

Disability Premium - Capex Zee Rana
(Old Form of SS of Soc. 1)

JMe/1/LM

Commissioner's File: CIS/045/94

SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Hartlepool social security appeal tribunal dated 18 October 1993 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal is referred to a differently constituted social security appeal tribunal for determination in accordance with the directions given in paragraph 16 below (Social Security Administration Act 1992, section 23(7)(b)).

2. The claimant became entitled to income support from 16 October 1992. His doctor issued statements advising him to refrain from work, but the claimant was not entitled to sickness benefit, apparently because of a lack of the necessary contributions. On 22 April 1993 the disability premium was included in the claimant's applicable amount, as evidence of incapacity for work, in the form of statements from his doctor, had then been submitted for a continuous period of 28 weeks. On 4 June 1993 the claimant was examined by an examining medical officer, who gave an opinion that he was medically capable of suitable alternative work. The claimant's normal occupation was said to be self-employed boarding house proprietor. On 25 June 1993 an adjudication officer within the sickness benefit section gave an opinion that the claimant was not incapable of all work and suggested some alternative jobs.

3. The chain of decision-making then becomes rather difficult to follow. It appears that on 29 June 1993 an income support adjudication officer decided that the claimant was not incapable of work and that he no longer satisfied the conditions for the disability premium. Although no operative date for that decision is given, it appears that it was intended to operate from 1 July 1993. Whether any further decision was made by an adjudication officer is unclear, because paragraph 6 of the summary of facts on the form AT2 prepared for the appeal tribunal says that the claimant was advised that he should return his order book and that if he wished to claim income support he should register unemployed and submit a form B1. Such a suggestion would only be proper if the claimant's entitlement to income support had been

terminated on review by an adjudication officer, but there is no specific evidence of that formal step having been taken. The claimant did return his order book and submitted a further medical statement from his doctor. On 5 July 1993 the claimant appealed against the withdrawal of the disability premium and on 6 July 1993 an adjudication officer awarded him income support from 1 July 1993 at a rate excluding the disability premium, on the basis that he was not required to be available for work while he was pursuing an appeal against the adjudication officer's decision that he was not incapable of work (Income Support (General) Regulations 1987, regulation 8(2)).

4. The appeal tribunal heard the claimant's appeal on 18 October 1993. The claimant did not attend. His representative from Hartlepool Law Centre was given time to go to the claimant's address, but he was not there. The appeal tribunal decided to proceed in the claimant's absence despite an application for an adjournment. There was some complaint about that decision in the application on the claimant's behalf for leave to appeal to the Commissioner, but, since I am setting the appeal tribunal's decision aside for other reasons, I need not explore that. According to that application, the claimant told his representative that he had not received notification of the date of the hearing. It is therefore surprising that there was not a specific application to set the appeal tribunal's decision aside under regulation 11(1)(a) of the Social Security (Adjudication) Regulations 1986 or that the application for leave to appeal was not referred to a chairman to be considered as an application under regulation 11(1)(a). Such a procedure might have avoided a lot of delay.

5. The adjudication officer's submission to the appeal tribunal on form AT2 included the following passage in paragraph 7:

"In the present case the Adjudication officer made an indefinite award of income support on 22/10/92, under Regulation 17(1) of the Claims and Payments Regulations. The award was therefore subject to [the claimant's] continued satisfaction of the requirements for entitlement (Regulation 17(4)). One of the conditions for entitlement to income support being that [the claimant] is, or is deemed to be, incapable of work. The question of incapacity for work is one which, in the first instance, is for the Adjudication Officer to decide in the light of all the available evidence and where an Adjudication Officer finds that incapacity has not been proved the decision awarding benefit is to be reviewed under Regulation 17(4). If, therefore, the Tribunal accept that [the claimant] was not incapable of work in respect of the period from 1/7/93 it is my submission that the decision awarding benefit was correctly reviewed and revised so as to disallow the claim for benefit on the grounds of incapacity from and including that date."

The submission also asserted, in paragraphs 10 and 14, that it was for the claimant to prove on the balance of probabilities

that he was incapable of work.

6. The appeal tribunal confirmed the adjudication officer's decision and determined that the claimant was not entitled to a disability premium from 1 July 1993. It concluded, "on the balance of probabilities and on the basis of the somewhat conflicting medical evidence", that the claimant was capable of limited work.

7. The application for leave to appeal to the Commissioner challenged the appeal tribunal's explanation of how it came to that conclusion. The appeal tribunal chairman refused leave, but leave was granted by a Commissioner on 24 January 1994. The submission of the adjudication officer now concerned with the case, in the document dated 17 February 1994, supported the appeal tribunal's decision. That support was continued in a further submission dated 30 September 1994 after the eventual identification of the correct reference to a decision of a Northern Ireland Commissioner on the effect of substantial pain. In the event, I do not need to consider the points made in those submissions or in the replies on the claimant's behalf. That is because the appeal tribunal's decision is erroneous in law in a more fundamental respect.

8. The error is that regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987 ("the Claims and Payments Regulations"), relied on by the adjudication officer, was not a proper basis for the decision made by the appeal tribunal. Indeed, the appeal tribunal failed to deal expressly with the power to review at all. The most helpful method of explanation is for me to set out how in my view the complexities of situations like that in the present case should be approached.

9. It is a general condition of entitlement to income support that, except in such circumstances as may be prescribed in regulations, a claimant is available for employment (Social Security Contributions and Benefits Act 1992, section 124(1)(d)(i)). Regulation 8(1) of the Income Support (General) Regulations 1987 ("the Income Support Regulations") provides, in exercise of the power given in section 124(1)(d), that any person (other than a student) to whom any paragraph in Schedule 1 to the Income Support Regulations applies in any week shall not be required to be available for employment in that week. At the dates in question in the present case, paragraph 5 of Schedule 1 applied to:

"A person who provides evidence of incapacity in accordance with regulation 2 of the Social Security (Medical Evidence) Regulations 1976 (evidence of incapacity for work) in support of a claim for sickness benefit, invalidity pension or severe disablement allowance within the meaning of sections 14, 15 or 36 of the Social Security Act [1975], provided that an adjudication officer has not determined that that person is not incapable of work, or a person who is in receipt of statutory sick pay within the meaning of Part I of the Social Security and Housing Benefits Act

1982."

The form of paragraph 5 has changed significantly from 31 March 1994. Evidence of incapacity within regulation 2 of the Medical Evidence Regulations includes doctors' statements on forms MED 3. In the present case, it was accepted (in paragraph 4 of the adjudication officer's submission on form AT2) that the claimant had provided evidence of incapacity in support of a claim for sickness benefit, although the claim would be unsuccessful except for the possible purpose of having contributions credited.

10. It is helpful to take stock at this point, before adding the extra complication of the disability premium. In order for a claimant to be exempted from the requirement to be available for employment under the form of paragraph 5 of Schedule 1 which I am considering, it is not necessary for him to prove that he is incapable of work. The provision of the medical evidence is enough, provided that an adjudication officer has not determined that the claimant is not incapable of work. I am restricting myself to cases where a claimant does not qualify for sickness or invalidity benefit, for instance because of inadequate contributions. An adjudication officer will then probably not have positively decided that the claimant was incapable of work for the purpose of those benefits. What then happens when a claimant is examined by an examining medical officer and the report of that examination, plus possibly advice from a sickness benefit adjudication officer, is put before an income support adjudication officer? In my view, that adjudication officer is bound to consider whether the claimant is not incapable of work and, if he determines that he is not, to make a decision to that effect. Such a decision is not a review decision, because in the circumstances I have described there is no existing decision on capacity or incapacity for work. It is a free-standing decision given under the authority of paragraph 5 of Schedule 1. However, because of the form of paragraph 5 and because the making of the decision by the adjudication officer operates as an exception to paragraph 5, the adjudication officer should only decide that a claimant is not incapable of work when satisfied on the balance of probabilities that the claimant is not incapable of work. The adjudication officer should not ask himself whether the claimant has proved on the balance of probabilities that he is incapable of work. Certainly, if the matter comes before an appeal tribunal, the burden of proof must be put on the adjudication officer. If, on appeal, the appeal tribunal decides that the adjudication officer has not proved that the claimant was not incapable of work, the effect is as if the adjudication officer had not made his decision against the claimant.

11. If the income support adjudication officer does decide that the claimant is incapable of work, that is a relevant change of circumstances which provides a ground of review of the decision awarding income support under section 25(1)(b) of the Social Security Administration Act 1992. It is a relevant change because it means that the claimant ceases, from the date of the decision, to fall within paragraph 5 of Schedule 1 to the Income Support Regulations (subject to the possibility that on a future change

of circumstances he may fall within it again). The burden of proving that a ground of review exists lies on the adjudication officer (R(£) 1/71), but that burden is clearly met once the decision on incapacity has been made. Review under regulation 17(4) of the Claims and Payments Regulations 1987 is not available. Regulation 17(4) provides:

"(4) In any case where benefit is awarded in respect of days subsequent to the date of claim the award shall be subject to the condition that the claimant satisfies the requirements for entitlement; and where those requirements are not satisfied the award shall be reviewed."

The requirements for entitlement to income support do not cease to be satisfied where a claimant remains entitled to income support to some extent, even though the amount of benefit has reduced or the conditions attached to entitlement are different (see paragraph 7 of Commissioner's decision CIS/627A/1992). The mere fact that a claimant no longer falls within paragraph 5 of Schedule 1 does not mean that he ceases to be entitled to income support. He might fall within another paragraph and still not be required to be available for employment. If he appeals against the adjudication officer's decision on incapacity for work, then if the other conditions of regulation 8(2) of the Income Support Regulations are satisfied, he is not required to be available for employment pending the determination of the appeal. If the claimant does become required to be available for employment, he may be able to prove his availability and to comply with any directions given by the Secretary of State as to attendance at the unemployment benefit office under regulation 8 of the Claims and Payments Regulations. There was not, until the introduction of regulation 37AA(3) of the Claims and Payments Regulations on 3 October 1994, any direct sanction for a failure to comply with a direction under regulation 8. There is no warrant for an immediate decision on review that the claimant is not entitled to income support before the claimant has had a chance to prove his availability for employment or to appeal against the decision on incapacity for work. Even if the claimant cannot prove availability for employment, the requirement to be available must be lifted where the adjudication officer is satisfied that, unless income support is paid, the claimant or a member of his family will suffer hardship (Income Support Regulations, regulation 8(3)).

12. All that indicates that at the date on which a claimant ceases to fall within paragraph 5 of Schedule 1 to the Income support Regulations, that change in itself (subject to what is said below about the knock-on effect on the disability premium) will not mean that the requirements for entitlement to income support are not satisfied. Thus, regulation 17(4) of the Claims and Payments Regulations cannot be invoked. The reasoning set out in paragraph 7 of the adjudication officer's submission on form AT2 is entirely misconceived. There will be grounds for review under section 25(1)(b) of the Social Security Administration Act 1992, and no doubt there should be a revision so as to impose the requirement of availability if the claimant does not fall within

any other paragraph of Schedule 1. There may need to be further reviews at later dates if, for instance, the claimant appeals against the adjudication officer's decision on incapacity for work or fails to prove availability for employment for a particular week or weeks.

13. It is now necessary to consider the qualifications for the disability premium. Of the various alternative qualifications, the one which is relevant in cases like the present is that contained in paragraph 12(1)(b) of Schedule 2 to the Income Support Regulations. From 10 April 1989 the condition has been that:

"the circumstances of the claimant fall, and have fallen, in respect of a continuous period of not less than 28 weeks, within paragraph 5 of Schedule 1 or, if he was in Northern Ireland for the whole or part of that period, within one or more comparable Northern Irish provisions;"

If a claimant's applicable amount includes a disability premium by virtue of that provision, then the revised decision following the relevant change of circumstances constituted by an adjudication officer's decision under paragraph 5 of Schedule 1 that the claimant is not incapable of work should include the removal of the disability premium from the applicable amount. In some circumstances, depending on the level of the claimant's income apart from income support and the level of the other elements of his applicable amount, that might result in the claimant losing overall entitlement to income support, because his applicable amount no longer exceeds his income. The requirements for entitlement to income support would not then be satisfied. It may therefore be the case that the conditions for review under regulation 17(4) of the Claims and Payments Regulations would then be met. However, I consider that it would be undesirable for an adjudication officer simply to rely on that power to review, because that would tend to obscure the complicated and interlocking chain of decisions leading up to the result of a removal of entitlement to income support. It is better that in all circumstances the power to review on the ground of relevant change of circumstances should be used. I do not have to express a concluded opinion on the question because in the present case the claimant appears not to have had any income other than income support, so that the removal of the disability premium reduced the level of his applicable amount, but his income was still less than the reduced applicable amount. Therefore, regulation 17(4) could not be invoked in his case, for the reason explained in paragraph 11 above.

14. If, as in the present case, a claimant appeals against a withdrawal of the disability premium, that appeal should be treated as an appeal against all the elements of the process leading to that result. In particular, it should be treated as an appeal against the adjudication officer's decision that he is not incapable of work, so as to trigger the application of regulation 8(2) of the Income Support Regulations. A claimant cannot be expected to appreciate the technicalities behind the

withdrawal of the disability premium and any other conclusion could cause injustice.

15. The appeal tribunal of 18 October 1993 manifestly (although understandably) failed to apply the analysis set out above and the express reasoning behind the adjudication officer's decision which it confirmed was inconsistent with that analysis. As a result, the appeal tribunal did not ask itself the right questions and its decision must be set aside as erroneous in point of law. Although it focused on the factual issue which is at the heart of the correct approach, it did not put that issue into the right legal context, or sufficiently show that it had placed the burden of proof on the adjudication officer. The appeal must be referred to a differently constituted social security appeal tribunal for determination.

16. The new appeal tribunal must apply the analysis set out in paragraphs 9 to 14 above and conduct a complete rehearing on that basis. In particular, the new appeal tribunal must approach the question of whether the adjudication officer has proved that as at 1 July 1993 or at some subsequent date the claimant was not incapable of work completely afresh. The parties will have the opportunity to submit further evidence, which must be considered along with all the existing evidence, and to make whatever new submissions are thought relevant, including submissions about the factors to be taken into account in determining capacity or incapacity for work.

(Signed) J Mesher
Commissioner

Date: 23 January 1995