WMW/HJD/T/CH

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SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Dunfermline

Case No: 504 73924

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1. This claimant's appeal succeeds. I hold the decision of the tribunal dated 2 June 1994 to be erroneous in point of law and accordingly set it aside. The case is referred to the adjudication officer to consider his position in light of what is set out in paragraph 9 below.

2. On 23 October 1993 an adjudication officer issued a decision which bore to be a review of an earlier decision awarding income support to the claimant from and including 28 September 1990. That had been made in the usual open form and the adjudication officer's review decision determined that the requirements for entitlement were not, in October 1993, any longer satisfied because he concluded that the claimant was then not incapable of work by reason of some specific disease or bodily or mental disablement. The claimant had been awarded income support subject to relief from what is now section 124 of the Social Security Contributions and Benefits Act, 1992 and which requires that a recipient be available for, and actively seeking, employment. The relief was granted under paragraph 5 of Schedule 1 to the Income Support (General) Regulations, 1987 which so provides for those giving in evidence of incapacity for work save where an adjudication officer has determined that that person is not incapable of work. As I understand it, the adjudication officer's decision of October 1993 was a decision which, by implication at least, negatived relief under said paragraph 5.

3. The material before the adjudication officer, including medical evidence from an examining medical officer of the Department, concluded that the claimant had a good range of movement in all limbs and would suffer no more discomfort in a suitable job, such as a childminder, than she did in her everyday activities. He noted that she seemed to be working as a childminder for her own family. He concluded that she was medically capable of suitable work alternative to her normal occupation of electronic assembler. On the other hand the claimant's evidence to him was that she had had right-sided pain for many years and used painkillers. She appeared to be anxious and talkative but with a normal range of movement and ability to get about including a good grip although she complained of pain in the right forearm. Her general practitioner was still issuing Med 3 forms advising that the claimant refrain from work at about the time in question mainly because of lumbar arthritis.

4. In light of all that material the review adjudication officer had concluded that the claimant was fit for alternative employment such a cloakroom attendant, a bingo caller, a toilet attendant

or a petrol pump attendant and possibly sales assistant in small business. The claimant appealed to the tribunal.

5. The tribunal received a considerable body of evidence, including some that appeared to be in rebuttal of the medical officer's report. It does not appear that she had any wholly relevant medical evidence to offer. She was asked if her doctor had been asked to provide written evidence of her present problems which -

> ".. she averred also included osteo myelitis. She said that her doctor had referred her to a gynaecologist for further examination."

but there seems to have been no evidence from her doctor confirming that. The tribunal preferred the Department's medical officer's evidence and determined that the review of the claimant's -

> ".. entitlement to income support had been properly decided and accordingly income support was not payable as and from 23.10.93."

It is against that decision that the claimant again appeals, with leave of a Commissioner.

6. The grounds of appeal focus upon the dispute about the correctness of the examining medical officer's report and other similar issues, including those of fact. These are not for a Commissioner who is concerned only with questions of law. My jurisdiction is limited to such questions as to whether the tribunal applied the correct law, applied it correctly and, broadly speaking, gave all concerned a reasonable opportunity to advance, and consideration of, their respective cases. The claimant says, on an alleged point of law, that her doctor has said that she is not fit for any work. That is simply a dispute about the medical evidence. The material upon which she now founds should, of course, have been put before the tribunal, or, if it was not then available, it should have been gathered in time for that purpose. It is for a claimant to make a case before the tribunal in such a situation, once the adjudication officer has discharged the initial onus of establishing, as he sought to do in this case, that the claimant was capable of undertaking certain other types of her in her normal employment. If evidence in rebuttal was insufficient a Commissioner cannot provide a remedy. It is therefore not at all surprising that, as the case originally developed, an adjudication officer, in a submission to the Commissioner, requested dismissal of the appeal. In response the claimant raised further issues of fact. Whilst I sympathise with her position and fully understand that she will have difficulty in appreciating the complexities of the procedure, once matters have reached this level she must, in turn, appreciate that I have to apply the law as it exists and therefore cannot pay any attention to the points which she has made.

7. However it did appear to me that the tribunal had gone beyond what the adjudication officer had done. Accordingly I gave a direction on 25 May 1995 asking for a further submission as to whether there was any executive revisal decision by an adjudication officer and whether or not there ought to have been an interval allowed between a review and any cessation of benefit during which the claimant would be required to make herself available for, in order to allow her to take steps to seek employment in compliance with said section 124. A future termination would then depend upon the nature and extent of her steps in that regard.

8. In response the adjudication officer now accepts that the tribunal's decision was, for the reasons given, "technically erroneous in law". I am not sure what emphasis he seeks to give by the word "technically". It certainly seems to me that if the tribunal exceeded, as in my judgment they did, their jurisdiction then their decision must be struck down.

9. It is clear to me that the tribunal have not appreciated the rather curious position of an adjudication officer's decision in such a situation as this, as explained in paragraph 2 above, and unlike similar decisions related to invalidity benefit. That the claimant has throughout been receiving income support because of the effect of regulation 8(2) of the General Regulations has encouraged me to give the decision in the form set out in paragraph 1 above. It seems to me that it is unrealistic and probably pointless now to seek to start a proper procedure based upon a decision now almost two years old, given the irrecoverability in the circumstances of the benefit already paid and the possibility, at the least judging from the claimant's factual material as now displayed, that there have been further changes of circumstances which might or might not have warranted further reviews or awards. Accordingly I think that what should happen is that the adjudication officer should now start *de novo* and determine whether, in light of up-to-date material, any decision is *now* justified under said paragraph 5 of said Schedule 1. If it is, then the claimant will have a fresh right of appeal to a tribunal. Any such will be required to note, and should have a copy of this decision before them, that they are only concerned with the justification of the adjudication officer's decision and not any consequences that may flow from it. Either way, when and if such a decision is made the claimant, in accordance with what I understand to be normal practice, should be given an opportunity to make herself available for and to actively seek employment. Only when, and if, it can be determined that she is not doing that can any executive decision be made to the effect of that made by the tribunal, terminating the right to income support.

10. Finally I should note that the adjudication officer now concerned has not responded directly to my question about whether there should have been some revisal decision by the original adjudication officer in October 1993. It may be a matter of form, but it may avoid similar problems occurring in the future, if, when such decisions are given, it is in some way recorded clearly that the consequence is that the running award is being revised on the review so that the condition imposed by section 124 is to apply to the claimant as a consequence of the ending of the period of relief under paragraph 5 of Schedule 1.

(signed) W M Walker
Commissioner
Date: 3 August 1995