

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

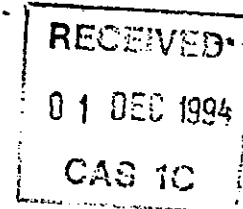
CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Appeal Tribunal: Middlesbrough

Case No: 1:39:26856



1. For the reasons given below I hold that the decision of the social security appeal tribunal given on 13 April 1994 stopping the claimant's entitlement to invalidity benefit from 30 September 1992 was erroneous in law. The decision must therefore be set aside and the case referred to a further tribunal for redetermination.
2. The claimant, who is now aged 45 and used to work as a steel erector, had a road traffic accident in 1988 which badly damaged his right knee. This has remained very painful and continued to restrict his mobility and he has never managed to re-establish himself in work. In 1989 he claimed and was awarded sickness benefit and subsequently invalidity benefit. He has also been awarded mobility allowance up to the age of 60. Over the period from December 1990 to September 1992 he has had four medical examinations in connection with invalidity benefit, and in each of them has been found capable of limited work in a sedentary job; although not of course at his previous work as a steel erector, as his ability to stand, move about and climb has been substantially impaired. His doctor has given him numerous certificates over the years advising him to refrain from work on account of his knee injury and although there are no medical details of his medication the claimant himself says that he has been taking quantities of painkillers and sleeping pills which leave him fuddled and drowsy. He does not consider himself capable of work at all.
3. The claimant's appeal to the tribunal arose out of the decision of the adjudication officer reviewing his entitlement to invalidity benefit under regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987 S.I. No. 1968, and determining that from and including 30 September 1992 the claimant was not incapable of work by reason of disease or bodily or mental disablement and accordingly was not entitled to the benefit from that date. The test applied by the adjudication officer and by the tribunal was whether the claimant was or was not capable of any work, it being accepted that he was incapable of returning to his previous job as a steel erector. This was

plainly the correct test at this distance in time from the original injury, it being long past the point where it could be said that the claimant's capacity for work had reasonably to be judged by reference to his previous field of employment. See R(S) 7/60 paragraph 10.

4. The adjudication officer's decision purports in terms to review the original decision of the adjudication officer awarding invalidity benefit from and including 7 January 1989, without making any reference to the fact that that decision had already been reviewed and the entitlement under it terminated by a revised decision made on 21 May 1991 which revision had itself been reviewed (as having been given in ignorance of the material fact that the claimant was receiving mobility allowance) and substituted by a further decision of the adjudication officer in about June 1991 awarding the claimant invalidity benefit from and including 21 May 1991 because the adjudication officer was satisfied that he was incapable of all work.

5. Thus the review decision considered by the tribunal did not in terms relate to the actual decision under which the claimant was entitled to his award of invalidity benefit at the time of the appeal, but to an earlier decision which was by then spent. This is a purely formalistic point as the real question to which both the adjudication officer and the tribunal correctly addressed their minds was whether the claimant was not incapable of work at and after 30 September 1992. However its effect on the appeal will have to be considered by the parties and the tribunal at the rehearing. The history of the claim and the earlier reviews was correctly put before the tribunal in the adjudication officer's submissions for the hearing on 13 April 1993 and the point made no difference to the questions they actually considered.

6. At that hearing the claimant attended in person and gave evidence but was unrepresented. In his evidence he made two important points in particular on the question of his ability to work, first that as he had already told the Department on 19 August 1992 he had had an earlier accident which had caused nerve damage to his right hand and restricted his ability to do manual or clerical work, and second (also reiterating earlier information given by him) that the sleeping tablets and painkillers he was taking made him drowsy so that he would be unable to do the specific jobs mentioned in the medical officer's reports satisfactorily. In response to a point raised during the hearing that no letter or report had been put forward from the claimant's GP, he said that he had not asked for one because he believed the Department would be getting that and that his whole medical file would be there before the tribunal.

7. The tribunal after referring to the various medical reports saying that the claimant was capable of limited work, dismissed the appeal and held that he was not entitled to invalidity benefit from and including 30 September 1992. As to his own evidence they recorded in their reasons for decision that he had failed to convince them that he was incapable of doing the jobs

listed by the most recent medical officer. They said they were unable to accept his evidence as to his various ailments as they took the view that were they as severe as he was now alleging, he would have mentioned them to the medical officers who examined him and they noted that he had failed to produce a letter or report from his own GP confirming "his alleged ailments". They concluded that these could not be as serious as the claimant had painted them and they rejected his appeal.

8. Sometime after receiving this decision the claimant consulted the Citizens Advice Bureau for the first time and on 25 March 1994 was granted leave by a Commissioner to bring this appeal on the grounds set out in the CAB's letter dated 25 February 1994 that the tribunal had wrongly required him to prove that he was not capable of employment, had wrongly assumed against him that there was no medical evidence to support what he said about his condition apart from his knee, and had failed to give adequate reasons for their decision withdrawing his benefit.

9. The appeal is supported by the adjudication officer in a helpful submission dated 24 May 1994 pointing out that on a review of an existing award of benefit under regulation 17(4) of the Claims and Payments Regulations it is for the adjudication officer to establish that the claimant is no longer incapacitated rather than the other way round (see R(S) 3/90); and that a decision on capacity for work outside the claimant's previous normal employment should not be given against the claimant without deciding affirmatively that there was some specific work that he could reasonably be expected to be able to do. The adjudication officer also submits in paragraph 10 of his submission that the tribunal had to consider whether the requirements for entitlement were satisfied from 30 September 1992 and that the later medical reports had been ignored in their findings. The first point is undoubtedly correct but I do not think the tribunal were in fact guilty of ignoring the two medical reports of July and September 1992 which are clearly referred to in the record of their findings: see the second continuation sheet page T78.

10. In my judgment the main submissions made by the adjudication officer and the claimant's representative must be accepted and the tribunal's decision set aside as erroneous in law. In particular it does appear from the stated reasons for their decision that they were approaching the appeal on the basis that it was for the claimant to satisfy them that he was incapable of doing the various jobs listed by the medical officers and that the burden of proof to establish incapacity as a result of his various ailments was on him, whereas it is well established that the burden of proof on a review under regulation 17(4) (as distinct from an original claim for invalidity benefit) is on the adjudication officer to demonstrate that the claimant has ceased to qualify for benefit: see R(S) 3/90 paragraph 6.

11. In addition, it was not in my judgment sufficient in the circumstances for the tribunal merely to say that they were

unable to accept the evidence of the claimant himself in the absence of further medical reports produced by him. In the first place he had given them what on the face of it was a perfectly reasonable explanation (that he believed his whole medical file would be obtained for the tribunal); but in any case in an inquisitorial procedure with the claimant unrepresented, the tribunal should in my judgment have enquired further for itself and made its own findings on the two material contentions he raised affecting his capacity for work. These were first that he had difficulty with his right hand, and second that his ability to concentrate was affected by the medication he was taking. The tribunal should not have simply assumed against the claimant without further enquiry that these points were fabricated or exaggerated.

12. I hold therefore that their decision was erroneous in law because they failed to apply the correct test on the burden of proof for the purpose of a review under regulation 17(4), and failed to address with sufficient clarity and care the two material contentions raised by the claimant on the question of his capacity for work, or to give sufficient reasons by reference to specific jobs for concluding that he was capable of work.

13. In accordance with section 23(7) Social Security Administration Act 1992 I therefore set aside the tribunal's decision of 13 April 1993 and refer the case to a differently constituted tribunal which I direct to rehear and determine all material issues on whether the claimant's existing award of invalidity benefit has been effectively reviewed, and whether it has been demonstrated that the requirements for entitlement are no longer satisfied.

14. The appeal is allowed and the case remitted accordingly.

(Signed) P L Howell
Commissioner

Date: 18 November 1994