Overpayment of sickness benefit - fraud by misrepresentation
Not working in therapeutic regions - no error of law
Not open to claimant to make more than one application to set aside

DGR/SH/2

Commissioner's File: CS/137/1988

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Dale Evans

Appeal Tribunal: Boston

Case No: 417/01215

IDENTIFIABLE DECISION
NOT TO BE SENT OUT OF
THE DEPARTMENT

1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal given on 19 October 1987 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with my leave, against the majority decision of the social security appeal tribunal of 19 October 1987.

3. On 8 July 1987 the adjudication officer reviewed each of the earlier decisions awarding the claimant sickness benefit for the inclusive period from 19 February 1987 to 11 June 1987 on the ground that they were given in ignorance of a material fact namely that the claimant had done certain work. The adjudication officer's revised decision was that sickness benefit was not payable for the inclusive period from 19 February 1987 to 15 July 1987, because the claimant had not proved that he was, during that period, incapable of work by reason of some specific disease or bodily or mental disablement. The adjudication officer further decided that there had been, as a result, an overpayment of benefit amounting to £481.61 and that, by reason of the claimant's having erroneously stated, each time he claimed benefit in reliance on his doctor's statement, that he had not worked since the date of his last claim, the overpayment was recoverable by the Secretary of State. The adjudication officer also set out a schedule showing how the overpayment was arrived at. In due course, the claimant appealed to the tribunal and the opportunity was taken to refer to that adjudicating authority the further period from 16 July 1987 to 13 August 1987.

4. In the event, the tribunal by a majority upheld the decision of the adjudication officer, and further decided that sickness benefit was not payable for the period referred.

5. The majority of the tribunal gave the following reasons for their decision:-

1. Section 104(1) Social Security Act 1975 applied and section 17(1)(a)(ii) [of the] Social Security Act. The adjudication officer had the right to review her original decisions awarding sickness benefit as the decisions had been given in ignorance of a material fact - namely that the appellant was not incapable of work by reason of some specific disease or bodily or mental disablement. Sickness benefit was not payable from 19.2.87 to 15.7.87.

2. An overpayment of sickness benefit occurred from 19.2.87 to 15.7.87 (inclusive) amounting to £481.61, as the appellant had misrepresented the material fact that he was incapable of work during these days. This sum is now recoverable from the appellant and the Tribunal found the appellant capable of work.

3. The Majority Tribunal did not accept the appellant's submission that he was incapable of work from 19.2.87 to 13.8.87 (inclusive). He had demonstrated his capacity for work by carrying out some of the duties at the taxi firm normally carried out for remuneration by his sister, during the relevant time and on more than one occasion. The work undertaken by the appellant was not under medical supervision and the work which involved responsibility for telephone calls at a taxi firm was found not to be so trivial that it could be regarded as negligible. R(S) 5/53.

By working on several occasions during the period 19.2.87 to 15.7.87 the appellant proved to the Majority Tribunal that he could reasonably be expected to work throughout the period. The appellant was found to have worked on the days his sister wished to go house-hunting and be absent from her employment. The Majority Tribunal found no grounds on which to find that the appellant was incapable of work on any day during the period 19.2.87 to 15.7.87.

4. The Tribunal found that the appellant undertook the work to assist his sister who wished to be absent from work, he did not undertake the work for therapeutic reasons. The Adjudication Officer proved to the satisfaction of the Majority Tribunal that the appellant was capable of work and that he could reasonably be expected to work. There were no grounds on which to find the appellant ceased to be capable of work from 16.7.87 to 13.8.87 (inclusive)."

I see nothing wrong with the tribunal's decision.

6. Clearly, what had happened was briefly that the claimant, who was a taxi driver and had maintained that, by virtue of an accident he had sustained, he was incapable of work, had throughout the relevant period been working in the taxi office, carrying out the duties normally undertaken by his sister. He had thereby demonstrated his capacity for work. However, somewhat surprisingly, the adjudication officer now concerned

supports the appeal. Whilst he correctly rejects the grounds on which he claimant himself relied, namely that it was in the interests of natural justice that the claimant should be regarded as incapable of work - manifestly there was nothing in this - he went on to suggest three separate grounds on which the tribunal's decision should be set aside. I will deal with each in turn.

7. In paragraph 9 of his submissions the adjudication officer set forth an argument, which I am afraid I do not properly comprehend. He would seem to be suggesting that no awards of benefit had ever been made in respect of the inclusive period from 19 February 1987 to 11 June 1987. I say "would seem to be" because his actual words read as follows:-

> "However, there was no evidence in the appeal papers of any awards having been made by an adjudication officer in the period 19.2.87 to 11.6.87."

I presume that what he meant was that there was no evidence of any awards having been made <u>in respect of</u> the period from 19 February 1987 to 11 June 1987. The adjudication officer now concerned then goes on to state as follows:-

> "In the absence of any awards made on the date the reference was made to the adjudication officer the appeal tribunal could not find as a fact that any decisions could be reviewed on the grounds of ignorance of a material fact."

I presume that what is being suggested is that there were no awards made covering the relevant period, and if they were never made, they could never be reviewed on the grounds of ignorance of a material fact or, for that matter, on any other ground. If I have correctly understood this submission, it is a very odd one indeed. Adjudication officers do not normally review decisions that have never been made, and it is normal practice to assume, even if copies of such decisions are not in the papers, that they actually existed. Of course, it is different if the claimant takes the point that such decisions were never made, or if the adjudication officer concerned with the appeal is able to bring, on his own initiative, evidence to show that they never existed. But in the present instance neither of these circumstances applied. The appeal papers are not required to contain every conceivable document relating to the matter; they need only contain the <u>relevant</u> documents. Accordingly, I see nothing in this submission on the part of the adjudication officer.

8. In the evidence before the tribunal the claimant did not dispute that, on the days listed in his reply to an enquiry from the local office, he actually worked. Moreover, in his appeal to the Commissioner he does not contend that the finding by the majority of the tribunal that the activities undertaken were work was erroneous. He does, however, rely on regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [S.I. 1983 No 1598]. That particular provision read at the relevant time as follows:-

"3. (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 exceed £26 in the week in which that work is performed."

9. In the present case, the claimant did not contend before the tribunal that he fell within sub-paragraph (i). However, he did contend that he "had good reason with regard to the therapeutic rules", by which he clearly meant that he could bring himself within sub-paragraph (ii). In Decision R(S) 4/79 the Commissioner considered the meaning of "good cause", and accepted that this phrase encompassed activities undertaken for therapeutic reasons. However, the majority members of the tribunal found that the appellant undertook the work in question so as to assist his sister who wished to be absent from her employment, and did not undertake it for therapeutic reasons. Moreover, there had been no suggestion that good cause could have been established on any other basis.

10. However, the adjudication officer now concerned maintains that the tribunal "have recorded no finding on good cause, but merely that the claimant did not undertake the work for therapeutic reasons and it is my submission that the tribunal thereby erred in law". This approach is wholly pedantic. As already explained, the only issue was whether or not the claimant was undertaking the work for therapeutic reasons, and when the tribunal decided that he was not, that was the end of any contention that the claimant could establish good cause within sub-paragraph (ii). It was unnecessary for the tribunal to take the matter any further. Tribunals are not to be entangled in legalistic traps.

11. The third ground on which the adjudication officer now concerned relies for his contention that the tribunal erred in point of law is set out in paragraph 17 of his submissions. He argues as follows:-

"The appeal tribunal .... found as fact the amount overpaid to the claimant was the sum of £481.61, as set out in the adjudication officer's schedule of the overpayment. However, the tribunal had no evidence before them of any

sums having been paid to the claimant or the amount of such sums. It is my submission that the tribunal thereby erred in law."

I reject that submission. When a claimant is awarded a benefit, he is normally paid it. This is invariably assumed to be the case unless the claimant contends to the contrary or alternatively the presenting officer of his own volition shows that in the particular instance payment had not been made. In the present case, payment had never been in issue before the tribunal, and as far as I am aware it is not in issue now. Accordingly, the tribunal were not required to go into the matter. They were entitled to assume that the awards had been duly paid, and in view of their findings on the question of misrepresentation, they were entitled to conclude that the overpayment was recoverable. Accordingly, I see nothing in the adjudication officer's submission. In short, the tribunal have, in my judgment, gone into the whole matter with a commendable thoroughness, and have produced an exemplary decision.

12. There is, however, one technical matter to which I should advert. On 6 April 1987 section 53 of the Social Security Act 1986 came into operation, and it is expressed to apply to all social security benefits. It calls for repayment of benefit overpaid if the beneficiary is guilty of a misrepresentation or a failure to disclose, and such misrepresentation or failure to disclose led to the overpayment. Moreover, it matters not whether the misrepresentation or failure to disclose was wholly innocent. In the case of sickness benefit section 53 replaced section 119 of the Social Security Act 1975. which calls for repayment where the beneficiary, or his agent, failed to exercise due care and diligence to avoid overpayment. In the present instance, sickness benefit was overpaid in respect of a period prior to 6 April 1987 as well as a period after that date, and the question arises whether section 53 applied retrospectively to the earlier overpayment. Both the parties and the tribunal clearly proceeded on the basis that section 53 operated retrospectively. However, there is some considerable doubt about whether section 53 does so operate (see the starred decision of a Tribunal of Commissioners CA/126/1989). The matter will in due course be resolved by the Court of Appeal. But, whatever the legal position, it is quite clear in this case that by virtue of his misrepresentation the claimant did not exercise due care and diligence, and accordingly nothing turns on whether section 53 or section 119 applies to the earlier overpayment.
Accordingly I have no hesitation in dismissing this appeal.

13. However, before I leave this matter there is one other issue to which I should refer. The claimant's representative sought to have the tribunal's decision set aside pursuant to regulation 11(1) of the Social Security (Adjudication) Regulations 1986 [S.I. 1986 No.2218]. That regulation reads as follows

> "11 (1) Subject to regulation 12 (provisions common to regulations 10 and 11), on an application made by a party to the proceedings, a decision may be set

aside by the adjudicating authority who gave the decision or by an authority of like status in a case where it appears just to set the decision aside on the ground that

(a) a document relating to the proceedings in which the decision was given was not sent to, or was not received at an appropriate time by, a party to the proceedings or the party's representative or was not received at an appropriate time by the adjudicating authority who gave the decision; or

(b) a party to the proceedings in which the decision was given or the party's representative was not present at a hearing or inquiry relating to the proceedings; or

(c) the interests of justice so require."

The claimant's representative contended, in reliance on sub-paragraph (b), that he had mistakenly recorded the date of the appeal hearing in his diary, and consequently had not attended to represent the claimant. However, the tribunal found that the claimant had declined an invitation to have the hearing on 19 October 1987 adjourned because of the representative's absence, and they could identify no grounds for setting aside their decision. The application was accordingly refused. However, on 29 February 1988 the claimant's representative made a further application to have the tribunal's decision set aside, but this time on totally different grounds. The first application had clearly been made under regulation 11(1)(b) whereas the second application was made under regulation 11(1)(c). Nevertheless, the clerk to the appeal tribunal refused to entertain the second application, pointing out that there had already been an application to set aside which had been rejected, and from which there was no appeal, and that if the claimant wished to prosecute the matter further, he should do so by way of appealing the substantive decision to the Commissioner.

14. The adjudication officer now concerned contends that "regulation 11 contains no provision to restrict the number of applications that can be made on differing grounds for the same decision to be set aside", and submits that the second application is still outstanding undetermined. I do not accept that submission. It is not open to a claimant to make more than one application for the tribunal's decision to be set aside, albeit he does so on different grounds. When in the High Court or County Court a claimant presents his case, he has there and then to set forth all the grounds on which he relies. It is not open to him to let his case rest on some grounds only, and when his case is dismissed then to prosecute it all over again, this time based on totally different grounds. And the reason why this is so is that it is public policy that litigation should be brought to an end. In my judgment, exactly the same principle applies when a claimant seeks to set aside a tribunal's decision

under regulation 11. That particular provision sets out the various grounds on which a claimant may rely, but it does not follow from this that he can have "several bites at the cherry" based on a variety of different grounds. Once the application has been heard by the tribunal, that is the end of the matter. No injustice is done, because if the claimant fails, he can, as in fact he did in the present instance, appeal against the substantive decision to the Commissioner. If there is any force in the new ground or grounds on which he wishes to rely, doubtless he will get leave and will succeed. What would be intolerable, involving wholly unnecessary public expenditure, would be a series of applications to the tribunal for setting aside, each application based on a different ground. Accordingly, in the present case, I am satisfied that the clerk to the tribunal was correct not to entertain the second application, but to invite the claimant to apply for leave to appeal to the Commissioner against the substantive decision.

(Signed) D.G. Rice
Commissioner

Date: 1 March 1990