Therapeutic earnings - no concept of minimal exercise. Because C. does some work does not mean he is capable of work - (what medical evidence.

JJS/1/LM **Commissioner's File:** CS/270/89

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Appeal Tribunal: Mansfield

Case No: 4/18/03456

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 and 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 an appeal by the claimant against the decision of the Mansfield social security appeal tribunal, given on 3 July 1989, which decided that invalidity pension was not payable to him from 1 August 1988 to 25 January 1989 and further that invalidity benefit, in the sum of £1,781.94, had been overpaid to him and was recoverable under the provisions of section 53 of the Social Security Act 1986.

3. The claimant at the time of the adjudication officer's decision was aged 64 years. He had been a mine worker. From 6 June 1986 to 13 August 1986 he received sickness benefit and this was followed by invalidity benefit. His doctor certified that he was incapable of work because he suffered from angina pectoris. A medical officer of the Department of Health and Social Security reported on 1 August 1988 that the claimant was not examined because his incapacity for work was not in doubt and there was no need for him to be referred to the Department's doctor again. It would appear that the report of the Department's doctor was not before the tribunal. It would have supported the claimant's case. But in any event the only medical evidence before the tribunal went to prove that the claimant was incapable of work.

4. The claimant's son is a partner in a manufacturing firm. The claimant attended at the firm's place of business and did some work there. The tribunal found as fact that from the beginning of August 1988 he had, for a minimum of two days a week, until 25 January 1989 attended there. On those days he took the son's dog for a walk. He made tea for the employees. He kept the factory clean by sweeping it and he drove the firm's van to deliver goods. He did not receive any payment for these activities. The case for the claimant was that his doctor had advised him to find a new interest as he was becoming depressed

and bored and consequently he began "pottering about" at the factory and this had been of great therapeutic value to him.

5. The tribunal's findings of fact were as follows:

> "1. [The claimant], aged 64, a redundant mine worker, received sickness benefit from 6 June 1986 to 13 August 1986 and invalidity benefit from 14 August 1986. He suffers from angina pectoris.
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> 2. From the beginning of August 1988 [the claimant] has, for a minimum of two days per week (until 25 January 1989 for the purposes of this appeal) attended at the factory of Mansfield Fabrications (his son being a partner in the business carried on there) and carried out functions including:-
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> 1) Taking his son's dog for walks.
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> 2) Tea making for the employees (approximately 8 in numbers).
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> 3) Keeping the factory clean by sweeping up.
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> 4) Driving the firm's van to deliver the firms goods.
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> 3. [The claimant] received no payment for those activities.
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> 4. [The claimant] did not disclose those activities to his local DSS office."

The tribunal decided that invalidity benefit was not payable to the claimant from 1 August 1988 to 25 January 1989 (both dates included); and, also, that invalidity benefit in the sum of £1,781.94 had been overpaid to him during that period and such amount was recoverable from him. The reasons for the decision were as follows:

> "The tribunal is satisfied that the Adjudication Officer had power to review his decision awarding invalidity benefit, for the reasons set out in paragraph 6.1 of that officer's submission on Form AT2.
>
> Taking all evidence into account, the tribunal is satisfied that, on a balance of probabilities, [the claimant] was not incapable of work during the period from 1 August 1988 to 25 January 1989. During that period, he was performing functions at Mansfield Fabrications. There is conflict of evidence as to the regularity of such performance, to the extent that [the claimant's] evidence in his appeal letter and verbally to the tribunal today conflicts with his signed statement dated 16 January 1989. The tribunal is not convinced by [the claimant's] explanation that he thought that statement only related to a two week period of

investigation. [The claimant] did not appear today to be confused in any way and the tribunal incline to view that if it were not the case he would not have permitted the statement to give the impression that on a regular basis since August 1988 he had been carrying out light duties (van driving delivering goods, sweeping up) for $5^1/_2$ hours per day.

The tribunal appreciate that [the claimant's] motives in performing such functions may have been activated by boredom and a desire not to be inactive. However, the tribunal's task today is to decide whether [the claimant] is incapable of work (meaning work full time or part time, which the claimant can reasonably be expected to do and for which an employer would be prepared to pay).

On all the evidence, the tribunal takes the view that [the claimant], in spite of his age of 64 and his heart condition, is capable, at least on a part time basis, of a job involving sweeping floors, making tea and van driving and delivering (for journeys which can, on his own evidence, last as long as 2 hours).

In the tribunal's view, the fact that [the claimant] has not been paid by his son's firm for the activities he has undertaken at Mansfield Fabrication is not conclusive.

The tribunal takes the view that the activities which [the claimant] has undertaken are not negligible and are of such extent and nature to establish that there is work which he can reasonably be expected to do and for which an employer would be prepared to pay.

The tribunal has also considered Unemployment, Sickness and Invalidity Benefit Regulation 3(3). Despite the two letters from Dr , the tribunal does not consider this to be a case in which it should exercise its discretion under regulation 3(3)(ii). In [the claimant's] case the tribunal does not consider that the sole nature of him performing the functions at Mansfield Fabrication was therapeutic. It appears to the tribunal that the nature and extent of the activities undertaken take this case out of the type where a doctor advises minimal exercise to assist physical or mental recovery or well being. On the evidence in this case, as shown above, the tribunal has accepted that [the claimant] was regularly sweeping floors, van driving and delivery for comparatively long periods. To the tribunal, that precludes the exercise in [the claimant's] favour of the discretion given by regulation 3(3).

The result is that in the tribunal's view [the claimant] was not during the period at issue incapable of work and was not to be deemed so incapable.

It follows that invalidity benefit was overpaid to him

during the period from 1 August 1988 to 25 January 1989. The tribunal decided that [the claimant's] attendance and performance of functions at Mansfield Fabrications was a material fact within section 53 of the Social Security Act 1986."

6. Section 15 of the Social Security Act 1975 provides for the determination of days for which benefit is payable. In so far as this appeal is concerned, it is section 17(1)(a)(ii) which is relevant. It is there provided that to rank a day as one of incapacity for work, a claimant must on that day either actually be incapable of work by reason of some specific disease or bodily or mental disablement or be deemed in accordance with regulations to be incapable of work. In so far as the question of deeming is concerned, it is regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 which fall for consideration; it is 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 -
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> (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
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> (ii) work which is not so undertaken and which he has good cause for doing,
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> and from which, in either case, his earnings do not exceed £27.00 in the week in which that work is performed."

Whether a claimant is incapable of work is a question of fact to be determined by a tribunal on the evidence before them. Medical opinions on incapacity are of assistance to the tribunal but the opinions of the doctors can be defeated by evidence as to the claimant's actions. A person may be found not to be actually incapable of work because of work he has done while suffering from bodily or mental disablement. However regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations assist claimants who are suffering from a specific disease or bodily or mental disablement and are found not to be actually incapable of work because of work which they have done while so suffering. The regulation allows a tribunal a discretion to deem a claimant incapable, if the conditions provided for by the regulation are satisfied. It is accepted by the adjudication officer now concerned that on the basis of the medical evidence before the tribunal the claimant was incapable of work. There was the evidence however concerning his activities at the son's factory and the basis of the tribunal's decision was that the claimant had done some work and it is for this reason that they found he was not incapable of work. The tribunal went on to consider the effect of regulation 3(3). They

had found as fact that for a minimum of two days per week the claimant carried out functions at the factory and they went on to say that these "are not negligible and are of such extent and nature to establish that there is work which he can reasonably be expected to do and for which an employer would be prepared to pay". Clearly the first category of work provided for in regulation 3(3) could not be relied upon by the claimant but he sought to bring himself within the second category of work. It is true that there was no prior advice by the claimant's medical practitioner relating to the desirability of this work. But, as was held in CSS/5/87, prior approval by a doctor is not a pre-requisite for allowance on the second category of work. The Commissioner stated that it was sufficient if after the event a doctor is prepared to say that the work done had a therapeutic value. In the case before me the claimant relied on CSS/5/87 and supplied two letters from his doctor. The tribunal said that despite these letters the members did not consider the case to be one in which it should exercise its discretion under regulation 3(3)(ii); they did not consider that the sole reason for the claimant's performing functions at the factory was therapeutic. It appeared to them that the nature and extent of the activities undertaken put the case out of the category where a doctor advises minimal exercise to assist physical or mental recovery or well being. It is for the tribunal, in the exercise of its discretion, to come to a conclusion on the matter provided for in regulation 3(3); I am in no way entitled to substitute my view of the evidence for theirs. I am however required to consider whether the members have erred in law in dealing with the question. It seems to me they have. In exercising the discretion under the regulation the members of the tribunal have imported into it the concept of minimal exercise. There is nothing in regulation 3(3) which requires the type of work to be minimal and the members of the tribunal seem to have imported such a requirement into it.

7. The adjudication officer now concerned submits that the tribunal have given insufficient reasons for deciding either that the condition of regulation 3(3)(ii) was not satisfied or in not considering it to be a case in which to exercise its discretion under the provision. He also points out that when deciding that the claimant is not assisted by the provision, the tribunal have made no findings as to whether he worked on every day and if not whether he was capable of work on the days that he did not work. The new tribunal should take care to avoid falling into similar error.

8. It will be necessary for the new tribunal to consider the entire case afresh and to deal with the claimant's capacity for work, both on the days he actually attended at the factory and those when he did not. They should also have regard to the medical evidence and make a finding of fact on the basis of it. It will also be necessary for them to consider the deeming provision in regulation 3(3)(ii); and the claimant will be well advised to provide medical evidence which takes account of the work which he actually did. I also remind the tribunal, when dealing with the question of the overpayment, to bear in mind

that the recovery is sought under section 53 of the Social Security Act 1986 on the basis of failure to disclose; guidance on that issue has been given by the Commissioner in R(SB) 54/83.

(Signed) J J Skinner
Commissioner

Date: 1 November 1991