— IVB — Inadequate Findings — SSL Cannot Do Own Finding

RCP

Commissioner's File: CS/355/94

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: William McNally
Social Security Appeal Tribunal: Liverpool
Case No: 6/06/94/01009

1. My decision is that the decision of the Social Security Appeal Tribunal given on 21 June 1994 and determining that the claimant was no longer incapable of work from 5 January 1994 so that his invalidity benefit had to cease from that date was erroneous in law because it fails to record sufficient findings of fact to support the conclusion reached.

2. The decision is accordingly set aside; but I consider that on the basis of the evidence and material before me it is expedient to exercise the power in Section 23(7) Social Security Administration Act 1992 to record my own findings and to give the decision which I consider appropriate in the light of them. This is that the actual decision reached by the tribunal was correct, and that the burden of showing that the claimant was no longer incapable of work he might reasonably be expected to do on and after 5 January 1994 had, on the evidence before the tribunal, been discharged by the adjudication officer on the balance of probabilities. The original decision of the adjudication officer on review of the claimant's entitlement under regulation 17(4) Social Security (Claims and Payment) Regulations 1987 SI No 1968 is accordingly confirmed.

3. The claimant who is a man now aged 52 is a victim of the destruction of heavy industry in the north west. His main experience and skills were as a time served fitter installing and repairing heavy machinery for employers such as Cammell Lairds. By 1990 he was having to work as a taxi driver and in May of that year was involved in a road traffic accident which caused him whiplash injuries to his neck. He did not have to go into hospital but his neck continued to give him pain and on 10 June 1990 he claimed sickness benefit saying that he was also getting or waiting to hear about income support. He was awarded sickness benefit and subsequently invalidity benefit from 23 November 1990 on the basis of incapacity for work certified by his doctor on the ground of the whiplash injury to his neck.

4. On 18 October 1993 he was examined by a medical officer on behalf of the Department, to whom he reported that he was still suffering from restricted neck movements with pain, and had recently been getting lower back pain as well. The doctor's notes on examination said "I do not think he is able to drive and should avoid heavy lifting, carrying and movements requiring forward bending of neck. Avoid ladder work." He also added the perceptive comment that "I think he is quite anxious and depressed although he does not admit to this." He certified the claimant as medically capable of suitable light work although not in his former occupation, and avoiding forward bending of his neck, driving, or heavy lifting or climbing, and stressful situations.

5. After considering this report, a further certificate from the claimant's GP dated 31 December 1993 advising him to refrain from work for 13 weeks because of whiplash injury and backache, but adding the comment "only fit within limits" and a form filled in by the claimant himself saying that he thought he was unfit for all work because of restricted movement in his arms and neck and back trouble causing sleepless nights, the adjudication officer reviewed the award of invalidity benefit and determined that the requirements for entitlement were no longer satisfied from 5 January 1994. The claimant appealed to the tribunal on the ground that he believed he was incapable of work and his own doctor supported him.

6. Before the tribunal on 21 June 1994 the presenting officer relied on facts as summarised in paragraph 5 of the written submission of the adjudication officer and also informed the tribunal that the claimant's GP had issued a further certificate dated 28 May 1994 for a further 13 weeks on the ground of "whiplash injury and painful neck" although to this was added "fit some form of work". The claimant's representative summarised his medical problems and said that these necessitated wearing a neck collar intermittently. He said that the claimant suffered from "shooting pains" especially in cold weather, and had gastric problems which caused difficulties with one type of pain killer while another made him drowsy. He also suffered tension in dealing with other people and had difficulty sleeping. There were aspects of each of the possible jobs suggested by the adjudication officer (cloakroom attendant, car park attendant, and ticket collector) that meant these would be unsuitable for the claimant.

7. The Chairman's note of the submission to which no objection has been taken contains the following passage: "Accepted that sick note submitted indicates "fit for some work" and if the appellant able to find work it would be a psychological advantage but whether such work exists without skill or qualifications is the test". The claimant himself gave evidence and said that he spent his day watching TV and sometimes went to bed late but woke at 5 am and got up at 7; when going out he went in his daughter's car and had not got an up-to-date opinion or prognosis from a consultant about the condition of his neck

8. The tribunal disallowed the appeal unanimously on the basis of findings

of fact which they recorded by saying simply that they accepted the facts set out in paragraph 5 of the adjudication officer's submission. Giving the reasons for their decision they said that they had considered the medical condition of the claimant and the views of the examining medical officer, as well as the Commissioners' decisions cited to them on the test of incapacity to be applied and the approach they should adopt in relation to evidence about the types of job the claimant might reasonably be expected to be able to do. They said that the specimen job descriptions they had considered were not exhaustive and only indicative of the type of work which might be suitable, referred to the current medical certificate from the appellant's own GP indicating that he was fit for some work, and concluded that in the circumstances they did not feel able to allow the appeal as the appellant was capable of some form of work.

9. The claimant appeals with the leave of the tribunal Chairman on the grounds set out in his notice of appeal dated 18 August 1994 that the tribunal erred in law in not making sufficient findings of fact. The appeal is supported by the adjudication officer who in a submission dated 8 November 1994 agrees that the tribunal have failed to make full findings of fact and have also failed to give adequate reasons for their decision, in both respects falling short of what is required by regulation 25(2) Social Security (Adjudication) Regulations 1986 SI No 2218, so that their decision has to be set as erroneous in law. However she does submit that it is clear from the medical evidence available that the tribunal reached a proper conclusion on the balance of probabilities on the underlying issue of whether the claimant was fit for work he might reasonably be expected to do.

10. As I have already indicated I accept the submissions of both sides that the tribunal decision has to be set aside as erroneous in law on the ground of failure to state sufficient findings of fact in the record as required by regulation 25(2). The expedient of recording "findings of fact" by a simple cross reference to a summary prepared earlier by the adjudication officer was criticised in the decision in case CSSB 18/85 (to which my attention is helpfully drawn by the adjudication officer) and in my opinion should not normally be adopted; as the effect is to leave it unclear whether the tribunal have genuinely addressed their minds to the material evidence on the points of fact in issue and made conclusions of their own. The inherent dangers are well illustrated by the present case where the tribunal by saying that they accept the whole of the adjudication officer's summary appear to have espoused a statement about the medical evidence on an important issue (whether the claimant is still able to drive) which is the precise opposite of what the evidence actually says. (Paragraphs 5.3 and 15 of the adjudication officer's submissions at pages T18 and T22 of the case papers say that he can, whereas the actual evidence at page T9 says clearly that he cannot).

11. I am quite satisfied therefore that the tribunal's findings of fact are inadequate, although I do consider that in the context of the submissions made to them about difficulties the claimant might experience with particular aspects of

possible jobs, their reference to the medical evidence and their own comment about the particular aspects which might give rise to difficulty with the claimant not being a necessary part of certain jobs he might do gave a sufficiently clear indication of the reasons which led them to reject the claimant's argument on this aspect and decide as they did.I therefore set aside their decision on the former ground alone.

12. That leaves the question of what should now be done with the case, and despite the adjudication officer's suggestion that it has to be referred to another tribunal, I consider that on the material before me in this case it is expedient and appropriate for me to record the relevant facts and substitute my own decision for that of the tribunal. Accordingly, in exercise of the power under s.23(7) of the Administration Act I find the following facts:

(1) The claimant who was formerly employed as a skilled machinery fitter suffered a whiplash injury to his neck when working as a self-employed taxi driver on 10 May 1990 and had to give up this work.

(2) On 10 June 1990 he claimed sickness benefit and was awarded this and subsequently invalidity benefit which was paid to him from 23 November 1990 until 5 January 1994, when his entitlement was terminated by the decision of an adjudication officer on review under regulation 17(4) referred to above.

(3) He continues to suffer from restricted neck movements and some pain as a result of his injury, and has to wear a neck collar intermittently, but not continuously. He also suffers from some understandable psychological problems as a result of his injury and pain not having cleared up, and being out of work for such a long period. These manifest themselves in particular as tenseness, anxiety and loss of sleep but could well improve if he were to find work again, and would not prevent him from undertaking suitable work if he were able to find it. In addition he suffers from some lower back and other pains of more recent origin and from gastric problems but these are not connected with his accident and have not been sufficiently serious for him to be referred for specialist medical help or advice.

(4) He is still unable to drive a taxi for a living and his health and age would prevent him from going back to his former work as a fitter even if such a job were available. However he has no difficulty sitting for long periods during the day, is able to go outdoors and travel by car, and there is no indication that he has any difficulty getting about.

(5) Both the Department's doctor and the claimant's own GP consider the claimant medically capable of some work despite the restriction of movement in his arms and neck, his back pain and stress-related or other difficulties, although not as his previous employment either as a fitter or a driver in view of the lifting or bending movements which these would entail over a long period. There is no medical evidence which suggests the claimant is completely incapable of work at *any*

suitable or reasonable employment..

13. On the basis of those findings, which in my view are incontrovertible on the evidence and material before the tribunal and me, I consider that the tribunal were quite correct in finding that the claimant was no longer incapable of work and I so hold. For this purpose I have taken "work" to mean employment either indoors or outdoors in the type of sales or service occupations indicated in the appendix to the adjudication officer's submissions to the tribunal which do not require any academic qualifications or strenuous activity and could, I think, well be done on a full or part-time basis by a person suffering the partial but not total incapacity shown by the medical evidence on both sides in this case. I agree with the tribunal's commonsense approach that the question is the *type* of work activity that the claimant could reasonably be expected to do, and that the specimen job descriptions used as illustrations to enable a decision on the level of incapacity to be reached are only indicative for that purpose and are not to be picked over in detail so long as a fair conclusion is that the claimant would be able to undertake some work of this type; see R(S) 4/94.

14. For the sake of completeness I confirm that in my judgment the question of what work the claimant might reasonably be expected to do had by the beginning of 1994 (over 3 years from the start of his invalidity benefit) to be judged by reference to any possible field of work and not just the claimant's former employment. It is also clearly established that it has to be judged according to the type of work the claimant might be able to do on the assumption that such work was available, even though I am only too well aware that the chances of such work being readily available remain slim at present, and as his own representative acknowledged at the hearing it is really this that is the problem. Finally I confirm that as explained in case R(S) 3/90 on a review under regulation 17(4) of the Claims and Payments Regulations it is for the adjudication officer to satisfy the tribunal affirmatively on the balance of probabilities that the requirements for entitlement are no longer satisfied; and as I have indicated I agree with the tribunal's conclusion that this had been shown on the evidence as regards the period from 5 January 1994 onwards.

15. The appeal is accordingly allowed but only to the extent of setting aside the tribunal's decision and for the reasons I have indicated substituting my own decision to the same effect as set out above.

(Signed)

P L Howell

Commissioner
4 May, 1995