CS 722/1980

MJG/MP

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.S. 13/81

1. My decision is that invalidity pension is not payable to the claimant for the inclusive period from 29 January 1980 to 28 April 1980, because the claimant has not proved that for that period he was incapable of work by reason of some specific disease, or bodily or mental disablement: Social Security Act 1975 sections 15(1) and 17(1)(a)(ii). The claimant's appeal against the decision of the local tribunal is therefore dismissed.

2. The claimant is a man, aged 58 at the relevant time, whose occupation had been that of plasterer. From 7 May 1979 until 17 November 1979, he had been continuously in receipt of sickness benefit by reason of incapacity, diagnosed as due to "back injury/ arthritis of spine". Thereafter, invalidity pension was paid to him continuously until 28 January 1980. On 29 January 1980, the claimant's doctor signed a medical statement (form MED3) advising the claimant to refrain from work for 13 weeks by reason of "spinal arthritis". The claim for invalidity pension for those 13 weeks, i.e. for the period from 29 January 1980 to 28 April 1980, was, however, disallowed by the local insurance officer on the ground that the claimant had not shown incapacity for work for that period. That disallowance was upheld by the local tribunal by a unanimous decision.

3. Section 17(1)(a) of the Social Security Act 1975, provides,

> "17(1) - For the purposes of any provisions of this Act relating to ... sickness benefit or invalidity benefit -
>
> (a) subject to the provisions of this Act, a day shall not be treated in relation to any person -
>
> .....

(ii) as a day of incapacity for work unless on that day he is, or is deemed in accordance with regulations to be, incapable of work by reason of some specific disease or bodily or mental disablement,

('work', in this paragraph, meaning work which the person can reasonably be expected to do)".

4. Reported Commissioners' Decisions, which are summarised in the submissions of the local insurance officer to the local tribunal and of the insurance officer now concerned to the Commissioner, have indicated that after a certain period of time there must be considered not only the claimant's regular occupation, but also any kind of work, full or part-time, which the claimant can, in the words of section 17(1) of the 1975 Act, "reasonably be expected to do".

5. In this connection, the claimant was examined on two occasions by medical officers of the Department, who in their forms of report gave a detailed report and analysis, with their independent medical opinions as to whether or not the claimant was incapable of work. The two examinations were on 26 October 1979 and 18 January 1980 respectively. Both medical officers reported that, although the claimant was incapable of work at his regular occupation, he was nevertheless capable of work within certain limits, the extent of those limits being indicated in detail on the forms of report. The reports were made by different medical officers in different areas but they coincide in their main recommendations and findings, particularly the finding that the claimant was capable of work within certain limits. However, the report of 26 October 1979, states that an employment rehabilitation course is not required, whereas in the report of 18 January 1980 the medical officer stated "I strongly recommend a period of employment rehabilitation".

6. In connection with that particular point, the claimant tendered to the local tribunal a letter dated May 1979 to the claimant from an office of the Manpower Services Commission, telling the claimant that his application for sponsorship under a training opportunities scheme had been unsuccessful. According to a memorandum by the insurance officer who was present at the hearing before the local appeal tribunal, the letter was declared irrelevant by the tribunal but I consider that it ought to be taken into account, together with another letter from that Commission dated 31 August 1979 which makes it clear that the claimant had been making enquiries as to whether he could obtain employment as a Skill Centre instructor in plastering.

7. Nevertheless, after careful consideration, I have come to the conclusion that the claimant has not, taking into account all the evidence, medical and otherwise, shown that, for the period under appeal (I express no opinion as to periods after that period), he was incapable of all work which he could reasonably be expected to do.

8. There are two further matters in connection with the hearing before the local tribunal on which I consider some comment should be made, not because I consider that the tribunal in this case acted otherwise than conscientiously and impartially but to lay stress on the well-known statement that, "Not only must justice be done but it must also manifestly be seen to be done". The first concerns the statement by the claimant in his grounds of appeal to the Commissioner (dated 17 April 1980),

> "I also submit the local tribunal were biased against me. They stressed where I lived was a guest house (which it is not). Whether it is or not shouldn't have any bearing on the appeal and I feel they based their decision on that assumption".

9. In that connection, the insurance officer present at the hearing in a written statement to the Commissioner says,

> "The reference to a guest house - quoted in 'cross-examination by /one of the lay members of the tribunal named/' related to a question put by the member as to why, when the appellant moved from /his previous home in the North of England to a tourist area in the South of England/ he had purchased a property on the main road between /two towns in the tourist area/ which was well known for the high proportion of private residences catering for the tourist trade".

10. It is of course important that the lay members of a local tribunal should take an active part in the proceedings. All too often claimants allege that the lay members of the tribunal are purely passive and that the tribunal is in fact constituted by the chairman alone. However, that being said, I deprecate the use of the expression in the chairman's note of evidence (in form LT3) "cross examined by" in relation to the lay member's questions. In this particular case the phrase "cross-examined by" is the typist's version of the chairman's handwritten note which reads "XXD by". That, in my view, can only be regarded as an abbreviation for "cross-examined by". I consider that the use of that phrase is undesirable, because it might well indicate to a claimant or other party before a local tribunal that the members of the tribunal carried out questioning of a possibly hostile and disbelieving nature. In my judgment the expression "cross examined by" should be avoided at any stage in the local tribunal proceedings and in the record of those proceedings (on form LT3), whether in relation to questions by the members of the tribunal or, for that matter, by the insurance officer who acts as amicus curiae (literally, 'friend of the court'), not as advocate.

11. Moreover, members of local tribunals and insurance officers should not regard themselves as cross examiners, but as objective questioners to ascertain all evidence relevant to the appeal. It is of course the proper function of the members of the tribunal to ask questions, as the procedure before a local tribunal is inquisitorial and not adversarial, i.e. their function is to make a full inquiry

into the matter and not just to rely on the evidence presented to them by the parties. The chairman's note of evidence should record such questions by some such phrase as "questioned by [the lay member]" and the use of "cross examined by" should be avoided. Nevertheless I do not regard the use of the expression "cross-examined" in this case as constituting in any sense a breach of the rules of natural justice, or as constituting any sufficient appearance of bias to merit my setting aside the decision of the local tribunal.

12. The question about the guest house was, in my view, perfectly proper, in that it was perfectly legitimate for the members of the tribunal to try to ascertain for themselves the claimant's capability for any kind of work, e.g. helping guests in a guest house, that he, the claimant, might reasonably be expected to do. When asking more or less peripheral questions, however, members of a local tribunal should guard against giving the impression that they are, so to speak, acting in an 'amateur detective' capacity.

13. The other matter concerning the hearing before the tribunal arises from the claimant's allegation in his grounds of appeal to the Commissioner (dated 17 April 1980),

> "Finally, the chairman of the tribunal's parting remarks I quote 'If I allowed your appeal, I would have to allow a further 500' unquote. I thought every case was judged on its own merits and not on the assumption it may involve 500 other people".

14. The claimant is, of course, perfectly correct in stating that the issues in any particular appeal must be related only to the individual case. However, I do not regard the alleged remark by the chairman of the local tribunal as being of any serious nature, and I have therefore decided that it was not apposite for me to have an enquiry made of the chairman as to whether he made the remark or not. Such a remark, if made, clearly would be better left unmade, but I do not regard the making of such a remark as of itself vitiating a tribunal's decision unless there were evidence that a tribunal had decided a case according to predetermined policy rather than on the facts of a particular case. There is, in my view, no such evidence in this case.

(Signed) M J Goodman
Commissioner

Date: 15 July 1981

Commissioner's File: C.S. 722/1980
C I O File: I.O. 1483/V/80
Region: South Western