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Commissioner's File: CS/347/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 17 August 1992 as that decision is erroneous in law and I set it aside. 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 Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant, a married woman born on 4 August 1939. The appeal is against the unanimous decision of a social security appeal tribunal dated 17 August 1992, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 27 April 1992 in the following terms,

> "I have reviewed the decision of the adjudication officer awarding invalidity benefit from and including 1.12.90. There has been a relevant change of circumstances since the decision was given. This was that [the claimant] has been found capable of work within certain limits by two different departmental doctors on 10.1.92 and 31.3.92 respectively. My revised decision only for the period from and including 24.4.92 is as follows:- Invalidity pension is not payable from and including 22.4.92. This is because [the claimant] has not proved that she was incapable of work by reason of some specific disease or bodily or mental disablement. .. Social Security Act 1975 Section 104(1)(b). Social Security Act 1975 Section 50(1) and 70(1)(a)(ii). Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations

[1983], Regulation 3."

3. The appeal was the subject of an oral hearing before me on 19 August 1993 at which the claimant was present and was represented by Mr. F. Russell of the Newham and District Claimants Union. The adjudication officer was represented by Mr. N. Butt, of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to all those persons for their assistance to me at the hearing.

4. I have set the tribunal's decision aside because I accept the concurring submissions of Mr. Russell and Mr. Butt that the tribunal erred in law in dealing with the review aspect of this case. The local adjudication officer's decision issued on 27 April 1992 and quoted in paragraph 2 above was erroneous in law because it purported to review under section 104(1)(b) of the Social Security Act 1975 ie on the ground of "relevant change of circumstances" and then went on to hold that it was for the claimant to prove that she was incapable of work as from 22 April 1992. That was erroneous because the so-called "relevant change of circumstances" was "that [the claimant] has been found capable of work within certain limits by two different departmental doctors on 10.1.92 and 31.3.92 respectively." It is well established that a new or different medical opinion cannot of itself constitute a "relevant change of circumstances". There was no other circumstance that was relevant in this case. Therefore the review should not have been under section 104(1)(b) of the Social Security Act 1975 at all but under regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987, S.J. 1987 No.1968 which provides that "in any case where benefit is awarded in respect of days subsequent to the date of claim the award shall be subject to the condition that the claimant satisfies the requirements for entitlement; and where those requirements are not satisfied the award shall be reviewed." In R(S)3/90 the Commissioner held that where there is a review under regulation 17(4) the onus of proof is not upon the claimant but is upon the adjudication officer who must show that the claimant is no longer incapable of work. Indeed in paragraph 3 of his submission to the tribunal the local adjudication officer pointed this out. Nevertheless there is no indication in the tribunal's record of decision (on Form AT3) that they took this matter into account at all. It could well be, judging from the way the tribunal hearing proceeded, that the tribunal was acting on the assumption that the onus of proof was upon the claimant. Certainly they did not refer to the question of review or where the onus of proof lay. This is not merely a technical matter but could well have determined the outcome of the case. For that reason I have therefore set the tribunal's decision aside.

5. As I have set the tribunal's decision aside on that ground, I need not finally rule on a complaint by the claimant's representative made in detail at pages 2 and 3 of a letter to the chairman of the tribunal, dated 9 October 1992. The complaint was that the tribunal had "arbitrarily terminated" the hearing, after refusing the claimant's representative's request for an adjournment, whereas the claimant and her representative wished

to say more. In answer to an inquiry by me at the hearing before me on 19 August 1993, it transpires that the hearing before the tribunal had already at that stage lasted 50 minutes and it may well be that the tribunal was under considerable pressure. At all events I have not had inquiries made of the chairman of the tribunal about this matter and therefore it would not be proper for me to comment further on it. I merely record that the complaint was made but it forms no part of my decision.

6. The substance of the claimant's appeal was that the tribunal hearing was erroneous because the tribunal had put before it by the adjudication officer in an appendix to his submission detailed job titles (Mr. Russell preferred to call them task designations) under four heads ie

(1) garage console operator/cashier

(2) routine clerk (multiple tasks)

(3) repetitive assembler (electronic goods) and

(4) repetitive assembler (metal goods) (hand).

7. Mr. Russell criticised the detailed descriptions of these tasks or jobs as being out-of-date and impractical. In a written submission to the Commissioner by the adjudication officer now concerned dated 9 February 1993 that officer submits, (para.9),

> ".. that the job descriptions provided, which are taken from the Classification of Occupations and Directory of Occupational Tasks, are out-of-date and should be substituted for the following descriptions from the more recent Standard Occupational Classification. [Details are then given of these]. I submit that these classifications are materially similar to the older account of work in the same industries and sufficiently so that the dependence of the tribunal on these is within the requirement to consider the actualities of employment. I submit that the claimant's contention stands to the extent that the related job titles provided with the old descriptions are entirely obsolete and do not designate actual current employments of these kinds, but I submit that this objection is not sufficient to show that a reliance on the task detail for each job constitutes an error of law."

8. Paragraph 11 of the adjudication officer's submission of 9 February 1993 deals with the up-to-date classification of "Clerks (not otherwise specified)" and states,

> "I submit that this is substantially similar to the job of routine clerk (multiple tasks) described by the adjudication officer in his submission to the tribunal. I submit that in finding the claimant capable on the grounds that she could perform some of the tasks of the job description the tribunal have failed to satisfy the requirements of R(S)7/85 that suggested alternative employment should correspond to

the actualities of employment which I submit includes the ability to perform the full range of duties of any particular job."

9. The up-to-date descriptions of suggested alternative occupations set out in the adjudication officer's submission of 9 February 1993 should be put before the new tribunal that hears this case. What decision it arrives at on the facts and the claimant's capability is entirely a matter for the tribunal. My having allowed the appeal on the grounds of failure to refer to review (see above) does not of course indicate any view by me as to whether in substance this appeal should succeed.

10. I would however like to add a cautionary note generally as to the practice of adducing very detailed and/or numerous job descriptions or specifications to tribunals in cases of this kind. The practice dates from reported Commissioners' decisions R(S)6/85 and R(S)7/85. It represents a praiseworthy attempt on the part of adjudication officers to comply with what are regarded as the rulings in those Commissioners' decisions. However I would stress that, in <u>all</u> cases of this kind, importance must be attached to the background knowledge and commonsense of the members of the tribunal. It must be borne in mind that the 'wing' members of the tribunal come from panels of persons to act as such. Under section 40(2) and (3) of the Social Security Administration Act 1992. "The panel for an area shall be composed of persons appearing to the President to have knowledge or experience of conditions in the area and to be representative of persons living or working in the area. Before appointing members of a panel, the President shall take into consideration any recommendations from such organisations or persons as he considers appropriate."

11. The requirement that tribunal members shall have knowledge or experience of conditions in the area and be representative of persons living or working in the area should ensure that they are well qualified to judge in a commonsense manner the question of whether or not a person is capable of work within the meaning of section 17(1)(a)(ii) of the Social Security Act 1975, now section 57(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992, requiring that a person be incapable of "work which the person can reasonably be expected to do". That is the starting point in cases of this kind.

12. In R(S)6/85, at paragraph 5, Commissioner Edwards-Jones pointed out that, ".. often it can be properly concluded of a particular claimant that <u>as a matter of common knowledge</u> there is a range of occupations, or at least one occupation, of which the claimant must have been capable at the material date ..." (my underlining), See also R(S)2/82 (Tribunal of Commissioners) paragraph 19, to the same effect. In paragraph 4 of R(S)7/85, Commissioner Monroe said, ".... in many cases the nature of a person's impairments and his personal circumstances will be such that it is at once evident that there is relevant work of which the claimant must be capable." These statements appear in recent practice often to have been overlooked. There will be many cases

of this kind where the tribunal will be able to decide the matter (after having heard evidence from the claimant and any witnesses), using its own knowledge and expertise as to whether the claimant is capable of work which he can reasonably be expected to do. There will in such cases not be any need for detailed job specifications. The tribunal will of course have to bear in mind where the onus of proof lies - see paragraph 4 above. But even where that onus is upon the adjudication officer, he may be able to discharge it without the use of detailed job specifications.

13. Where there are cases which do not come within the above-cited statements in R(S)6/85 and R(S)7/85, I would stress that all that was required by R(S)6/85 was, ".. an affirmative conclusion, within reasonably precise and practical parameters, as to <u>what</u> work, within the overall sphere of employment for which an employer would pay, it is of which [the claimant] is properly considered to have been capable (as distinct of holding the claimant capable of work upon mere abstract assumption that there 'must be something' by way of work which he could reasonably be expected to do) and for which an employer would have paid." (paragraph 5). In such cases ".. it is necessary to examine more carefully the question whether medical views expressed in general terms correspond with the "actualities". (R(S)7/85 paragraph 4). It should be noted that the current forms of advice by regional medical officers do actually specify in more particular terms the kinds of jobs it is considered a claimant could do.

14. Both Mr. Russell and Mr. Butt concurred in submitting to me that all that in such cases needed to be put to a tribunal were a small number of job descriptions which, as a practical matter, the claimant might conceivably do. They also agreed that a great deal of unnecessary complication had occurred by the exceedingly detailed job specifications (some of which are only remotely applicable) which were put before tribunals in cases of this kind. I accept those submissions and would suggest that the current practice of putting lengthy job descriptions before tribunals be carefully reviewed in each case, since it may not be necessary at all (see above) or, even if there is a necessity for some alternative job descriptions to be before the tribunal, that task should be done in a sensible and brief way. Otherwise there is a danger, as may well have occurred in this case, that, in an excessively minute examination of the details of a large number of suggested alternative occupations, a tribunal loses its way in a thicket of technical job phraseology, after an unnecessarily protracted hearing.

15. I would ask the new tribunal to take these matters into account when it rehears the present case. I should say that this does appear to be the type of case where the tribunal would be assisted by <u>brief</u> and <u>relevant</u> alternative job descriptions. What decision they arrive at is, as I have already explained, a matter for them.

16. There is one further matter, relating to the constitution

of the tribunal. I note that the original tribunal that heard this case was comprised entirely of men despite the requirement, now to be found in section 41(6) of the Social Security Administration Act 1992, that "if practicable, at least one of the members of the appeal tribunal hearing a case shall be of the same sex as the claimant." In answer to my questions at the hearing before me on 19 August 1993, Mr. Russell stated that he did not realise this and moreover that the matter had not been mentioned at all at the hearing. I have not asked the Chairman of the tribunal about this, so I cannot make a finding on it. But I would have thought that this is precisely the type of case, involving the question of whether a woman is capable of various kinds of work suggested, where there should be a woman member of the tribunal. I would ask that the new tribunal that hears this case should if at all possible have on it a woman member. In view also of the time that this case has already been outstanding, I would ask that the tribunal authorities reschedule this case for hearing at an early date.

(Signed) M.J. Goodman
Commissioner

(Date) **20 September 1993**