

CS 124/1981

IEJ/ME

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

DECISION CS 11/81

1. (1) In practical terms this appeal succeeds. The effect of it is to hold invalidity benefit to be payable for the period 24 July to 27 October 1979 (both dates included) subject to set-off of any unemployment benefit received in the same period. For technical legal reasons my formal decisions must be expressed in the more elaborate form appearing next below.
- (2) I set aside the decision dated 22 August 1979 of the local tribunal that invalidity benefit was not payable either for the period 24 July to 11 October 1979 (both dates included) - which was purportedly the subject of an insurance officer's decision dated 23 July 1979 under appeal to such tribunal - or for the period 12 to 27 October 1979 (both dates included) which was purportedly the subject of an insurance officer's referral to such tribunal - because in my judgment the tribunal had no jurisdiction so to decide as neither such insurance officer's purported decision nor such insurance officer's purported referral was valid (for reasons below explained).
- (3) In exercise of the jurisdiction conferred on me by section 102 of the Social Security Act 1975 ("the Act"), I further decide that invalidity benefit is payable:
 - (A) for the period 13 July to 11 October 1979 (both dates included) embraced by the claimant's claim under a certificate in the form of a doctor's statement on Form MED3 (below abbreviated to a "MED3 certificate"), dated 13 July 1979; and
 - (B) for the period 30 July to 27 October 1979 (both dates included) embraced by the claimant's claim under a MED3 certificate dated 30 July 1979;

because the claimant has on the balance of probabilities proved that he was incapable of work throughout such respective periods by reason of some specific disease or bodily or mental disablement: sections 15(1) and 17(1)(a)(ii) of the Act.

Decision C.S. 11/81

- (4) Whilst for technical legal reasons there will now be more than one decision favourable to the claimant as regards certain days in the overall period 13 July-27 October 1979 that does not result in more than one day's benefit being payable for any one day, or in further benefit now becoming payable for any date in that overall period for which benefit has already been paid.
2. (1) The claimant, whose regular occupation was as a (gas) meter reader and who was then 52 years of age, suffered injury to his R shoulder in an industrial accident on 7 October 1976 and had not at the times material to this appeal worked since late 1976.
- (2) The duties of a meter reader involve reading the meters of the consumer and collecting and paying over coins from coin meters. The job accordingly involves carrying about bags of coins, which may cumulatively be of substantial weight, and obtaining access to meters which will often be located in places awkward to reach - e.g. in cupboards, under stairs, hanging on walls, or behind furniture and household goods which must be moved away and back again.
3. The claimant was at all material times "covered" by MED3 certificates from his own doctor referring to the injury to his shoulder and/or neck suffered in the accident.
4. (1) On 7 June 1979 the claimant was examined on behalf of the Divisional Medical Officer. The examining medical officer took the view that the claimant had "recovered sufficiently from his shoulder injury to enable him to read meters" and expressed the opinion that the claimant was not incapable of work at his occupation of meter reader.
- (2) On 28 June 1979 the claimant was examined by Mr E, F.R.C.S, a consultant orthopaedic surgeon, in connection with his claim for industrial injuries benefit. That report is in evidence dated 2 July 1979 and broadly confirms the same medical diagnosis and prognosis as is shown under (3) below, but is not of course a report directed to the claimant's capacity for work in his regular or any other occupation. For present purposes it is significant mainly for its reference to the claimant's then present condition - "pain radiating from the scapular region to the right shoulder, made worse by lifting. He has stiffness in the shoulder and neck muscles when he wakes in the morning".
- (3) On 2 July 1979 the claimant was again examined on behalf of the D.M.O, but by a different examining medical officer. He noted that the claimant had restricted movement of his R shoulder and slight impairment of his R hand grip and made express reference to the claimant's occupation involving carrying heavy weights of money collected from meters. In his opinion the claimant was incapable of work in his occupation as meter reader but "capable of work within certain

limits". In the more detailed report on Form DP1(R) (Part II) he recorded normal function in walking, standing, kneeling and bending, and in the L shoulder, arm and hand; but substantial impairment in lifting, carrying, climbing ladders and R shoulder and slight impairment also in R arm, R hand and climbing stairs. He considered that the claimant's condition was unlikely to show further improvement and that the claimant could not manage the money collection but that the claimant was capable of light work not involving driving or working at heights.

5. In the light of the two reports on behalf of the D.M.O. the claimant was, in accordance with usual practice, invited to attend his local unemployment benefit office to explore the possibilities of employment. He attended on 13 July 1979 but refused to register for employment on the grounds that he was still not fit for work, that this was confirmed by a fresh MED3 certificate issued by his doctor that day, and that his shoulder injury precluded not only lifting but the wearing of normal clothing as he could not stand the weight of a coat on his shoulder. The MED3 certificate is in evidence and is a 13 week certificate.

6. On 26 July 1979 an Aggravation Review Medical Board concluded that there had been unforeseen aggravation of the claimant's shoulder injury since the last preceding assessment on 16 August 1978 and made an assessment of 5% final for life in respect of loss of faculty and on 30 July 1979 the claimant's own doctor issued a fresh 13 week MED3 certificate.

7. (1) The case papers include claims for benefit by the claimant under the following MED3 certificates:

<u>Date of Issue</u>	<u>Period</u>	<u>Character</u>	<u>Expiring</u>
14.5.79	6 months	Open	13 November 1979
15.6.79	4 weeks	Open	12 July 1979
13.7.79	13 weeks	Open	11 October 1979

(2) On 23 July 1979 an insurance officer's decision was given that invalidity pension was not payable for the period from 24 July 1979 to 11 October 1979 (both dates included). From the Form LT2 on the case file it appears also that benefit was paid for the period 13 July to 23 July 1979 (both dates included).

(3) Whilst it is clear that benefit continued to be paid down to 23 July 1979 it is not now possible to identify positively as regards any of the period 15 June-23 July 1979 which of the three above mentioned separate claims was the foundation for the insurance officer's decision that benefit was payable, since as regards 15 June-12 July it could have been under the first or second of these claims and as regards 13-23 July under the first or third. It is not now material to reach a conclusion as regards 15 June-12 July, but is still material to reach a conclusion as regards 13-23 July, for the reason that since that formed the initial 10 days only of the entire period covered by the MED3 certificate dated 13 July 1979,

Decision C.S. 11/81

when the insurance officer came (as he did) to give his decision on 23 July 1979 for the period 24 July-11 October 1979 he was disposing adversely to the claimant of part only of the claim period comprised in that certificate, and as the law is now known from the Tribunal Decision R(S) 5/80 and the Decision C.S. 13/80 (unreported) that was not a course open to him unless he had already given a decision on that claim for the part period 13-23 July in the claimant's favour.

- (4) As it appears also that benefit in fact continued to be paid down to 7 August 1979 notwithstanding the decision of 23 July 1979 I am, with knowledge of the routine administrative procedures under which benefit is authorised derived from Decision C.S. 6/76 (unreported), driven to conclude that benefit for 13-23 July 1979 was not paid under any decision favourable to the claimant given in respect of the claim made under the MED3 certificate dated 13 July 1979, but was paid under some decision favourable to the claimant given under the 14 May 1979 certificate; and that the insurance officer's omission to deal by the decision on 23 July 1979 with the part claim period 13-23 July under the 13 July MED3 certificate, whilst entirely understandable, has in fact and in accordance with the law now known vitiated the whole of his decision then given.
8. (1) The claimant appealed to the local tribunal against the decision of 23 July 1979 and the appeal was heard on 22 August 1979.
- (2) By that date the insurance officer had also purported to refer for the tribunal's decision a claim by the claimant for the period 12 to 27 October 1979 (both dates included).
- (3) There was in fact no claim by the claimant for which that period constitutes the full claim period - that period represents the days additional to those the subject of his claim under the MED3 certificate dated 13 July 1979 which are part of the entire period 30 July-27 October 1979, the subject of a further claim made by the claimant in reliance upon a further MED3 certificate issued on 30 July 1979 (i.e. subsequent to the decision given on 23 July 1979).
9. That purported referral though consistent with the law as understood at the time (the practical result of which was to regard a "later" MED3 certificate as superseding any unexpired balance under a predecessor) was also in my judgment invalid when now viewed in the light of the recent decisions to which I have referred in paragraph 7 above, whereunder the claim under the MED3 certificate dated 30 July 1979 falls to be treated as a separate 13 weeks claim which required disposal by the insurance officer in its entirety (subject only to his freedom to decide an initial part period favourably to the claimant and defer decision or referral of the balance period).

10. (1) Since there was thus no valid insurance officer's decision or referral upon which to found their jurisdiction, and their treatment of the purportedly referred period cannot in my view be sustained as having been an exercise of their powers under section 102 of the Act, it follows in my judgment that I must now set the whole of the local tribunal's decision aside although (see R(U) 3/63) and in Re F (Infants) (Adoption Order : Validity) 1977 Fam. D 165 (E.A.) since the lack of jurisdiction is not apparent on the face of the tribunal's decision it has stood as valid until set aside.

(2) I am satisfied that (with the additional material later below referred to) all the facts material to giving a substantive decision upon the claims for the full claim periods under the MED3 certificates dated respectively 13 July and 30 July 1979 are now before me, and that if I have jurisdiction under section 102 of the Act now to give such decisions I should do so.

I have concluded after careful consideration that I have such jurisdiction, but will below indicate the aspect which has necessitated such consideration and the reason for my conclusion.

(3) I should however first indicate that the need to exercise jurisdiction under section 102 if available arises because, having set aside the local tribunal's decision, I do not consider that I can in this case merely substitute my own in accordance with the principles for which Decision R(U) 3/63 stands as authority. For it is to my mind clear that a decision given in purported substitution for a decision given without jurisdiction would itself be without proper foundation.

11. (1) The jurisdiction conferred on a Commissioner by section 102(1) of the Act arises and may be exercised only where a question under the Act "first arises" in the course of an appeal to the Commissioner, and duly empowers the Commissioner to determine the question "notwithstanding that it has not been considered by an insurance officer".

(2) It is in my view quite clear that neither the claim under the MED3 certificate dated 15 June 1979 nor the claim under the MED3 certificate dated 13 July 1979 was ever considered or disposed of by an insurance officer as an entirety pursuant to sections 98 and 99 of the Act as those provisions are now understood (indeed I entertain doubts as to whether either claim was ever submitted to an insurance officer as an entirety - but it is unnecessary for me to pursue that).

And in the present case no exercise of an insurance officer's further powers under regulation 11(1) of the Social Security (Claims and Payments) Regulations 1975 as amended in 1977 (or its successor regulation 11(1) of the 1979 regulations) can be inferred since they relate only to allowance of claims.

Decision C.S. 11/81

- (3) Thus in my view the proper fate of each of those claims, taking each in its entirety, is a question arising for the first time in the course of this appeal and I have jurisdiction under section 102 of the Act to decide such question.
- (4) In reaching that conclusion I have taken into account, but rejected, two arguments to the contrary;
- (A) that as regards each of the above claims the question does not "first arise" in the course of this appeal because part of the claim has already been disposed of by an insurance officer,
- (B) that the words in section 102(1) of the Act "notwithstanding that the question has not been considered by an insurance officer" are to be construed restrictively and to the effect that no jurisdiction is conferred by that section over any question which has been "considered" by an insurance officer, and that an insurance officer has "considered" each of these claims even if he has not given a decision upon the whole of it or otherwise fully disposed of it in accordance with section 99 of the Act.
- (5) As to (A):
- (i) there is in my view a substantive and material difference between disposing of the whole of a claim - i.e. dealing with the entire claim period - and "disposing of it in part only.
- (ii) a question first "arises" in the course of an appeal if it is then first recognised as an issue requiring determination - see the many authorities on the term "question arising" under various statutes of which Field v Longden 1902 1 K.B. 47 will suffice as an example.
- (iii) if further rebuttal be needed, I am satisfied also that where the need for determining the question arises in the course of an appeal by reason of the setting aside and avoidance of an earlier determination the latter has ceased to exist in the contemplation of the law.
- (6) As to (B):
- (i) as already indicated, in my view neither of these questions has in fact been "considered" by an insurance officer.

- (ii) but in any event I do not regard the "notwithstanding" provision as in any way limiting the operation of the preceding words in section 102(1), as a matter of construction.

To my mind they are sufficiently accounted for and given effect as inserted "ex abundanti cautela" - i.e. as a precaution against any wrong impression as to the force of section 102(1) being drawn from the circumstance of its location in the Act at the end of a sequence of provisions for adjudication commencing with section 98 and 99 which deal with submission of claims to an insurance officer and his consideration and disposal of them.

- (iii) it would in my view be quite anomalous if a local tribunal or Commissioner was empowered to decide questions which an insurance officer had never considered but was precluded from disposing of clearly outstanding questions which an insurance officer had "considered" but failed to "dispose of"; and a conclusion to that effect should be reached only if (which it does not) the wording compels it.

- (7) I therefore proceed with determination "on the merits" of the two outstanding questions, in the first instance by referring to the additional evidential material now before me.

12. (1) At the hearing on 22 August 1979 the claimant gave evidence in the course of which he indicated that he was taking 6 pain killing tablets a day, still could not wear a top coat or jacket or any sort of protective clothing because of the pain, and to the effect that although he did not go so far as to say he was incapable of all work he had yet to discover any kind of work for which he was capable - in particular he had tried to get work as a stock checker but was rejected for it when it transpired that he could not wear normal clothing.

- (2) The local tribunal dismissed the appeal and (after correction) also purported to disallow the claim for the referred period. They did not complete Box 4 on Form LT3 as to the reasons for their decision, but those can be gleaned from Box 2 as having been that they considered the claimant to have been throughout capable of light work; and whilst I am not to be taken as encouraging any non-compliance as regards the due completion of Box 4 neither am I disposed in this instance to hold there to have been any breach of the tribunal's statutory obligation to state their reasons.

13. (1) The claimant on 5 September 1979 instituted the present appeal. Amongst the documents submitted in support of it

is a letter dated 31 August 1979 from the Disablement Resettlement Officer confirming her agreement with the claimant and his own doctor that so long as the claimant's pain in his shoulder, arm and chest persisted there was no reasonable prospect of the claimant getting and keeping employment.

- (2) On 19 September 1979 the claimant appeared before an Advisory Medical Board in connection with his renewal claim for Special Hardship Allowance. That Board took the view that:

- (a) there had been some improvement of R shoulder movements
(b) he was then capable of his regular occupation, giving as their reasons "He has full use of left upper limb and could carry the money bag in this arm"

and added under "REMARKS" "There is a gross functional overlay".

- (3) The medical evidence on the present appeal includes also an earlier Orthopaedic Consultant's report, that of Mr B, F.R.C.S., rendered on 21 November 1978.

That report concluded that the claimant had incurred permanent loss of shoulder movement and was unlikely to obtain improvement but that he was suitable for light work of a clerical nature, and was amplified (but not materially for present purposes) by subsequent letter dated 9 March 1979.

- (4) Also now in evidence is a further letter dated 26 November 1979 from the Disablement Resettlement Officer. Materially this indicates that:

- (i) the claimant did, under protest, register for employment as from 8 August 1979 in the circumstance that his invalidity benefit had been stopped as from that date
(ii) his employment prospects were "poor" so long as the earlier mentioned conditions remained.

- (5) Finally, I now have before me also a letter from the claimant's own doctor dated 17 December 1979 in the following terms:

"17 December 1979

Dear Sir,

re: Mr Joseph Currie
[Address]

This man sustained an injury to his left shoulder in 1976. He is still having such severe pain in this joint that all movements are severely restricted and he has great difficulty even in dressing himself.

In my opinion he remains unfit to follow a regular occupation."

14. (1) In my judgment I should on the foregoing state of the evidence and in the circumstances of the case draw the following conclusions:
- (i) The condition of the claimant had deteriorated between August 1978 and July 1979 (see paragraph 6 above).
 - (ii) In July 1979 the claimant had, apart from restriction of movement of his right shoulder, significant pain radiating from the scapular region to the right shoulder (see paragraph 4 above).
 - (iii) His condition did not improve over the ensuing material times (see paragraph 13 above).
- (2) Proceeding in the light of those, and in awareness that the claimant's own doctor, alone amongst the medical men whose views are in evidence, had the advantage of continuity of observation of the claimant over the whole period since his accident, and noting also that neither of the consultants' reports and neither of the Examining Medical Officers' reports refer to any "functional overlay", I further conclude that the pain suffered by the claimant did in fact preclude him from wearing normal top clothing and that at all material times this operated to produce, in conjunction with the other physical elements of his condition, a situation in which there was no work he could be reasonably expected to do and for which an employer would pay.
- (3) I therefore accept the claimant as satisfying the burden of proof of incapacity for work throughout all material times.
15. For the foregoing reasons my decision is as stated in paragraph 1 above.

(Signed) I Edwards-Jones
Commissioner

Commissioner's File: C.S. 124/1981
C I O File: I.O. 2388/V/79
Region: North West (Manchester)

Date: 1 July 1981