RLG — Tribunals Do Not Consider Entitlement Down To Date Of Their Decision Unless Tribunal Asks Them

27/95

DGR/SH/11

Commissioner's File: CS/879/1995

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Helen Quinn

Appeal Tribunal: North Shields

Case No: 1/41/94/07506

[ORAL HEARING]

1. I grant the claimant leave to appeal against the decision of the social security appeal tribunal given on 24 November 1994. As both parties have consented to my treating the application as the actual appeal, I can conveniently go on to deal with the appeal itself. For the reasons set out below, the aforesaid decision is not erroneous in point of law, and accordingly this appeal fails.

2. On 9 August 1994 the adjudication officer reviewed the award to the claimant of invalidity benefit, and disallowed the same from and including 8 August 1994 on the ground that the claimant had ceased, from that date, to be incapable of work by reason of some specific disease or bodily or mental disablement. In due course, the claimant appealed to the tribunal, who in the event upheld the adjudication officer. In arriving at their decision the tribunal proceeded on the basis that certain evidence, contained in a document dated 14 October 1994, was not to be taken into account. They took the view that they were concerned with the position as from 8 August 1994, and as they were satisfied that from that date the claimant had ceased to be incapable of work, they concluded that entitlement to invalidity benefit had ceased from 8 August 1994, and as a result evidence as to the claimant's condition on 14 October 1994 was irrelevant. In view of certain observations made in Commissioner's Decision CIS/030/93 suggesting that the tribunal might have been in error in not looking at the report of 14 October 1994, I directed an oral hearing. At that hearing the claimant, who was present, was represented by Mr Dave Ohlson of NACAB Welfare Rights Unit, whilst the adjudication officer appeared by Mr D Connolly of Counsel, instructed by the Solicitor's Office of the Department

of Social Security.

3. The tribunal made the following findings of fact:-

"Tribunal accepted facts per form AT2 Summary of Facts Box 5 paragraphs 1-4. Appellant is capable of part-time work (after 10.00 am) as a garage console operator, general receptionist, medical receptionist, and pay box attendant (sports complex), in particular as a medical receptionist. This seems most appropriate to appellant's qualifications. She is not capable of carrying out her former work as a nurse."

The tribunal gave as the reasons for their decision the following:-

"Tribunal considered all submissions and reports and held:-

1. The appellant no longer satisfies the requirements for entitlement to Invalidity Benefit and the award of that benefit was therefore correctly reviewed under regulation 17(4) of the Social Security (Claims and Payments) Regulations.

2. The burden of proof is on the adjudication officer - Commissioner's decision R(S) 3/90.

3. Appellant has now been in receipt of Invalidity Benefit for almost 12 months and it is therefore time to consider whether she is capable of work other than her own employment - Commissioner's Decision R(S) 7/60.

4. The tribunal applied Commissioner's decision R(S) 2/78 and considered the appellant's age, education, experience, state of health, the nature and length of appellant's regular occupation, her present condition and adaptability.

5. Tribunal considered the medical evidence. On 16 June 1994 Dr. Tose, the appellant's GP, reported 'Ability is limited'. On 25 July 1994 Dr. Todd reported that appellant is fit for semi-sedentary work avoiding repeated bending and heavy lifting. On 14 October 1994 Dr. Tose gave his opinion that appellant is not medically fit to seek gainful employment. The critical date at which the claimant's condition is reviewed is 8 August 1994. Any deterioration after that date is not to be taken into account.

6. Tribunal observed the appellant in the tribunal room. She did not have the appearance of one in constant pain, and her movements were free. In view of the above matters tribunal accepted the medical evidence that appellant is fit for semi-sedentary

work. They accepted appellant's evidence that her ankles ached for half an hour to an hour after she gets out of bed, and they therefore accepted that she could work on a part-time basis only. It may be that the appellant's condition has deteriorated since August, but that was not a matter for the tribunal."

I see nothing wrong in law with the tribunal's decision.

4. The first question I have to determine is whether the tribunal were right to exclude the report of 14 October 1994. On the basis that the tribunal correctly concluded that, as from 8 August 1994, the claimant had ceased to be incapable of work, and as a result from that date was no longer entitled to benefit - a matter which I will deal with later - why should events subsequent thereto be in any sense relevant? Entitlement had ceased from 8 August 1994, and there was no fresh claim covering a later period before the tribunal. Although this might be thought to be self-evident and obvious, some uncertainty has been generated by what was said in CIS/030/93. For at paragraph 16 of that decision the Commissioner said as follows:-

" 16. .... It would be wrong to limit an appeal tribunal's decision either confirming or overturning an adjudication officer's decision to review and revise an award of benefit so as to terminate entitlement from a particular date to the position as at that date."

The Commissioner then went on to support this proposition by reference to CIS/391/1992. In that case, the issue was whether or not entitlement should be disallowed from 15 March 1991, and in giving directions to a new tribunal the Tribunal of Commissioners did so in the following terms:-

"Unless a proper valuation is produced to the effect that the claimant's notional undivided share was, on 15 March 1991, or some later date, worth more than £8,000 the appeal against the adjudication officer's decision should be allowed and the award of benefit should not be reviewed but should be continued."

The Commissioner in CIS/030/93 emphasised the words "or some later date" and observed as follows (at paragraph 17):-

"That final passage seems to confirm that the Commissioners considered that all weeks in the period in issue .... had to be dealt with by the new appeal tribunal, and not just the position as at 15 March 1991. The Commissioners recognise that if the conditions for review were not met as at 15 March 1991 they could be met at some later date."

5. So far, I would not quarrel with what the Commissioner said. The adjudication officer in CIS/391/1992 had disallowed benefit from 15 March 1991, However, the question at issue was not simply the position as at 15 March 1991, but as at that day and

all subsequent days. The adjudication officer had disallowed benefit not merely for 15 March 1991, but for all time thereafter. It follows that if at 15 March 1991 the claimant had not ceased to be entitled to benefit, that did not dispose of the matter. It was incumbent on the tribunal to consider all subsequent days prior to the date of their decision to see if at any moment of time the claimant ceased to be entitled to benefit. If he did, then from that date the claim was extinguished, and if subsequently the claimant wished to reassert entitlement he had to make a new claim. Accordingly, the tribunal were concerned with the position up to the date of their decision, but only in the sense that they were under a duty to identify any date when entitlement ceased.

6. However, in CIS/030/93 the Commissioner went on to muddy the waters by suggesting that where entitlement had ceased at a date prior to the tribunal's decision, but again prior to their decision, the claimant had established valid grounds for a fresh entitlement, notwithstanding that he had never lodged a new claim, the tribunal should still adjudicate as though there were a continuing claim and make an award from the date when the claimant re-established title. He said with reference to the situation in CIS/391/1992 as follows:-

> "The Commissioners did not expressly state what was to be done if the conditions for review were met as at 15 March 1991, but the evidence showed that the claimant would be entitled to income support in some later week within the period in issue. However, parity of treatment and elementary fairness requires that, if a decision confirming the termination of entitlement on review is to be given an effect beyond the operative date of the review, the decision should be able to award benefit for any weeks within the period of entitlement in which the conditions of entitlement were met. I consider, therefore, that the decision of the Tribunal of Commissioners supports the conclusion which I had reached independently and expressed in paragraph 16 above."

In my view, the decision of the Tribunal of Commissioners does nothing of the sort. Moreover, the Commissioner in CIS/030/93 fails to deal with certain other obstacles in the way of this approach.

7. Section 1 of the Social Security Administration Act 1992 provides that no person shall be entitled to any benefit unless he or she makes a claim for it in the manner prescribed by regulations made under Part I of the Act. Moreover, regulation 4 of the Social Security (Claims and Payments) Regulations 1987 provides as follows:-

> " 4. (1) Every claim for benefit shall be made in writing on a form approved by the Secretary of State for the purposes of the benefit for which the claim is made, or in such other manner, being in writing, as the Secretary of State may accept as

sufficient in the circumstances of any particular case."

Accordingly, by statute once a claim has been extinguished no further award can be made unless there is a new current claim and that claim has to satisfy regulation 4 of the Social Security (Claims and Payments) Regulations 1987. That claim has either to be in proper form or alternatively accepted by the Secretary of State. Manifestly, in the present instance, no new claim was made, after the old one was extinguished with effect from 8 August 1994, still less was it in a manner specifically approved by the Secretary of State. Moreover, the need to make a fresh claim after an earlier one has been finally disposed of was endorsed by the Commissioner in CSS/71/94 (at paragraph 6) and, ironically, by the same Commissioner who was responsible for CIS/030/93, in his earlier decision CIS/248/1991 (paragraph 17).

8. I am aware, of course, that the requirement that a claimant, if his existing claim has been extinguished, must make a new claim, should he wish to resume entitlement, could adversely affect him if too long an interval of time had elapsed between the date when he again became entitled to benefit and the date of the adjudicating decision extinguishing the earlier entitlement. More than a year could have elapsed, and the claimant would be caught by the "12 months' rule" imposed by section 1 of the Social Security Administration Act 1992. That is unfortunate, but would seem to be an inevitable consequence of the statutory provisions, and I have no power to waive or amend them. If it is thought that an injustice is done in these circumstances, then it is for the legislature, and the legislature alone, to make the necessary statutory adjustments. However, in the present instance, the claimant has ample time in which to lodge a new, albeit late, claim without being caught by the "12 months' rule".

9. I now turn to the substantive matter in this case, namely whether, on the basis that the tribunal were not concerned with the report of 14 October 1994, the tribunal were entitled to reach the conclusion they did, and whether they gave sufficient reasons for their decision. Notwithstanding the arguments of Mr Ohlson, supported with vigorous persistence by Mr Connolly, I find nothing wrong with the tribunal's decision. They set out the medical evidence before them, and expressly stated that they accepted it. She was "fit for semi-sedentary work avoiding repeated bending and heavy lifting". They tested that evidence by looking at the claimant herself and decided that "she did not have the general appearance of one in constant pain and her movements were free". In other words, there was nothing suspicious to suggest that there might be anything wrong with the medical report of Dr. Todd. They were therefore satisfied that the claimant could undertake various occupations as set out in their findings. Moreover, they were prepared to accept the claimant's own evidence "that her ankles ache for half an hour to an hour after she gets out of bed", and to accept that her work should be part-time "(after 10.00 am)". In my judgment, the tribunal were perfectly entitled to reach the conclusion they did

on the evidence before them, and they have explained the position with commendable lucidity.

10. Accordingly, I see nothing wrong in law with the tribunal's decision, and have no hesitation in dismissing this appeal.

(Signed) D.G. Rice
Commissioner

(Date) 28.4.95