stressed that, if the claimant was going to rely on her doctor's advice that the work in question had a therapeutic value, then it was necessary to show that he had actively encouraged it. Mere acquiescence was not in itself sufficient. Furthermore, she contended that the therapy had to be directed to the claimant's specific condition. Thus, if the work in question was thought to be helpful in averting depression, that was an immaterial consideration if the claimant so far had never suffered from depression. I am not sure that this might not be putting the matter too high, in that it might be said that something which prevents depression occurring, albeit it does not already exist, is still therapeutic. It could be argued that anything which prevents a person, who is already suffering from one complaint, from experiencing a further condition must necessarily be beneficial. However, it is unnecessary for me to decide this specific issue, in that I am satisfied on the medical evidence that the claimant's discharge of her duties as a councillor was therapeutic in respect of the specific condition from which she was then suffering. The relevant part of the doctor's letter reads as follows:-

"Although the final diagnosis has yet to be confirmed, it is considered that her basic problem is one of arthritic changes in the hip and lower spine. She is having treatment for this at present and as is well known, a certain amount of movement in the joints concerned is beneficial if not essential to maintain the mobility of the patient.

[The claimant's] duties as a councillor would give approximately the right amount of exercise to maintain freedom of these joints and one might say that her duties would thus be called therapeutic. I am sure the problems of other people with which she has to deal are in themselves a means of distracting her conscious mind from her own pain and disability and as such her continuing work will be beneficial".

The date of that letter is 3 April 1981. Although the letter is open to criticism, in that the phrase "one might say that" is employed by the doctor, suggesting perhaps a lack of enthusiasm on his part, but a wish to say as much in the favour of the claimant as his conscience would allow, I think it is just enough to establish the claimant's contention. I think that his opinion is particularly helped by the final sentence, which appears to be directed to her actual condition and a method of alleviating the pain therefrom, rather than to the avoidance of a potential new condition, namely depression. Accordingly, I am satisfied that the claimant is able to bring herself within paragraph (ii) of regulation 3(3).

11. However, the claimant will still fail, unless she can show that "her earnings do not ordinarily exceed" the relevant statutory maximum. (Attendance allowances paid to councillors constitute 'earnings' (R(P)2/76)). Prior to the hearing before me, there had been no evidence of the claimant's earnings for the relevant period, but fortunately Miss Wooldridge was able to produce particulars of the claimant's entitlement to attendance allowances, and the figures so produced were not challenged by Miss Warry. Accordingly, I accept them as being accurate. For convenience they are set out in the first schedule hereto.

The claimant informed me in her oral evidence that originally she did not realise that there was a financial limit on earnings imposed by regulation 3(3), but that, when she was aware of the situation, namely from 15 February 1982 onwards, she scrupulously refused to accept payment for her attendance on council business in excess of the statutory figure. Miss Wooldridge argued that, as a consequence, there could be no question of the claimant's having transgressed the final condition of regulation 3(3) in respect of the inclusive period from 15 February 1982 to 2 November 1982.

12. However, there is difficulty about accepting this contention. The regulation concerned speaks of "earnings", not "payments". Although during the period from 15 February 1982 to 2 November 1982 the claimant, admittedly, only received sums not in excess of the statutory maximum, her entitlement was normally very much greater. In other words her earnings as, distinct from receipts, normally exceeded each week to a substantial extent the statutory maximum. In my judgment, I am only concerned for the purposes of construing regulation 3(3) with earnings, not with the amount of money ultimately received by the claimant in respect of such earnings. If the legislature had meant payments, it would have so provided. I derive some assistance for this conclusion from Commissioner's Decision R(P)1/70 where it was contended that the profits from a business in Italy did not count as "earnings" because they remained in Italy and were not transferred to England. The learned Commissioner observed at paragraph 6 as follows:-

"What has caused the difficulty is the claimant's belief that his wife's "profits" from her business did not count as "earnings" for purposes of section 43 of the [National Insurance Act 1965], because they remained in Italy and were not transmitted to England. I confess to some sympathy with the claimant's point of view in this regard: because in the ordinary case what a person has earned and what he is paid (by way of earnings) appear to be synonymous. But in truth they are not synonymous. A man "earns" that which he is entitled to receive in return for his work or services, whether he is paid at the time or not. This was clearly pointed out by the Commissioner in, eg Decision R(P)5/53 ..."

Admittedly, the decision in R(P)1/70 proceeded on the basis that the earnings would be paid some time in the future, whereas in the case before me all earnings beyond the statutory maximum have been relinquished by the claimant for ever, but I do not see how the distinction really affects the issue. Earnings are still earnings whether they are received sometime in the distant future or whether they are surrendered altogether. The claimant by her exertions had created a monetary entitlement, albeit she never intended to be paid the full extent of that entitlement. I am afraid that the device adopted by the claimant of artificially bringing herself within the statutory figure does not enable her to escape from the "earnings rule" imposed by regulation 3(3).

13. Miss Wooldridge endeavoured to overcome the above difficulty by arguing that the earnings in question were only gross earnings and should be reduced by the claimant's expenses. She referred to regulation 4(c) of the Social Security (Computation of Earnings) Regulations 1978 [S.I. 1978 No. 1698], which provides as follows:-

"4 ... in calculating or estimating for the purposes of any provision of the Act and of any regulations made under the Act which relates to benefit the amount of a person's earnings for any period, there shall be deducted from the earnings which he derives from employment in that period -

(a) ...

(b) ...

(c) any other expenses (not being sums the deduction of which from wages or salary is authorised by or under any enactment) reasonably incurred by him without reimbursement in connection with and for the purposes of that employment".

She submitted to me a statement of expenses, computed weekly, showing a telephone bill of £3.00, postages of 50 pence, travelling expenses of £2.90 and the cost of additional clothing of £1.25, totalling in all £7.65. The expense of travelling was apparently over and above the allowance made by the Council for attendance at Council meetings. Miss Warry was prepared to accept these expenses as being reasonable, but I am not entirely satisfied that the item, additional clothing, was justified. However, for the purposes of this appeal but without laying down any principle for general application, I will accept this as a proper expense. Now, it will be seen that if £7.65 is deducted each week from the gross weekly earnings during the period from 15 February 1982 to 2 November 1982, the net earnings will, in most cases, fall below the statutory maximum. It follows that the relevant earnings did not ordinarily exceed the statutory maximum. Accordingly, I am satisfied that for the period from 15 February 1982 to 2 November 1982 the claimant satisfies all the requirements of regulation 3(3) and is therefore entitled to sickness benefit.

14. It remains for me to consider the earlier period from 23 August 1981 to 14 February 1982. Miss Wooldridge submitted on behalf of the claimant certain evidence as to the amounts paid by way of attendance allowances. The details of that statement are set out in the second schedule hereto. Unfortunately the earliest payment is 3 September 1981 and neither Miss Wooldridge nor Miss Warry was able to provide me with any figures covering the period from 23 August 1981 to 2 September 1981. The information provided by Miss Wooldridge only sets out the dates on which the payments were actually made, and it is not possible on the evidence to identify any particular payment with any particular week. Moreover, the period in question also covers the period from 17 September 1981 to 3 October 1981 when it is conceded that the claimant was incapacitated from work by reason of her accident. However, it is clear that, if the payments are totalled and divided by the number of weeks in the period, the average earnings were considerably in excess

of the statutory maximum. Moreover, even if the expenses of £7.65 are deducted, the position is not materially altered. Furthermore, quite apart from averages, the general picture presented by the table produced by Miss Wooldridge indicates that the claimant did not receive, either gross or net, an amount ordinarily within the statutory weekly maximum, and this the criterion imposed by the regulation. There is the admitted difficulty of not being able to identify exactly what payment relates to what week, but I think the general picture is of someone who was ordinarily earning in excess of the statutory limit. Accordingly, I am satisfied that at least for the period from 3 September 1981 to 14 February 1982 the claimant cannot satisfy the final requirement of regulation 3(3) and is therefore not entitled to invalidity benefit.

15. There remains the period from 23 August 1981 to 2 September 1981. There is no reason for me to suppose that the position then obtaining was substantially any different from that which immediately followed, and accordingly on the balance of probability I am satisfied that the claimant is unable to comply with the final requirement of regulation 3(3). If, however, it should subsequently prove possible to ascertain the true figures, and it transpires that the conclusion I have reached for that period is erroneous, then the insurance officer will be at liberty to review and revise my decision for that period in the light of fresh evidence.

16. Finally, before leaving this matter, I think I should say that the claimant appeared to me a person of great integrity, and nothing which she has done can in any way be the subject of criticism.

17. I allow this appeal in part.

(Signed) D G Rice  
Commissioner

Date: 15 July 1983

Commissioner's File: C.S. 19/1983  
C I O File: I.O. 8300/V/82  
Region: London South

SCHEDULE 1

<u>Week Commencing</u>	<u>Gross Earnings</u>	<u>Amount Actually Paid</u>
15.2.82	£22.00	£16.50
22.2.82	£22.00	£16.50
1.3.82	£30.00	£16.50
8.3.82	£22.00	£16.50
15.3.82	£22.88	£16.50
22.3.82	£16.64	£16.50
29.3.82	£16.64	£16.50
5.4.82	£24.96	£16.50
12.4.82	£22.68	£16.50
19.4.82	£44.00	£16.50
26.4.82	£22.68	£16.50
3.5.82	£ 8.32	£ 8.32
10.5.82	£16.64	£16.50
17.5.82	£14.56	£14.56
24.5.82	£ 9.32	£ 9.32
31.5.82	£14.56	£14.56
7.6.82	£39.52	£16.50



<u>Week Commencing</u>	<u>Gross Earnings</u>	<u>Amount Actually Paid</u>
14.6.82	£31.20	£16.50
21.6.82	£ 8.32	£ 8.32
28.6.82	£16.64	£16.50
5.7.82	£37.44	£16.50
12.7.82	£37.44	£16.50
19.7.82	NIL	NIL
26.7.82	£14.56	£14.56
2.8.82	NIL	NIL
9.8.82	NIL	NIL
16.8.82	NIL	NIL
23.8.82	£ 8.00	£ 8.00
30.8.82	£14.56	£14.56
6.9.82	£37.12	£16.50
13.9.82	£31.20	£16.50
20.9.82	£14.56	£14.56
27.9.82	£16.64	£16.50
4.10.82	£22.88	£16.50
11.10.82	£22.88	£16.50
18.10.82	£16.64	£16.50

## SCHEDULE 2

<u>Date</u>	<u>Gross Earnings</u>
3.9.81	£22.00
10.9.81	£30.00
21.9.81	£36.00
8.10.81	£38.00
12.10.81	£30.00
14.10.81	£22.00
23.10.81	£30.00
29.10.81	£16.00
4.11.81	£28.00
20.11.81	£30.00
26.11.81	£38.00
2.12.81	£22.00
9.12.81	£28.00
17.12.81	£30.00
23.12.81	£16.00
7.1.82	£38.00
22.1.82	£30.00
29.1.82	£24.00
4.2.82	£24.00
12.2.82	£36.00

Week Commencing

Gross Earnings

Amount Actually Paid

25.10.82

£22.68

£16.50

1.11.82

£16.64

£16.50