CPAG

JJS/1/LM **Commissioner's File:** CS/142/91

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal is erroneous in point of law and accordingly I set it aside; I remit the case for determination to a new social security appeal tribunal who should have regard to what I have said in the course of this decision.

2. This is a claimant's appeal against the decision of the Potteries social security appeal tribunal, given on 18 January 1990, which decided that he was not entitled to invalidity pension from and including 22 August 1989 because he had not proved to the tribunal that he was incapable of work by reason of some specific disease or bodily or mental disablement. I have before me written argument prepared on behalf of the claimant by Mr Chris Hughes, the assistant manager of the Stoke-on-Trent Citizens Advice Bureaux, and a submission from the adjudication officer now concerned.

3. On 8 August 1989 the adjudication officer then concerned with this case issued a decision on review. He reviewed earlier decisions and his revised decision was that invalidity pension was not payable from and including 22 August 1989 because the claimant had not proved that he was incapable of work by reason of some specific disease or bodily or mental disablement. It is to be observed that both that adjudication officer and the tribunal found against the claimant because he had not proved that he was incapable of work. Clearly both the adjudication officer and the tribunal misdirected themselves on the onus of proof. It is trite law that while the onus lies on a claimant to establish incapacity for work on the balance or probability, that the position differs where an adjudication officer revises an award of benefit. In those circumstances it is for the adjudication officer to establish incapacity for work. I am satisfied that the decision of the tribunal is erroneous in point of law because of the misdirection on the onus and that it must be set aside.

4. The claimant has put forward a number of grounds of appeal.

The first of these arises from a passage in the findings of fact which is as follows:

> "We accept that [the claimant] would almost certainly be unable to fulfil the suggested occupations of a security officer or gate keeper, but our view is that he could fulfil the other occupations suggested namely, a repetitive assembler. One member of the tribunal have experience of Remploy which deals with work carried out by handicapped employees who did in fact carry out such tasks as repetitive assembly. Even if an employee is in a wheelchair they are quite able to deal with the assembly of parts for various manufacturing items, and the view of the tribunal was that certainly [the claimant] would be able to carry out such a job. Consequently we have decided to dismiss the appeal."

The claimant's representative takes the point that the knowledge of the member of the tribunal was not presented as evidence during the tribunal proceedings and that the claimant's representative did not have an opportunity to comment on it. It is argued that this led to a breach of natural justice. I agree. I have had regard to Wetherall v Harrison, (1976) 1 QBT 773, which dealt with the question of whether a medical practitioner sitting as a justice was entitled to use his specialised knowledge in assessing evidence and whether it was right that he should inform the justices of his opinion. Lord Widgery said at page 778:

> "So I start with the proposition that it is not improper for a justice who has special knowledge of the circumstances forming the background to a particular case to draw on that special knowledge in interpretation of the evidence which he has heard. I stress that last sentence, because it would be quite wrong if the justice went on, as it were, to give evidence to himself in contradiction of that which has been heard in court. He is not there to give evidence to himself, still more is he not there to give evidence to other justices; but that he can employ his basic knowledge in considering, weighing up and assessing the evidence given before the court is I think beyond doubt."

J had this to say at page 779:

> "I endorse fully what Lord Widgery CJ has said but they must not, so to speak, start giving evidence in the case because it offends a number of our rules; above all, it is not in the presence of the parties and it is not open to cross-examination. But if that is borne in mind, that the person with specialised knowledge must not give evidence, then it seems to me that it is entirely legitimate for him to express his views that he himself has been helped to form on the evidence in the case and on the issues in the case as a result of his own specialised knowledge and to communicate that to his fellow justices, if he so wishes,

always bearing in mind that he must not start substituting what he might have said in evidence, as opposed to using his own knowledge to assess the evidence which is available."

Those words were spoken of justices exercising a judicial function but account has to be taken of the inquisitorial nature of the proceedings before a social security appeal tribunal. They are not bound by the strict rules of evidence. However they are bound by the rules of natural justice and they must exercise their jurisdiction with fairness. Clearly the tribunal in the instant case accepted that one of the members had specialised knowledge which was material to the enquiry before them. The dividing line between drawing on specialist knowledge in interpretation of the evidence and in giving evidence may often be a fine one; but I am satisfied that in the instant case that what the member told his fellow members was in the nature of evidence. He told them what happened in Remploy workshops and of the work done by disabled people there. I accept that what he said was in the nature of evidence. If that had happened where justices had retired then it would be an error of law for the reasons given in Wetherall. However the position of a social security appeal tribunal is different because of the inquisitorial nature of the proceedings. It seems to me open to a member of the tribunal to speak of his specialist knowledge, even if it is in the nature of evidence. However what he must not do, and what a chairman of a tribunal must not allow to happen, is for that to happen in secret, in the confines of the retiring room. He may speak in the presence of the parties of facts which he knows of because of his experience provided the parties have an opportunity of dealing with those facts and making comments on them. But it seems to me contrary to the rules of natural justice to allow a tribunal to rely on those facts without the parties having had an opportunity to deal with them. Indeed the instant case illustrates the dangers of acting in the way which the members did act. If the facts relating to the Remploy work had been put to the parties and their representatives, then it might well have been pointed out to the tribunal that "work" in the context of section 17(1)(a)(ii) of the Social Security Act 1975 means remunerative work for which an employer would be willing to pay and that it is unnecessary to take into account work which would only be offered to a claimant on compassionate grounds, see R(S) 7/85. The claimant's representative makes that point now and it seems to me to be well founded.

5. For the reasons which I have given in the earlier paragraphs, I find that the decision is erroneous in point of law and I set it aside. I direct that the new tribunal in rehearing the case shall pay particular attention to the aspects to which I have referred in this decision above and further they shall consider carefully the question which arises under

section 17(1)(a)(ii) of the Social Security Act 1975 and make and record their findings on all the material facts and give reasons for their decision.

(Signed) J J Skinner
Commissioner

Date: 18 January 1993