

CS 527/1981
886/1979

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IEJ/MC

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR SICKNESS AND INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Bruce Gilder

Local Tribunal: Nottingham

Case No: 75/1 and 82/4

1. My decision is given in paragraph 2 below in respect of two separate appeals by the claimant.

- (1) His first appeal is against a decision dated 5 October 1979 by a local tribunal which held invalidity benefit not payable from 20 June 1979 to 26 June 1979 and - as a referred question - also not payable from 27 June 1979 to 7 August 1979.
- (2) His second appeal is against another decision of a local tribunal - dated 29 August 1980 - which held invalidity benefit not payable from 8 August 1979 to 12 November 1979 and sickness benefit not payable from 9 January 1980 to 5 August 1980 and - purportedly as a referred question - also held sickness benefit not payable from 6 April 1980 to 16 September 1980.
- (3) It is a matter of record that the claimant has made successful appeals against previous disallowances of invalidity benefit, namely:
 - (i) by (eventually) my own decision dated 13 December 1979 in his favour as regards the aggregate period 17 March-22 April 1978; and
 - (ii) by a local tribunal's decision dated 2 April 1979 (following a hearing on 30 March 1979) as regards the aggregate period 31 October-10 December 1978.

2. (1) The first appeal is allowed. My decision is that invalidity benefit is payable for the period from 20 June 1979 to 7 August 1979 (both dates included) because the claimant has proved that he was throughout such period incapable of work by reason of some specific disease or bodily or mental disablement.

(2) The second appeal is allowed in part only. My decision is that:

(i) invalidity benefit (but not sickness benefit) is payable for the period from 8 August 1979 to 12 November 1979 (both dates included) for the same reason as last above indicated; but

(ii) neither sickness benefit nor invalidity benefit is payable in respect of any of the period 9 January 1980 to 16 September 1980 (both dates included) because the claimant has not as regards any of such period proved that he was incapable of work by reason of some specific disease or bodily or mental disablement.

(3) My decisions above found upon sections 14(1), 15(1) and ~~17(i)(a)-(ii)~~ of the Social Security Act 1975 ("the Act"), and that covering the period 6 April-16 September 1980 is given in exercise of my jurisdiction under section 102 of the Act.

(4) I should also record that whilst the decision of an insurance officer under which the claimant was paid sickness benefit in respect of the period 13 November 1979 to 8 January 1980 may be rendered anomalous by my decision under (1) above, it is not one now before me.

3. (1) In June 1979 the claimant was some 39 years of age and his regular occupation was as a miner. He had some years earlier suffered injury to each of his knees and had been in receipt of invalidity benefit for substantial periods in 1976, 1977 and 1978 in respect of diagnosis of "old knee injury". By June 1979 he had been in receipt of invalidity benefit since a date in July 1978 in reliance upon MED3 certificates latterly in respect of diagnoses of "gout", and "bronchitis and gouty arthritis", the most recent at 20 June 1979 being a MED3 certificate in the former tenor expressed as a four weeks "open" certificate dated 30 May 1979, which was succeeded by a six weeks "open" certificate in the latter tenor dated 27 June 1979. The position so reached in June 1979 had, however, been prefaced by a suspension of benefit from October 1978 to 18 December 1978 following the insurance officer's decision referred to in paragraph 1(2)(i) above and prior to the claimant's successful appeal also there referred to.

(2) In April 1978 a medical report given by the RMO had recorded that the claimant suffered pain from the old injury to his L knee and from recurrent bronchitis but considered him fit for light manual work excluding prolonged walking or kneeling/crouching; and it appears that another report as to fitness for work within limits had been given in early October 1978. But on 19 December 1978 the DMO was (without a fresh examination) satisfied that the claimant was suffering exacerbation of gout such that he was unable to

attend for assessment, and accepted incapacity as not in doubt for 2 months, the claimant then having been continuously under medical treatment and supervision since discharge from hospital in July 1978.

- (3) On 10 April 1979 the claimant was again examined by the RMO. On this occasion the claimant's "old" injury L Knee" was again indicated to be his main condition, with "history of gout and bronchitis" as secondary conditions, and he was indicated to be handicapped as to walking far, crouching and kneeling and to have "occasional chest infections". But - whilst recording that the claimant was due to see a specialist about his gout on 15 May 1979 - the RMO considered the claimant capable of some semi-sedentary work and made observations which included "last worked 3 years ago ... motivation is poor".
- (4) The claimant was in the light of that report invited to visit the local employment office with a view to exploring possibilities of employment, and attended there on 3 May 1979 but declined to register for employment, maintaining that he was unfit for any type of work and that his own doctor supported that view. In inferred reliance on that report an insurance officer's decision dated 21 June 1979 disallowed invalidity benefit from 20 June 1979 to 26 June 1979 and - the claimant having appealed to the local tribunal - the tribunal were asked to decide upon the claimant's further claim for 27 June-7 August 1979 as a referred question.
- (5) A further examination and report on behalf of the RMO on 23 July 1979 also expressed the view that the claimant was then capable of work within limits, observing "no bronchitis today. History gout in L ankle - nil today. Mild arthritis left knee".
- (6) The local tribunal who heard the claimant's appeal on 5 October 1979 appear, understandably in view of the complexity of the case history, to have become confused as to the true course of events and the evidence upon which they were being asked to give their decisions. For though recording that the claimant indicated at their hearing "I succeeded an appeal to the tribunal on 30 April 1979. I then got benefit until 19 June 1979" /and I here interpose that research has confirmed that there was no appeal of the claimant's heard on 30 April 1979, which is a misreference to 30 March 1979 for which the local tribunal are in no way to blame/ and in arriving at decisions adverse to the claimant both as to 20 June 1979 to 26 June 1979 and as to 27 June 1979 to 7 August 1979 their recorded findings of fact are as follows:

"The claimant aged 39 was paid invalidity benefit from 27 6 78 to 19 6 78" (emphasis supplied by me). He was disallowed after he had been examined on 2 separate occasions by 2 different doctors each of whom considered him capable of some kind of work although he is not fit to return to his job as a miner".

4. But as to those findings:

- (A) It is quite true that the claimant was paid invalidity benefit as from 27 June 1978 to 19 June 1979 and one might at large take the reference to 19 June 1978 as a simple error by oversight;
- (B) However, there had not been two recent RMO reports prior to the disallowance as from 20 June 1979 in reliance on which the disallowance on 21 June 1979 could properly be based - there had been two in 1978 on which the disallowance the subject of the appeal heard (and won by the claimant) on 30 March 1979 had founded. But the disallowance as from 20 June 1979 with which the tribunal on 5 October 1979 were concerned had followed the intermediate RMO report of 19 December 1978 of "incapacity not in doubt" and quite clearly proceeded in reliance on the one subsequent report dated 10 April 1979 for the second report since ~~19 December 1978 which was before the tribunal on 5 October 1979, being dated 23 July 1979, quite clearly could not have served as foundation for a disallowance by decision on 21 June 1979, over a month earlier.~~
- (C) The reasons for decision start "we accept the reports of the 2 DOs in the case..."
- (D) In those circumstances I cannot let the local tribunal's decision stand, and must set it aside. But I am also in the circumstances entitled to substitute my own decision - as I have in fact done in para 2 above, for reasons I will indicate later below.

5. I should at this point further indicate as follows:

- (1) At the tribunal on 5 October 1979 the claimant indicated that he was due to see one specialist, Mr J S on 2 November 1979; and was seeing another, Dr S, at hospital monthly.
- (2) The claimant appealed from the local tribunal's decision on grounds:
 - (a) of incapacity for employment due to attendance for physiotherapy 2 days a week; and
 - (b) of complaint of the omission from the claimant's notes of any reference to his gout or acute bronchitis; - and he provided a note from the hospital in support of his attendance for physiotherapy.
- (3) I gave directions on 4 February 1981 as to obtaining reports from Dr S and Mr J which have led to such reports respectively now being in evidence before me, and in each instance sought their assistance as to the claimant's condition at or about 19 June 1979 in the context of capacity for work in a less strenuous field than his former job as an underground coal worker.

6. Dr S materially indicates that:

- (1) claimant was first treated for acute gout (and also arthritis in the L ankle) as an in-patient in June 1978, although he had by then a prior history of at least two prior admissions as an in-patient in connection with pain in his L ankle following an initial injury to it at work in 1973.
- (2) The claimant was still suffering from gout, although undergoing medication for it, in October 1978 when again seen; and continued to receive medication for gout, with improvement in his condition by December 1979, his condition in March 1981 remaining controlled, though accompanied at that date by osteo-arthritis in both knees.
- (3) Records as at May 1979 show the claimant to have been experiencing acute arthritis in the R knee which settled in 2 weeks but with pains in the L ankle continuing to subsist, and the claimant's uric acid level still raised in July 1979 "and I think he was still suffering from fairly active gout at that time".
- (4) Dr S expresses the clear view that the claimant could not in May/August 1979 have worked in his regular occupation and as to other remunerative work at that period considers "it is possible that he may have been able to do some" - but not during the acute attack of gout, or involving any strenuous manual labour - "and as he has a chronic knee condition I support that he would have been limited in the long term".

He indicates also "I think the prognosis overall should be very guarded" although hopeful that there will be no recurrence of further attacks of gout.

7. Mr Jackson, an Orthopaedic Consultant, in his report dated 1 May 1981, materially indicates that although the claimant probably suffered an osteochondral fracture following his original injury in 1973, with a likelihood of resultant osteoarthritis, and could not in the summer of 1979 have followed his occupation as a miner "he would be capable of some remunerative work" - though not much crawling or kneeling, and heavy lifting would be difficult. But he was able to express a "reasonably good prognosis".

8. Although the insurance officer now concerned submits otherwise, I have come to the conclusion that although orthopaedically the claimant was not incapable of some remunerative work in the summer of 1979, the added effect of his still suffering from "fairly active gout" also is sufficient to carry the claimant over the line between capacity and incapacity for any work he could reasonably be expected to do, and for which an employer would pay, for the periods in issue upon the claimant's first appeal - though by no great margin. For whilst Dr S considers that the claimant might have been able to do some remunerative work except during the acute attacks of gout themselves

I have to bear in mind that these would not have occurred at predictable times and would clearly have been wholly disruptive of his continuity of service to an employer when they occurred.

The claimant accordingly succeeds on his first appeal.

9. (1) As regards the second appeal, the starting point of my decision can conveniently be to record that the claimant claimed benefit in reliance successively on "open" MED3 certificates furnished by his own doctor as follows:

<u>Date</u>	<u>Period</u>	<u>Diagnosis</u>
8 8 79	6 weeks	Gout, Bronchitis and Arthritis
24 9 79	"	Gout, Arthritis, Bronchitis
5 11 79	"	Arthritis, Gout, Bronchitis
17 12 79	4 weeks	L-knee pain after accident
		at work 1973 and Gout
14 1 80	6 weeks	Gout, Arthritis, Bronchitis
25 2 80	"	L knee pain from arthroscopy and gout
2 4 80	8 weeks	Gout, Arthritis, Bronchitis "Entering Harlow Wood"
28 5 80	8 weeks	Arthritis Ankle, Gout, Knee injury
23 7 80	8 weeks	Gout, Arthritis

- (2) (i) As indicated in paragraph 3 (5) above, the claimant had been examined on behalf of the DMO and considered capable of work within limits on 23 July 1979.

- (ii) He was again examined on behalf of the DMO on 1 December 1979 and again considered capable of work within limits. On this occasion the RMO observed "This claimant shows no sign of bronchitis and his gout is under control. There is limitation of flexion L knee and any attempt to overcome this causes pain".... "Improvement in the condition of the L knee is not to be expected. ERC would surely increase his self confidence if he could be persuaded to go - this I recommend. Fit for suitable work - but hankers after light work at the mine". This report also indicated that the claimant's main condition was:

"old injury L knee"

with secondary conditions:

"gout treated. Recurrent respiratory infections".

It stated as to handicaps

"standing walking and carrying all limited, kneeling to be avoided"; and considered that driving, working at heights, and exposure to fumes should be avoided also - but not "outdoor work in all weathers".

- (iii) Other evidence indicates that the claimant commenced physiotherapy treatment at a local hospital on 13 November 1979 and completed it on 8 January 1980, attending for 1 hour approximately twice weekly in the interim.
- (iv) The claimant was again examined on behalf of the DMO on 10 April 1980 and again found capable of work within limits - the general description of his condition on this occasion including "functional overlay", and the answer to the question "how is the patient handicapped?" being given as "mainly from introspection and functional overlay". On this occasion the only working condition indicated as to be avoided was "driving".

10. On 14 March 1980 an insurance officer's decision was given disallowing invalidity pension from 8 August 1979 to 12 November 1979 and sickness benefit from 9 January 1980 to 5 April 1980 - but sickness benefit was in fact paid for the period 13 November 1979 - 8 January 1980 (i.e. the period of physiotherapy treatment). That change to sickness benefit was no doubt consequential upon the assumed commencement of a new period of interruption of employment which at the time appeared to flow from the disallowances then on foot as regards the periods 20 June-7 August 1979 and 8 August-12 November 1979.

11. The claimant appealed to the local tribunal against the insurance officer's decision of 14 March 1980 and in support of that appeal submitted a report dated 24 June 1980 by his own doctor, in the following terms:

"This man suffers from old L knee injury - awaiting admission to Harlow Wood. Ankle gout and arthritis. Bronchitis. The left leg shows notable wasting of upper and lower muscle groups with subsequent weakness."

12. (1) The local tribunal heard that appeal on 29 August 1980, and the claimant attended and gave evidence in the course of which he indicated that:
- (i) Mr J had discontinued the claimant's physiotherapy and indicated he would "get him into Harlow Wood" (a hospital);
 - (ii) he was still awaiting such admission;
 - (iii) there was "no chance of my working at present" due to bronchitis and arthritis.

(2) At the hearing the insurance officer asked the tribunal to deal by reference with the claimant's further claims up to 16 September 1980 and the tribunal have recorded "the claimant consents to this." But the insurance officer now concerned points out - and I accept the submission - that this course of procedure does not dispense with the binding requirements for a proper reference imposed by section 99(3) of the Act.

(3) The local tribunal unanimously decided against the claimant as regards the two periods 8 August 1979 - 12 November 1979 and 9 January 1980 and purported also to decide against him as regards the period 6 April 1980 to 16 September 1980.

~~(4) The claimant has appealed against those decisions to the Commissioner, and has in his present grounds of appeal indicated that although he had complained in his grounds of appeal to the local tribunal that he did not think all his disabilities were being taken in their true perspective the insurance officer had failed to refer the local tribunal to the claimant's arthritis as a condition additional to his old ankle injury and gout. He has complained also of the local tribunal's observation, in the course of their statement of reasons for their decision, "We do not consider that he is as seriously disabled as he would have himself believe."~~

13. I now have, as additional medical evidence, the report by Dr S and the report by Mr J to which I have already referred in connection with the first of the two appeals now before me.

14. (1) For substantially the same reasons as I have expressed in regard to the first of the appeals now before me I am on the evidence as it now stands prepared to accept that so long as the claimant's gout was uncontrolled the combination of that condition and his orthopaedic condition did render him incapable of all work.

(2) However, there is now clear evidence that his gout condition was well controlled by mid-December 1979 at latest, and whilst I have not overlooked either the claimant's orthopaedic condition (including some osteoarthritis) or his susceptibility to bronchial infection, I have come to the clear conclusion that as from 9 January 1980 the claimant has failed to prove incapacity for work.

(3) Though I accept that the claimant has not at any material time been capable of work at his former regular occupation as a miner, I consider also that the time had come by 9 January 1980 (indeed well before then) at which it was no longer sufficient to consider the question of the claimant's incapacity for work in relation only to his former regular occupation, and base my decision on there being categories of lighter work of which, on the medical evidence, the claimant was by that date capable and so

continued over the full remaining period with which I am concerned, including that from 6 April 1980 to 16 September 1980, as to which my decision is given in exercise of my jurisdiction under section 102 of the Act.

15. My decision is accordingly as indicated in paragraph 2 above.

(Signed) I Edwards-Jones
Commissioner

Date: 23 December 1981

Commissioner's File: C.S. 527/1981 and CS 886/1979
C I O File: I.O. 8641/V/80 and 2361/V/79
Region: East Midlands & East Anglia