Decision of earlier tribunal relevant to point before SSAT can be put before 2nd tribunal for information

CSMA 25/92 NO

MJG/SH/7

Commissioner's File: CS/176/1990

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 28 June 1990, as that decision is erroneous in law. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to an entirely differently constituted social security appeal tribunal: Social Security Act 1975, section 101 (as amended).

2. This is an appeal to the Commissioner by the claimant, a man born on 17 May 1941. The appeal is against the unanimous decision of a social security appeal tribunal dated 28 June 1990, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 30 November 1989 in the following terms,

> "Invalidity pension is not payable from and including 20.11.89 because the claimant has not proved that he was incapable of work by reason of some specific disease or bodily or mental disablement."

3. I note from paragraph 5.12 of the adjudication officer's summary of facts to the local tribunal that this decision was given in pursuance of a new claim for invalidity benefit. It follows that the local adjudication officer's decision was not a review decision. Therefore regulation 17 of the Social Security (Claims and Payments) Regulations 1987 has no application and paragraphs 7-9 of the further submission dated 28 February 1992 by the adjudication officer now concerned are not applicable.

4. Both the claimant's representative and the adjudication officer now concerned concur in submitting to the Commissioner that the tribunal's decision was erroneous in law for want of sufficient reasons for that decision. In a direction dated 13 February 1992, I indicated that I was not at that point

prepared to accept a submission to this effect by the adjudication officer now concerned. However in the light of further submissions on the point by that adjudication officer at paragraphs 4-6 of the further submission of 28 February 1992, I am prepared to accept this contention. Although in their reasons for decision, the tribunal said, "In particular, the tribunal accepted that [the claimant] was capable of undertaking the jobs of gate-keeper, switchboard operator and routine clerk", they did not give reasons related to the conflict of medical evidence before them as to why they found that to be so. There was in fact detailed evidence before the tribunal in this case as to the claimant's medical condition and as to the possibility of certain detailed job descriptions which he might be able to comply with.

5. Cases of this kind are always difficult for tribunals in that, in the ultimate, they cannot really do more than give a value judgment as to whether, having heard all the evidence and observed the claimant, they consider he is or is not capable of certain types of occupation. However, in this case although it is clear to me the tribunal took considerable trouble with it they did not really give particulars of why they considered the claimant was capable of undertaking these jobs and therefore I must set their decision aside.

6. The new tribunal will need to go into the matter entirely afresh and can of course arrive at whatever conclusion it considers to be correct on the facts. The fact that I have allowed this appeal on the ground of want of sufficient reasons does not imply any opinion by me as to whether or not in substance the appeal should succeed. That is entirely a factual matter for the new tribunal.

7. A further matter arises in this case, from my direction of 13 February 1992. I drew attention to the fact that when the matter first came before a social security appeal tribunal on 27 April 1990 the tribunal adjourned its hearing in the following circumstances. The chairman's note of evidence reads,

> "We have reviewed all the relevant papers in this case and in particular noted that there was included a Form AT3 of a hearing of an appeal [before a social security appeal tribunal] which took place on 23.9.88 together with the medical evidence that was available to the Tribunal at that time. We took the view that this could be regarded as prejudicial to the appellant. The appellant attended together with his representative .. and we explained the situation to them and expressed our view that this could create prejudice so far as the appellant was concerned and that we were thinking of adjourning the hearing of the appeal to permit the papers to be re-presented to another tribunal not including Form AT3 relating to the previous hearing. [The claimant and representative] agreed to this procedure and the Presenting Officer had no objection."

8. The matter subsequently came before another social security appeal tribunal on 28 June 1990, the earlier papers which the

earlier tribunal considered might be prejudicial to the claimant having been removed. However one member of the tribunal on 28 June 1990 (the second tribunal) was the same person who had sat on the earlier tribunal on 27 April 1990.

9. In my direction of 13 February 1992, I requested written submissions from the parties as to whether the decision by the first tribunal to adjourn was correct and, if it was, whether the second tribunal's proceedings were vitiated by the fact that one person was a member of both tribunals.

10. I have received conflicting submissions on this point. In written submissions dated 25 February 1992, the claimant's representative submits as follows,

> "In the interest of justice we feel the Chairman was right in adjourning the appeal. On the question of the presence of [the same male member] on both appeal panels [we] also contend that this could constitute an error of law in the interest of Natural Justice, as we feel although a period of 2 months had elapsed, the manner in which the appeal was adjourned would still be in [that same member's] mind and the contents of the papers would also play a part in the decision made by him, whatever that decision was. If the situation had been pointed out at the beginning of the second Tribunal then providing that the claimant had not agreed to the hearing being heard by 2 members, then an adjournment was inevitable, again in the interest of justice."

I do not accept that submission, for the reasons given below.

11. In a further written submission dated 28 February 1992, the adjudication officer now concerned submits as follows,

> "It is my submission that an appeal to the Social Security Appeal Tribunal following closely on a period which was the subject of an earlier tribunal decision in the same circumstances should be mentioned irrespective of the result in the adjudication officer's submission. This action was taken by the adjudication officer in his summary of facts and in support of such a statement the tribunal's decision on Form AT3 was included in evidence but not the documents relating to that appeal. However, it is my submission that it is open to the tribunal to ask to see the documents from that earlier appeal if they feel it would assist them in determining the appeal before them. It is my submission, therefore, that the fact that the decision of an earlier tribunal was included in evidence could not be regarded as prejudicial to the claimant and it was incorrect of the tribunal to adjourn the tribunal on 27.4.90 to have that evidence removed. The tribunal had jurisdiction to have regard to that evidence or to conclude that it offered no assistance and to disregard it in reaching a decision on the issue that was before them. It is my decision that proceedings at the tribunal hearing on 28.6.90, following

the adjourned hearing on 27.4.90, were not contrary to law by reason of the fact that [the same person] was a member of both tribunals. Regulation 24(3) of the Social Security (Adjudication) Regulations [1986] provides:-

> '(3) where an oral hearing is adjourned and at the hearing after the adjournment the tribunal is differently constituted ..... the proceedings at that hearing shall be by way of a complete rehearing of the case.'

It is my submission that the hearing on 28.6.90 has not contravened this provision."

12. On that submission, I should first say that if in fact the first tribunal's adjournment was correct, then the same male member should not have sat on the second occasion. Regulation 24(3) of the 1986 Regulations is not in fact concerned with this point at all but deals with how an adjourned hearing should be conducted.

13. However, I see no reason why a tribunal should not have full information before it. If there was a decision of an earlier tribunal relevant to the point, it was perfectly in order for the local adjudication officer to put that before the tribunal for its information. It is in my experience common for an appellate body, whether it be a social security appeal tribunal or the Commissioner, to have a record of earlier proceedings put before it and the documentation that was used in those earlier proceedings. I cannot see that there was anything prejudicial or contrary to natural justice in doing this. On the contrary it would appear to me to be a sensible procedure, since an appellate body must have all information that might be relevant. If a local adjudication officer is in any doubt as to whether information is or is not relevant, he should place that information before the tribunal and leave the tribunal to make the decision on the point.

14. In this case the record of decision of the earlier tribunal, dated 23 September 1988, holding the claimant to be capable of sedentary and semi-sedentary work, was properly put before the tribunal and there was no need for the hearing to be adjourned because of supposed prejudice. It follows that the question whether or not the same member should have sat on both occasions does not in fact arise.

(Signed) M.J. Goodman
Commissioner

(Date) **25 March 1992**