Tribunals must Consider Issues Down to Date of Hearing for All Cases

7 * 6897

Commissioners' File: CS/12054/96

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF A TRIBUNAL OF COMMISSIONERS

Name:

Social

Case No

[ORAL HEARING]

1. We allow the claimant's appeal against the decision of the social security appeal tribunal dated 29 August 1995 as that decision is erroneous in law and we set it aside. We remit the case for rehearing and redetermination, in accordance with the directions in this decision, to an entirely differently constituted social security appeal tribunal: Social Security Administration Act 1992, section 23.

2. This is one of 3 appeals heard together by a Tribunal of Commissioners on 11 July 1997. The other 2 appeals were on files CIB/14430/96 and CIS/12015/96. We have given separate decisions on those files. However all 3 cases give rise to the same point, namely whether a tribunal should adopt the "down to the date of hearing" approach. We have answered that question in the affirmative, for the reasons given in the common Appendix to the 3 decisions, which is therefore made an Appendix to this decision. We give detailed directions to the tribunal as to how to deal with the case of this kind and we do not propose to repeat those directions here. We have set the tribunal's decision aside because (see below) they did not apply the "down to the date of hearing" rule.

3. In the present case, the tribunal unanimously dismissed the claimant's appeal from a decision of the adjudication officer issued on 8 October 1993 as follows -

"I have reviewed the decision of the adjudication officer awarding Invalidity Benefit from and including 16/9/91. The decision awarded benefit for days after the date of claim and the requirements for entitlement are not satisfied. This is because I am satisfied that from and including 8/10/93 [the claimant] is not incapable of work by reason of some specific disease or bodily or mental disablement. Accordingly, my revised decision is that [the claimant] is not entitled to Invalidity Benefit from and including 8/10/93."

4. In dismissing the claimant's appeal the tribunal said the following -

"The tribunal then considered the available evidence as to [the claimant's] incapacity as at the date of the Adjudication Officer's decision. The tribunal noted that it had been [the claimant's] intention at one time to produce medical evidence to controvert the Examining Medical Officer's conclusions. He had got as far as obtaining an appointment through his solicitors with Mr. S. Orthopaedic Surgeon, but was then unable to attend for examination and did not bother to obtain an alternative employment. Durham Welfare Rights had on two occasions (but only very recently) approached the GP practice for a report, which it seems they were unwilling to do as a matter of policy. [The claimant] had confined his efforts to seeking a change of heart with his GP to a brief mention to both of them, but without eliciting any reason for their reluctance to assist him. The only available medical evidence therefore is that of the Examining Medical Officer which the tribunal find to be well reasoned and conclusive."

5. The tribunal therefore did not therefore adopt the "down to the date of hearing" approach, and for that reason we have set the tribunal's decision aside as erroneous in law, although it is apparent to us from the tribunal's detailed record of decision on Form AT3 that they took considerable care with the case. It does however appear that they rejected the possibility of further evidence as to deterioration being available. For example they noted in their findings of fact, "the trouble with his left shoulder is of more recent origin. His depression was a recent onset and mild." It seems that evidence of those conditions was rejected as a result.

6. The new tribunal should take all these matters into account. If the claimant wishes to obtain medical evidence as to a deterioration in his condition after the adjudication officer's review decision he should make

certain to have it available at the time of the new tribunal's hearing.

7. Lastly we should point out that as a result of a decision of a Tribunal of Commissioners on file CSIS/40/92 it is no longer critical to ascertain whether the original adjudication officer dealt with the review under section 25 of the Social Security Administration Act 1992 or Regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987, S.I. 1987 No. 1968.

(Signed) **Kenneth Machin**
Chief Commissioner

(Signed) **M.J. Goodman**
Commissioner

(Signed) **R.A. Sanders**
Commissioner

(Date) **17 July, 1997**

A P P E N D I X

1. This is the common appendix to 3 cases (CIB/14430/96, CIS/12015/96 and CS/12054/96) which were heard by a Tribunal of Commissioners on 11 July 1997. At the hearing the 3 claimants (whose appeals they were) were represented by Mr. B. McGarr of Durham Welfare Rights. The adjudication officer was represented by Mr. S. Cooper of the Office of the Solicitor to the Departments of Health and Social Security. Mr. R. Drabble Q.C. of Counsel, appeared as amicus curiae, instructed by the Treasury Solicitor. We are much indebted to Mr.McGarr, Mr. Cooper and Mr. Drabble for their assistance to us at the hearing.

2. All 3 cases consist of appeals by claimants whose contention is that they were suffering from a degree of bodily or mental disablement such as (in CS/12054/96) to entitle the claimant to Invalidity Benefit; (in CIB/14430/96) to entitle the claimant to Incapacity Benefit; and (on file CIS/2015/96) to entitle the claimant to Income Support without the need to make himself available for employment. The question common to all 3 cases was whether the social security appeal tribunal erred in law in refusing to take account of evidence that, after the adjudication officer had terminated the claimant's award of benefit by a review decision, the claimant had (between the date of that decision and the date of the tribunal's hearing) a deterioration in health. In other words, the question is whether a social security appeal tribunal should deal with all matters "down to the date of hearing", which would of course let in evidence of subsequent deterioration in health. Alternatively, should a tribunal refuse to consider the position after the date of the adjudication officer's review decision, so following a decision (CS/879/95 - starred as 27/95), given on 28 April 1995. There have been other decisions of Commissioners to the same effect, e.g. CSS/71/94 and CS/7387/95. On the other hand, there have been decisions of Commissioners in favour of the "down to the fate of hearing" approach, e.g. CIS/030/93, which was criticised and expressly not followed by the Commissioner in his decision on file CS/879/95.

3. This Tribunal of Commissioners was convened to resolve the conflict between the Commissioners' decisions and to give a ruling on the general principle involved. For the reasons which we set out in detail below, we hold that the correct approach is "down to the date of hearing". The result is that the social security appeal tribunals in all 3 cases erred in law in refusing to accept contentions and/or evidence as to deterioration

since the date of the adjudication officer's review decision. In the individual decisions on these cases we have therefore set the tribunal's decisions aside and remitted them to another tribunal for rehearing and redetermination. There are some subsidiary matters in relation to each of the individual 3 cases which are dealt with in the separate decisions.

4. The reason we hold that the "down to the date of hearing" approach is correct is because we accept the submission of Mr. Drabble to that effect (a submission with which Mr. McGarr concurred, he having also made careful submissions, largely to the same effect). We therefore proceed to outline Mr. Drabble's submissions and to deal with the case put by Mr. Cooper on behalf of the adjudication officer.

5. It is common ground that there is no provision in the Social Security legislation (Acts or Regulations) dealing precisely with this point. However the Commissioner in CS/875/95 founded himself on section 1 of the Social Security Administration Act 1992 ("the 1992 Act") which provides that -

> "... No person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied, ... he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; ..".

The relevant regulation is regulation 4(1) of the Social Security (Claims and Payments) Regulations 1987, S.I. 1987 No. 1986, which provides that,

> "Every claim for benefit shall be made in writing on a form approved by the Secretary of State for the purpose of the benefit for which a 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."

6. In the decision CS/879/95, the Commissioner stressed these provisions and held that once an adjudication officer had terminated an award of benefit by a review decision under section 25 of the Social Security Administration Act 1992 there was nothing left of the original claim, with the result there could be no subsequent entitlement to benefit because that would require a fresh written claim for benefit. The Commissioner referred to the adjudication officer's decision as extinguishing the original claim for benefit. In CIS/030/93, another Commissioner had reached a different conclusion, relying on a decision of a Tribunal

of Commissioners in CIS/391/92 (the Palfrey) case). We agree with the Commissioner's comments on this in CS/879/95, where he said that the Palfrey decision did not warrant the proposition that the tribunal could hold entitlement to arise after a review decision stopping it. The Palfrey decision in fact concerned the length of time for which a claimant was disqualified for income support by having excessive capital.

7. At the hearing before us, however, Mr. Drabble having first referred to sections 1, 5, 25, 28, 29, and 60 of the Social Security Administration Act 1992 and to R(S)1/83, the decision of a Tribunal of Commissioners, submitted as follows. Section 25(1) relating to "review of decisions" referred not to review of an award but to review of "any decision under this Act of an adjudication officer ..". It followed therefore that a review decision by an adjudication officer, reviewing an earlier decision of an adjudication officer, had to be read together with the original decision so that the two together constituted a composite decision, just as a will and a codicil have to be read together as a testamentary disposition. Mr. Drabble therefore submitted that it was incorrect to state that a review decision of an adjudication officer, even though at its date it terminated benefit entirely, extinguished the original adjudication officer's decision; the review decision had to be read with the original adjudication officer's decision. That original decision had ex hypothesi awarded benefit indefinitely, but e.g. where there was a relevant change of circumstances or ignorance of or mistake as to a material fact (s.25), all that the review decision of the adjudication officer did was to add, so to speak, a supplement to the original decision. In other words it qualified the original decision of the adjudication officer in some way e.g. by turning an indefinite award into a finite award. That being so, Mr. Drabble submitted that on an appeal by a claimant to a social security appeal tribunal against the review decision of the adjudication officer, under the provisions of section 28 of the 1992 Act, the tribunal had to consider the composite decision.

8. Mr. Drabble then drew attention to what was said by a Tribunal of Commissioners in R(S)1/83 where, as part of the ratio decidendi of the case, the Tribunal said (paragraph 12),

> "There are occasions particularly in the case of appeals to the Commissioner where there is a lack of up-to-date medical evidence on an open-ended claim. Frequently the claimant has lodged no new claim but maintains that there has been a recent deterioration in her condition. In such cases it is open to the

Commissioner before finally disposing of the appeal to call for further medical evidence if such evidence could lead to an award of benefit for the most recent period before him. Alternatively we consider that it would be open to the Commissioner before finally disposing of the appeal, even if the earlier part of the period of claim fell to be disallowed to give an interim decision covering that part of the period of claim and to remit the balance of the period of claim to the local tribunal or the insurance officer for further investigation, without transgressing the rules set forth above."

9. Mr. Drabble acknowledged that R(S)1/83 was not dealing with an appeal against a review decision but with an appeal against an adverse decision on an original claim. Nevertheless the Tribunal had said (see the quotation above) that a social security appeal tribunal ought to consider evidence of a subsequent deterioration in the claimant's health even though at the date of claim the adjudication officer's decision had been correct and the claimant was not then entitled to benefit. Mr. Drabble submitted (and Mr. McGarr and Mr. Cooper agreed) that, whether or not this was intellectually sound, it was a long-standing and accepted decision of a Tribunal of Commissioners and should be followed. We agree with that observation and we can see good pragmatic reasons why the Tribunal of Commissioners decided in this way. We accept the decision in R(S)1/83 as good law.

10. Mr. Drabble then submitted that what the Tribunal of Commissioners had said in R(S)1/83 as to the necessity of the social security appeal tribunal's accepting of evidence of deterioration applied, as was said in CIS/35/93, equally to an appeal against an adjudication officer's review decision. That was because the two decisions, the decision on the original claim and the review decision, had to be read together as one composite decision. We accept that submission. Mr. Drabble pointed out the anomalous consequences which could ensue from treating a decision on a claim and a review decision differently. The factual result ought to be the same yet could depend on the time-scale of decisions by the adjudication officer. We agree.

11. In his reply to Mr. Drabble, Mr. Cooper argued that the Commissioner's decision on file CS/879/95 was rightly decided and cited the rule (long accepted but again not the subject of a specific provision in the legislation) that when a claim had been finally disposed of it, it no longer subsisted and was extinguished. We accept that that is so but of course the crux of the matter is to ascertain when the claim is finally disposed of. Section 60 of the 1992 Act ("Finality of decisions") provides

that "the decision of any claim or question in accordance with the foregoing provisions of this Part of this Act shall be final; and ... the decision of any claim or question in accordance with .. regulations shall be final." However, the position is that if (as we have held) the social security appeal tribunal on an appeal by a claimant against an adverse review decision (a right conferred by section 28 of the 1992 Act), has to consider the original decision of the adjudication officer and the review decision as one composite decision, then the original claim has not been finally disposed of.

12. Mr. Cooper also drew attention to practical difficulties that might arise if the "down to the date of decision" approach was adopted but it appears to us that the balance of practical advantages is very much the other way. If the "down to the date of hearing" approach is rejected then as was pointed out in CS/879/95, a claimant could find that, by the time his subsequent appeal in a social security appeal tribunal had been determined adversely to him, it was too late (because of the 12 months' rule in section 1 of the 1992 Act) to make a fresh claim for the period in issue. This is a problem that has been recognised throughout the decisions on this subject. Claimants do not necessarily realise that they should make a further claim during the pendency of their appeal. It would appear to be wrong that they should be disadvantaged by simply waiting for the appeal decision (compare section 29 of the 1992 Act). We therefore reject Mr. Cooper's submissions. Furthermore, as it seems to us, the CS/879/95 view would or could lead to an undesirable proliferation of claims.

13. Consequently, we hold that social security appeal tribunals must adopt the "down to the date of hearing approach" and must not e.g. (as happened in these 3 cases) reject contentions or evidence of a deterioration in the claimant's health between the date of the adverse review decision of the adjudication officer and the date of hearing in the social security appeal tribunal. It is obviously desirable that all issues that are outstanding should be resolved if possible by the social security appeal tribunal at its hearing. Nevertheless, if such a contention is made to the tribunal at its hearing, it may well wish to adjourn the hearing in order to exercise its powers under section 53 of the 1992 Act to obtain e.g. medical or other expert evidence to assist it in coming to a conclusion on the assertion that there has been a subsequent deterioration in health. Alternatively the tribunal may decide to require the claimant or his representative to produce e.g. medical or other evidence of the alleged deterioration. A tribunal is not obliged to rule immediately on assertions of deterioration in health. Although the tribunal is obliged to deal with

the matter (and does not have a mere discretion), it nevertheless should not, bearing in mind the detailed nature of the evidence required e.g. as to the all work test for Incapacity Benefit), rule on the matter until it has sufficient evidence.

14. In view of the grounds of our decision as set out above, we need not rule on an alternative contention that was made to us by Mr. McGarr, though rejected by Mr. Drabble that section 36 of the 1992 Act ("Questions first arising on appeal") would give a discretion to a tribunal to deal with an assertion of deterioration in health. We have emphasised above that this matter is not discretionary and that the tribunal has a duty to deal with it (subject to adequate evidence).

15. We ought lastly to mention that Mr. Cooper, in relation to the Incapacity Benefit case, indicated that a problem might arise if "the down to the date of decision" approach were adopted, where regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995, S.I. 1995 No. 311 applies. Mr. Cooper submitted that a claimant might be disadvantaged if a tribunal were able to rule on his claim of e.g. deterioration in his health, in that the claimant would not then be able to take advantage of the "6 months' rule" in regulation 28(2)(b). If the point is correctly taken, it would seem to us to be a necessary consequence of the claimant having instituted an appeal in the first place. In any event we do not think that this is to be likely to be a substantial disadvantage. It would be of the claimant's own volition, if for example, he wishes to assert before the tribunal that his condition has deteriorated.