

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Case NO.

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 6 August 1990 as that decision is erroneous in law and I set it aside. I 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 Act 1975, section 101 (as amended).

2. This is an appeal to the Commissioner by the claimant, a man born on 14 June 1937. The appeal is against the unanimous decision of a social security appeal tribunal dated 6 August 1990 which dismissed the claimant's appeal against a decision of the local adjudication officer issued on 21 March 1990 in the following terms,

"[The claimant] is not entitled to sickness benefit from 29.2.80 to 4.10.86 (both dates included). This is because the claim was made on 5.10.87 and no person is entitled to benefit for a period more than 12 months before the date of claim. Social Security Act 1975, section 165A(1). Social Security (Claims and Payments) Regulations, regulation 6. Social Security Act 1975, section 165A(2)(b).

[The claimant] is not entitled to sickness benefit from 5.10.86 to 3.9.87 (both dates included). This is because his claim for that period made on 5.10.87 was not within the time limit for claiming and he has not proved that there was continuous good cause for the delay in making the claim. Social Security Act 1975, section 165A(1). [Social Security (Claims and Payments) Regulations, regulations 6, 19(1), 19(2) and 19(3) and Schedule 4]."

3. I have set the tribunal's decision aside for error of law because of a procedural fault in the proceedings which led to the

tribunal's decision. That arose from the fact that the claimant was not present at the hearing neither was his representative present. The chairman's note of evidence reads,

"Papers sent by first class post to claimant at last known address on 20 July 1990 [the date of hearing was 6 August 1990]. No reply received."

The tribunal then went ahead to deal with the appeal and as stated above dismissed it.

4. On 22 August 1990 the claimant made written application for the tribunal to set its decision aside on the ground that the claimant's representative was not able to be present at the hearing on 6 August 1990 and that both he the claimant and the claimant's representative wished to be present at the hearing.

5. The application to set aside was heard by a tribunal consisting of a different chairman and one different member. The other member had sat on the previous occasion. On their record of decision (on Form AT3 SA) the tribunal made the following finding of fact,

"We find that on the balance of probabilities [the claimant] was notified of the hearing of the appeal on 6 August 1990, but that his representative was not so informed. There is no indication on the papers that would have made it appropriate or necessary to inform a representative."

The tribunal then refused the application for setting aside giving as reasons for their determination,

"While in general it is important to ensure that appellants' representatives are given notice of the hearing and enabled to attend, in this case we find that it was open to [the claimant] to inform his representative in advance, or to attend himself on the hearing and ask for an adjournment. He did not do so. On the basis of form AT6 [AT2?], which was before the original Tribunal it would appear that [the claimant] is disqualified in any event from receiving Sickness Benefit in view of his contribution record, and we have seen nothing from him which suggests that he may have an argument to the contrary. In the circumstances no useful purpose would be served by setting aside the decision of 6 August 1990. There is no evidence anywhere in the papers that the Department or the Tribunal Office were aware of any address or a representative of [the claimant's] or of his involvement on behalf of the Appellant."

6. I should make it clear that no appeal lies to the Commissioner from a determination of a social security appeal tribunal on an application to set aside (Social Security (Adjudication) Regulations 1986, regulation 12(3)). However, it is established that nevertheless the Commissioner has the power (whether or not there has been a determination on a setting aside application) himself to set a tribunal's decision aside on the

ground of failure of natural justice - see R(SB) 23/83 where this principle is reiterated (referring to what is now regulation 12(4) of the above-cited Adjudication Regulations). That decision indicates that one of the circumstances where there may be a setting aside by the Commissioner is where a claimant has not been able to attend a hearing, though on the facts of that particular case in R(SB) 23/83 the Commissioner refused to set aside the tribunal's decision.

7. Following the tribunal's refusal to set aside in their determination dated 12 November 1990 the claimant's representative wrote a letter dated 20 December 1990 to the Regional Chairman of Social Security Appeal Tribunals in the following terms,

"You will see that the Tribunal refused to set aside the August decision because the representative's interest was nowhere to be seen in the case papers. My name is clearly evidence throughout the case papers and the failure to notify myself of the date and place of the hearing led to [the claimant] himself also failing to attend. [The claimant] advised me on the Friday before the Monday of the hearing that in fact the Tribunal was due to take a course by which time it was too late to request an adjournment. The request to set aside the decision was in fact initiated by the Department and not by myself albeit signed by [the claimant]."

8. The Regional Chairman replied to the claimant's representative on 7 February 1991, saying,

".. I have also asked the Full-time Chairman .. to have a look at the situation. The position is that we are undoubtedly of the view that on the papers the decision of the Tribunal of 12 November should have been to set aside the August decision. This, of course, is only our post facto independent view and as you know, the Tribunal in November did not in fact set aside the August decision. There seems to be no provision whatsoever in the law to rehear at Tribunal level a setting aside decision of another Tribunal."

9. I should say that I entirely agree with the view of the Full-time chairman and of the Regional Chairman that there should have been a setting aside of the tribunal's decision. However, I can now rectify the matter in exercise of my own independent jurisdiction (see R(SB) 23/83) and I conclude that this is undoubtedly a case where I should set aside the tribunal's decision of 6 August 1990 on the grounds of breach of the rules of natural justice. Such a breach can occur even inadvertently. It is not necessarily any criticism of the August tribunal that I have felt obliged to set their decision aside.

10. In a written submission (undated but received on 12 August 1991) the adjudication officer now concerned also supports the claimant's appeal on the ground of there being in

effect a breach of the rules of natural justice. In paragraph 2 of that submission the adjudication officer submits that, as regulation 2(1)(b) of the Social Security (Adjudication) Regulations 1986 provides that any representative "shall have all the rights and powers to which the person whom he represents is entitled under the Acts and these Regulations", that would include a right by the representative to receive a notice of hearing under regulation 4(2) of the said Regulations which provides that, "reasonable notice (being not less than 10 days beginning with the day on which the notice is given and ending on the day before the hearing of the case ..) of the time and place of any oral hearing .. shall be given to every party to the proceedings, and if such notice has not been given to a person to whom it should have been given under the provisions of this paragraph the hearing .. may proceed only with the consent of that person."

11. However, I doubt whether the combination of regulations 2(1)(b) and 4(2) of the Adjudication Regulations does have this effect. The reference to "rights and powers" in regulation 2(1)(b) could not in my view vary the requirement of regulation 4(2) that the notice of hearing must be "given to every party to the proceedings". The expression "party to the proceedings" is elaborately defined in regulation 1(2) of the Adjudication Regulations and does not include a representative. However, that is largely an academic point in this case and indeed in other cases. That is because if it is known that there is a representative of a claimant and a tribunal proceeds in the absence of that representative (certainly where the claimant is also not present), there will prima facie be a breach of the rules of natural justice. It follows that it is a sensible practical course (which I expect the tribunal authorities follow) for representatives as well as for parties in fact to receive notice of the hearing.

12. As to the substantive issues in this appeal, I prefer to leave them entirely to the new tribunal particularly as I am confident that the claimant's representative in this case will be able fully to argue the various points before the tribunal. I would just mention that in the written submission from the adjudication officer received on 12 August 1991 attention is drawn to the fact that the relevant Claims and Payments Regulations are not the 1987 Regulations (to which the local adjudication officer referred in his submission to the tribunal) because they did not come into force until 11 April 1988, whereas the claim in this case was made before then namely on 5 October 1987. Consequently, the 1979 Claims and Payments Regulations apply. It appears there is a question of possible

"linking" of periods of incapacity. On that matter, it may be relevant to the new tribunal to enquire whether the Court of Appeal has given any decision on an appeal from a decision of mine on file CS/83/89 (Scully), which may well have similarities to the present case.

(Signed) M.J. Goodman
Commissioner .

(Date) 12 November 1991