RFMH/SH/MD

(12)

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Region: North Eastern

SOCIAL SECURITY ACTS 1975 TO 1984
CLAIM FOR SICKNESS/INVALIDITY BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Kenneth Parker
Appeal Tribunal: Middlesbrough
Case No: 34/1

1. My decision is that:-

(a) the decisions of the insurance (now adjudication) officer awarding sickness benefit and invalidity benefit to the claimant for the inclusive period from 6 December 1982 to 26 September 1984 shall be reviewed because the decisions were given in ignorance of some material fact; section 104(1)(a) of the Social Security Act 1975 ("the Act");

(b) the said decision shall be revised so that the said benefits are not payable in respect of the inclusive period from 6 December 1982 to 11 April 1984, because they were not days on which the claimant was incapable of work by reason of some specific disease or bodily or mental disablement within the meaning of section 17(1)(a) of the Act, and regulation 3 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 and 1983 ("the Regulations"); and

(c) Invalidity allowance is not payable in respect of the inclusive period from 11 April 1983 to 11 April 1984 because the claimant is not entitled to invalidity benefit for that period; Section 16(1) of the Act, and,

(d) the claimant is required to repay to the Secretary of State the said benefits overpaid during the inclusive period from 6 December 1982 to 11 April 1984 amounting to £3,942.98 as I am not satisfied that in the obtaining and receipt of that benefit he has throughout used due care and diligence to avoid overpayment; section 119(1) and (2) of the Act.

2. The claimant, a chief seafaring officer with a shipping company, had been in receipt of sickness benefit followed by invalidity benefit from 27 September 1982 by reason of diverticulosis. On 4 April 1984 information was received by the local office of the Department of Health and Social Security that the claimant was working as a

self-employed agent for a company from 6 December 1982. Subsequent investigations showed that the claimant had been employed from 6 December 1982 to 3 March 1984.

3. The payment of benefit was suspended from 16 April 1984 and the claimant was interviewed on 30 April 1984 by an inspector of the Department. He stated he was unable to go to sea and did not consider his activities as "work" although he had never made any enquiries. He later stated that he had last worked on 13 April 1984.

4. In the light of the evidence the adjudication officer reviewed his decisions awarding sickness benefit and invalidity benefit for the days in question on the ground that he was satisfied that the decisions were given in ignorance of some material fact. His revised decisions were to the effect that sickness benefit was not payable during the inclusive period from 6 December 1982 to 9 April 1983 and that invalidity benefit and allowance was not payable during the inclusive period from 11 April 1983 to 11 April 1984 because during those periods the claimant was not incapable of work by reason of some specific disease or bodily or mental disablement. He further required repayment of the sum of £3,942.98, being the amount of benefit overpaid during those periods as he was not satisfied that the claimant had throughout used due care and diligence to avoid overpayment in obtaining receipt of those benefits.

5. The claimant appealed to the social security appeal tribunal against the revised decisions of the adjudication officer. The claimant attended the hearing before the tribunal. He gave oral evidence and amplified his arguments with written observations. He stated that he had been advised to keep active and that he did not consider his activities to be "work". He conceded that his approach with regard to not reporting the income was lackadaisical and careless. He had at a later date read the instructions in the pension book but after consulting various people the general consensus of opinion was that a few hours work was acceptable. The claimant also submitted a letter dated 3 June 1982 from the consultant surgeon at the hospital he had attended. The letter stated "... On the 10 May 1982 he came to see me again with what was obviously recurrent diverticulitis ... My feeling is that this disease is likely to recur and complications of diverticulitis are potentially very dangerous and I would think that a seagoing appointment is not in this patient's best interest." The claimant also submitted a letter from his own doctor dated 31 May 1984 which explained that diverticulitis could result in peritonitis if medical attention was not quickly available and that as a result the claimant was no longer fit for his occupation as a seaman. The doctor added "He is also not fit for any sustained employment because of the nature of his condition". In the event the tribunal dismissed the appeal and the claimant now appeals to the Commissioner, leave having been granted by the tribunal chairman.

6. Regulation 19(2) of the Social Security (Adjudication) Regulations 1984 provides that every tribunal shall record a statement of the grounds for their determination and of their findings on material questions of fact. It is submitted on behalf of the claimant that the tribunal failed to record any finding as to whether the activities carried out were "work" within the terms of section 17(1)(a) of the Act, and if it was whether the amount was negligible and could be disregarded. Further although the claimant contended that the work was undertaken for therapeutic reasons the tribunal failed to consider whether the claimant was assisted by the provisions of regulation 3 of the Regulations. I agree with the submission that the tribunal failed to meet their obligations under regulation 19(2) and I have no alternative but to set aside the decision. However, it is open to me, instead of remitting the matter for fresh determination to another tribunal, to determine the appeal finally myself (R(U)3/63.) I think the interests of everyone would be best served if I adopted this course.

7. Section 104(1)(a) of the Act provides that a decision of an adjudication officer may be reviewed at any time if he is satisfied that the decision was given in ignorance of some material fact. On the evidence before me the awards of sickness benefit and invalidity benefit and allowance for the inclusive period from 6 December 1982 to 26 September 1984 were rightly reviewed as the adjudication officer was unaware of the material fact that the claimant was working.

8. Section 17(1)(a)(ii) of the Act provides that it is a condition of entitlement to sickness benefit and invalidity benefit that the claimant is, or is deemed in accordance with regulations to be, incapable of work by reason of some specific disease or bodily or mental disablement. Moreover, work is defined as meaning work which the person concerned can reasonably be expected to do. Whether a person is incapable of work is a question of fact (R(S)1/53). The burden of proving that he is incapable of work rests on the claimant (R(S)13/52). "Work" does not necessarily mean full-time work, part-time work is permissible. A doctor's statement is not conclusive evidence of incapacity or, for that matter, of the advisability of refraining from work; it represents a particular doctor's opinion which is to be weighed with all other relevant evidence in forming the judgment on the case (R(I)13/55, R(S)4/60). Throughout the period in issue the claimant submitted medical statements advising him to refrain from work by reason of diverticulitis. In Decision R(S)2/74 the Commissioner held that "Evidence of incapacity represented by medical certification may be negative by evidence that the claimant did a significant amount of work, and therefore was not incapable of work".

9. In the present case the claimant worked as a self-employed agent one day a week for a finance company. He was paid a commission calculated by reference to a percentage of the monies collected by him. Accordingly although the amount of his average weekly earnings fluctuated, the number of visits he made and hours he worked on behalf of the finance company did not. The claimant had 40-45 clients on his books and as they were not always available the claimant estimated that he made about 70 visits on each day he worked. He covered approximately 63 miles involving "low gear driving, weaving in, out and around the [housing] estates, with frequent stops and starts and getting in and out of the car". The schedule of earnings showed that during the period in issue the claimant worked every Friday on a regular basis. The work done by the claimant was not so trivial that it could be disregarded. His gross weekly earnings varied from £8.35 to £51.14 and was remunerative even after the deduction of admissible expenses.

10. In his appeal to the Commissioner the claimant submitted 2 further letters from his own doctor. The first dated 14 August 1984 reports that the claimant had to give up his occupation as a mariner and "He is not fit for continuous work but was able to do a light job for short periods. This was beneficial to him physically." The second letter dated the 24 January 1985 reports that "... At one stage he had a small job he did on one day per week and I encouraged him in this as at the time his activity was causing a little depression. A little activity would give him an interest and would have a positive therapeutic effect." I have considered all the evidence with care. It is not in dispute that the claimant is not capable of his normal occupation. However in my view the regularity and nature of the activities he carried out during the period in issue indicate that he was capable of work within the meaning of section 17(1)(a) of the Act. The fact that the claimant's own doctor considered it therapeutic is not decisive of the issue. It follows that the claimant does not satisfy the provisions of section 17(1)(a)(ii) of the Act and accordingly is not entitled to benefit. As a result by virtue of section 16(1) of the Act invalidity allowance is also not payable.

11. However, even if I am wrong in reaching the above conclusion, the fact remains that the claimant did work during the period in issue. In those circumstances a claimant may nevertheless be deemed incapable of work if he can satisfy either of the exempting provisions contained in regulation 3(3) of the Regulations. This provides

> "(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 ordinarily exceed £20 a week [£22.50 from 21 November 1983]."

12. In Decision R(S)4/83 (paragraph 10) the Commissioner stated:

> "...the words may be deemed must be intended to confer a discretion. This should, in my judgment, be exercised so as to take into account all the circumstances of the case including medical evidence which deals with a claimant's capacity to work and the nature of his his work: ... In order for regulation 3(3) to apply it is first necessary to find that the claimant is, during the period under consideration, not incapable of work ... Secondly, for regulation 3(3) to apply, the claimant must have been found to be not incapable of work 'by reason only of the fact that he has done some work while ... suffering from some specific disease or bodily or mental disablement'. Thirdly, that work must have been work which falls within either sub-paragraphs (i) or sub-paragraphs (ii) of regulation 3(3). If these three conditions are fulfilled there is a discretion to deem the claimant to be incapable of work."

13. It is not contended that the claimant is assisted by regulation 3(3)(i). In Decision R(S)4/79 the Commissioner considered the meaning of "good cause" in regulation 7(1)(g) (now repealed) but which used identical expression, and said that there should be evidence that the work done by the claimant was work which he was "encouraged by his doctor to do for therapeutic reasons".

14. In his appeal to the Commissioner the claimant submitted 2 further letters from his doctor. The first dated 14 August 1984 reports that the claimant had to give up his occupation as a mariner but that "He is not fit for continuous work but was able to do a light job for short periods. This was beneficial to him physically." the second letter dated 24 January 1985 states "... At one stage he had a small job he did on one day per week and I encouraged him in this as at the time his inactivity was causing a little depression. A little activity would give him an interest and would have a positive therapeutic effect." This letter was of course issued some time after the claimant had ceased working and looking at the medical evidence as a whole I am not convinced that during the period in issue the claimant was actively encouraged by his doctor to undertake the work or was even aware that he was so doing. It should be noted that regulation 3(3) confers a discretion to find a claimant nevertheless incapable of work.

In the circumstances I do not, consider that the evidence warrants a finding in the claimant's favour.

15. However, irrespective of the question of good cause, I find that the claimant was in fact capable of work during the period at issue. The final question for determination in this appeal is whether or not the claimant should be required to repay the sum of £3,942.98 being the amount of the said benefits overpaid to him.

16. The decisions to pay the said benefits to the claimant were made by the adjudication officer and varied on review. Section 119(1) and (2) of the Act provide that overpayment of benefits must be repaid unless the claimant can show to the satisfaction of the person or tribunal determining the appeal or review that in the obtaining of the receipt of the benefits he has throughout used due care and diligence to avoid overpayment.

17. In Decision R(G)1/79 the Commissioner explained that using due care and diligence meant not only merely refraining from carelessness, neglect, inattention or indolence in regard to entitlement to benefit but also taking positive action such as furnishing full information to enable entitlement to benefits to be correctly ascertained and finding out by enquiry of the conditions and circumstances of such entitlement.

18. The records of the Department show that the claimant was sent form BF11D on 1 October 1982 and forms BF228 were issued on 13 April 1983 and 8 September 1983. These forms instructed him to inform the Department's local office if he did any work of any kind. Further the order books contained instructions to report to the Department "if you intend to do any work". On each of the doctor's statements which the claimant submitted he signed a declaration that he had done no work since the date of the last doctor's statement. On the claimant's own admission he adopted a careless and lackadaisical attitude to the matter and made no enquiries from his local office as to whether his interpretation of the position was correct. Manifestly the claimant failed to display the degree of care and diligence called for in the circumstances and repayment is required.

19. The claimant's appeal is dismissed.

(Signed) R.F.M. Heggs
Commissioner
Date: 23rd July 1985.