

WRB 143

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SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name : Mrs Marlene June GARVEY

Appeal Tribunal: Kettering

Case No: 415/95/21687

[ORAL HEARING]

1. This is an appeal by the claimant, with the leave of a Commissioner, against the decision of the social security appeal tribunal ("the appeal tribunal") given on 28th February 1996. For the reasons set out below, that decision is erroneous in point of law. We therefore set it aside and refer the case to another social security appeal tribunal ("the new tribunal") for rehearing in accordance with the guidance given below.

2. The claimant appealed to the appeal tribunal against the decision of the adjudication officer given on 21st November 1995. She had become unfit for work on 8th January 1988, and was still unfit for

work on 13th April 1995, when the all work test ("the AWT") was introduced by section 171C of the Social Security Contributions and Benefits Act 1992 and regulation 24 of the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311). The claimant was required to satisfy the AWT because she had been unfit for work for 196 days although, until the AWT assessment was carried out, she was treated as satisfying the test so long as she provided medical certificates in the required form. In due course she completed an incapacity for work questionnaire and was examined by a medical officer from the Benefits Agency Medical Service.

3. Thereafter, on 21st November 1995, the adjudication officer gave the following decision.

This decision is given in respect of [the claimant's] claim for Sickness Benefit/Incapacity Benefit.

The test of incapacity for work in respect of [the claimant] from and including 13/4/95 is the all work test. The own occupation test is not applicable from that date. This because she has been incapable of work for 196 days in the spell of incapacity preceding 13/4/95.

She does not satisfy the all work test from and including 21/11/95 because she has not reached 15 points from physical descriptors. The total points were 6 which were calculated as follows:-

REACHING - 6.

Therefore she is not incapable of work and cannot be treated as incapable of work because in the opinion of a doctor approved by the Secretary of State there are no exceptional circumstances.

I have reviewed the decision of the adjudication officer dated 25/1/94 awarding Sickness Benefit from and including 25/1/94. The decision awarded benefit for days after the date of claim and the requirements for entitlement are not satisfied. This is because [the claimant] does not satisfy the all work test and therefore cannot be treated as being incapable of work by revised decision.

only for the period from and including 21/11/95 is as follows:-

[The claimant] is not entitled to Incapacity Benefit from and including 21/11/95."

The claimant appealed to the appeal tribunal against that decision. Her appeal was heard and unanimously dismissed on 28th February 1996.

4. The adjudication officer's decision, which purported to review an earlier decision identified as having been given on 25th January 1994, and which ended by declaring that the claimant was not entitled to incapacity benefit from and including the date of the decision, was thought to give rise, in a clear form, to a problem, which has produced differences of opinion among Commissioners. The problem is whether the tribunal may establish or reestablish entitlement after such has been rejected or terminated.

5.. The form of the adjudication officer's decision suggested that the present appeal was an appropriate one in which to have the point determined by a Tribunal of Commissioners. With that end in mind, a request for an oral hearing having already been granted, on 19th May 1997, the Chief Commissioner, in exercise of his jurisdiction under section 57(1) of the Social Security Administration Act 1992, directed that this appeal be determined by a Tribunal of Commissioners.

6. The appeal came before us on 27th May 1997. The claimant was represented by Mr P. Madge of the Corby Citizens Advice Bureau. The adjudication officer was represented by Mr Stephen Cooper, Solicitor to Central Adjudication Service, who abandoned the previous stance taken by the adjudication officer.

7. Contrary to submissions which the adjudication officer had made on 4th December 1996, Mr Cooper submitted that the appeal tribunal did fall into error and that their findings and reasons failed to comply with regulation 23(2) of the Social Security (Adjudication) Regulations 1995 (SI 1995/1801). He supported Mr Madge in submitting

that the appeal must be remitted for rehearing. We accept those submissions.

8. Secondly, his researches have revealed that the form in which the adjudication officer expressed himself, when making the decision under appeal, is incorrect. Notwithstanding the wording used, the claimant has never been awarded sickness benefit or incapacity benefit. Furthermore, she has never made a claim for the latter benefit. This is a "credits case" where, although the award of credits is a matter for the Secretary of State, questions of incapacity for work are to be determined by the adjudication officer. That was the only matter the appeal tribunal had jurisdiction to determine.

9. We accept Mr Cooper's submissions. It follows that the question for which the Tribunal of Commissioners was convened does not arise at all or in a sufficiently satisfactory manner.

10. We add the following comments for the assistance of the new tribunal. The appeal tribunal appears to have confused the evidence about the claimant's inability to walk more than a certain distance with her evidence about her inability to sit comfortably for more than a certain time. The new tribunal should take care to avoid such confusion by making findings as to each activity or descriptor that is in issue. In the incapacity for work questionnaire which she completed, the claimant referred to certain physical actions which, she says, cause her nausea or dizziness. If the new tribunal finds that the carrying out of a particular activity normally causes the claimant a significant degree of nausea or dizziness, then such nausea or dizziness should be treated as equivalent to pain - as to which see R1/62(SB). The new tribunal should consider the whole of the medical evidence with care and must reach their own conclusions in connection with that evidence. They should not adopt the findings of the Benefits Agency Medical Service medical officer unless they are satisfied, after considering all the medical evidence, that his findings are an accurate reflection of that evidence. Finally, the new tribunal should consider

the whole of the evidence with great care in the light of paragraphs 37 to 42 of Decision CIB/13161/96 (starred as 29/97).

(Signed) His Honour Judge Machin QC
Chief Commissioner

(Signed) R.A. Sanders
Commissioner

(Signed) J.P. Powell
Commissioner

Dated 6 June 1997