

ORIG

→ SHOULD LEAVE OUT JOBS CAN DO UNPREDICTABLY / IRREGULARLY.

- NOT IMAGINARY JOBS

CS/19/1987

**SOCIAL SECURITY ACTS 1976 TO 1986**

**CLAIM FOR INVALIDITY BENEFIT**

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

**Name:**

**Appeal Tribunal:**

**Case No:**

**[ORAL HEARING]**

1. My decision is that invalidity pension is payable from 10 July 1985 to 27 July 1985 (both dates included).

2. This is an appeal brought by the claimant with my leave against the decision of the social security tribunal ("the SSAT") dated 17 December 1985 which disallowed the claimant's appeal against the decision of the local adjudication officer issued on 16 July 1985 that invalidity benefit was not payable to the claimant for the period referred to in paragraph 1 above. The reason for the disallowance by the adjudication officer was that the claimant had not proved that he was incapable of work, by reason of some specific disease or bodily or mental disablement.

3. I heard the appeal at an oral hearing requested on behalf of the claimant who attended and gave evidence and was represented by Miss J Daly of the Harlesden Advice Centre. The adjudication officer was represented by Mr D M. Johnson of the office of the Chief Adjudication Officer.

4. The claimant, who was then aged 39 and employed as a car examiner, became incapable of work on 2 September 1984, the diagnosis being "back pain", a condition from which he had suffered during about 6 months in the previous 2½ years. After receiving statutory sick pay until 18 October 1984 he was in receipt of sickness benefit until 8 March 1985 and then invalidity benefit until and including 27 July 1985 when payment ceased as a result of the decision the subject of the present appeal. The diagnosis of his disability was back pain throughout the whole period and from 9 March 1985 the pain was attributed to Paget's disease of the pelvis. It is not in dispute that he suffers from that disease.

5. In accordance with the normal procedure of the Department of Health and Social Security the claimant was examined on 13 November 1984 by a medical officer of the Department who found him incapable of work at his normal occupation and advised that he need not be referred for examination again for 3 months. On 29 April 1985 he was again examined by a medical officer who considered him to be incapable of work at his normal occupation but capable of work within certain limits. He described the claimant's condition as follows:-

"Claimant has some back pain due to Paget's disease in its early form. At present the disability is minimal but it may slowly get worse over the years".

Although he referred to the disability as "minimal" he assessed the claimant's function as full in respect only of his shoulders arms and hands and for kneeling. For climbing stairs he assessed him as having full function to slight impairment of function; for walking and standing he assessed him as having slightly impaired function; for bending and lifting/carrying as having slight to substantial impairment and for climbing ladders as having substantial impairment. He advised against driving professionally and against outdoor work in all weathers. He considered the claimant to be capable of light semi-sedentary employment within the above limits. He again said that the claimant's condition might slowly deteriorate and recommended an E.R.C. assessment.

6. Although the examination by the medical officer took place on 29 April 1985 the decision disallowing benefit was not issued until 16 July 1985. I do not know why there was such a long delay but I do not consider it necessary for me to look further into the matter. However, in the meantime the claimant had made a further claim supported by forms Med 3 signed by his own doctor on 7 June 1985 and 1 July 1985 advising him to refrain from work signed by his own doctor on 7 June 1985 and 1 July 1985 advising him to refrain from work and it was thus clear, before the disallowance was made on 16 July 1985 that the claimant's doctor disagreed with the opinion expressed by the medical officer. In the circumstances it seems rather surprising that the decision to disallow was made without a further examination by one of the Department's medical officers with the result that there is less contemporary medical evidence than is usually available in such cases.

7. There is, however, some further medical evidence which, although it is late in date, I think I can properly take into account. There is a letter dated 5 November 1985 written to the claimant's doctor by the orthopaedic senior registrar of St Mary's Hospital London as follows:-

"This man is still having chronic low back pain. He has Paget's disease of the pelvis.

On examination there is yet a very good range of movement in his lumbar spine.

I am afraid that the only treatment we can give him is some physiotherapy to build up his back muscles and I have no further appointment for the clinic".

There is also a letter from the claimant's own doctor to the claimant's representative in the following terms:-

"[The claimant] is totally incapable of any gainful employment. He cannot bend, stand, sit lift or walk for more than a few minutes at a time. Enclosed please find [the report quoted above] and also the DHSS doctor's report of April 1985, who has stated the possibility of further determination of his Paget's disease of the hip joints. His back is troublesome practically round the clock and the frustration from his pain is very annoying for him. Hope this will be helpful for you to decide his case compassionately".

8. In addition to the medical evidence I must also take into account the claimant's own evidence before the SSAT and before me. In their reasons for decision the SSAT said:-

"The claimant himself says he cannot sit still and he cannot move about a lot and he refers to the fact that London Transport will not give him even a messenger's job. His wife has to massage his hips. He has difficulty in getting on a bus but he manages to drive his car to go to physiotherapy but that is only ten minutes away.

He does however say in his evidence that when he can no longer sit he can stand and when he cannot stand he can walk about and that is in fact what he does all day.

It seems to the Tribunal therefore that light bench work or packing for a limited period of time, even if it were only part time, might be suitable employment. On the balance of probabilities the Tribunal feel that this could be attempted by the claimant."

9. I am satisfied that the claimant was not at the relevant time capable of work at his former occupation and I am also satisfied that by that time, in view of the long duration of the claimant's disability, the point had been reached at which it became appropriate, in accordance with well-established practice, to consider the claimant's capacity to a field of employment enlarged to include any form of work that he could reasonably be expected to do. Consideration of possible jobs in such an enlarged field must, of course, be limited to jobs that actually exist in the real world. It is not permissible to hold a claimant capable of work if the only job of which he would be capable is an imaginary job with a description tailored to involve only the activities of which he is capable. Also, although it is well established that part-time work has to be considered, it is in my opinion necessary to limit consideration to jobs that a claimant could do on a part-time basis reasonably likely to meet the requirements of some employer. Thus jobs that a claimant would be capable of doing only irregularly or unpredictably should be left out of account.

10. I now turn to consider whether the present claimant should be held to have been incapable of work during the relevant period in the sense mentioned above having regard to the matters mentioned in the preceding paragraph and to the available evidence as to his ability to perform physical functions. The letter from the orthopaedic registrar confirms that the claimant was suffering from chronic low back pain and that he has Paget's disease of the pelvis. However, it does not express any opinion about the degree of pain or its relevance to the claimant's ability to perform specific tasks and is therefore not of much assistance in deciding the question before me. The report of the examining medical officer refers to the claimant having "some pain" and to the "minimal" disability. However, the specific functional limitations mentioned in the second half of the report seem to me to add up to something rather more than minimal. The letter from the claimant's own doctor indicates a degree of pain and discomfort much greater than that noted by the medical officer and broadly in line with the claimant's own description. His doctor had been his doctor for many years which adds weight to her opinion. My own observation of the claimant inclines me to prefer the view of his own doctor, even after applying a discount on account of the fact that I saw him more than two and a half years after the period in issue and also the fact that the medical officer expressed the view that the disability might get slowly worse over the years. On the evidence as a whole my conclusion is that on the balance of probability the claimant was not capable of any of the jobs suggested by the adjudication officer and that it is very unlikely that an employer would have been willing to employ him except for charitable reasons.

11. I am satisfied that for the reasons stated in the further submission by the adjudication officer now concerned, dated 21 October 1987, it was open to the local adjudication officer, on his view of the claimant's capacity for work, to disallow benefit for the period 10 July 1985 to 27 July 1985 (both dates included). It is therefore appropriate for me, on my view of his capacity for work, to award benefit for that period.

12. For the foregoing reasons my decision is as set forth in paragraph 1 above.

13. Although this appeal relates only to the period mentioned in paragraph 11 above, I must make some observations about the later period for which the claimant intends to press claims. The case papers include claims submitted on behalf of the claimant on 10 March 1986, 20 June 1987 and 27 July 1987, based on medical statements from his doctor of the same dates and respectively for periods of 52 weeks from 27 July 1985, 27 July 1986 and 27 July 1987. According to the form BF 40C which is document C74 in the case papers, claims as just mentioned were initially disallowed for the disallowances were then cancelled. I understood the

claimant to say that he had never received any notices of disallowance in respect of these claims and Mr Johnson, on behalf of the adjudication officer, was not convinced that such notices were issued it would appear that the claimant would still be in time to appeal. If, on the other hand, the claims were never adjudicated upon it appears that that should now be done.

(Signed) J N Penny  
Commissioner

Date: 5 February 1993

