

**SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR INVALIDITY BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name:

Appeal Tribunal:

Case No:

[ORAL HEARING]

1. My decision is that:
 - (a) the decisions of the adjudication officer awarding invalidity benefit from 2 May 1985 to 25 January 1986 were properly reviewed because they were given in ignorance of a material fact;
 - (b) these decisions are not to be revised on review because the claimant was incapable of work from 13 May 1985 to 25 January 1986 by reason of some specific disease or bodily or mental disablement; and
 - (c) no question of overpayment or repayment arises.
2. I held an oral hearing of this appeal. The claimant was present and gave evidence. His case was argued by Mr S Price of the Citizens Advice Bureau and Mr Ross of the Solicitor's Office in the Department of Health and Social Security represented the adjudication officer.
3. The claimant appeals against the decision of the Exeter social security appeal tribunal given on 16 December 1976, which confirmed a decision of the adjudication officer that earlier decisions were to be revised so as to make invalidity benefit not payable from 13 May 1985 to 25 January 1986 (both dates included) because the claimant was not incapable of work by reason of some specific disease or bodily or mental disablement and that the deeming of incapacity was not appropriate. It was further decided that an overpayment of invalidity benefit amounting to £2,379.28 had been made, and that the claimant was required to repay the said sum on the grounds that it had not been shown to the satisfaction of the determining authority that in the obtaining and receipt of the benefit he throughout used due care and diligence to avoid overpayment.
4. The claimant is aged 47 years and for a considerable time has suffered from arthritis of the spine. He was in receipt of sickness/invalidity benefit from 28 July 1981 to 25 January 1986. In late 1982 he went to live at Exmouth because he hoped that the warmer weather there would help his condition. He joined the cricket club. He had at one time been a minor county cricketer and had a keen interest in the game. He became involved in the organisation of games for young cricketers and later in coaching them. The coaching did not actually involve handling a bat himself. He was later appointed ground chairman of the club which involved supervising the groundsmen and attending at meetings of the

committee. All this was undertaken on an honorary basis. In May 1981 the main groundsman became ill and the claimant began to help the groundsmen and as the main groundsman's illness progressed he became more involved in this. It was still done on an honorary basis. He was drawn more and more into this work and eventually undertook it on the basis of a payment of £2 an hour. He has described in evidence what he did and I accept his account as correct and a truthful one. He drove a motor-roller and rolled the pitches. There was more than one wicket to be rolled. The length of time which he spent on the work would depend upon how he was feeling that day. Some days he was unable to do any work at all, other days he would spend an hour or more at work. He made his own hours of work. He did not regard it as a proper job. It was done initially on a voluntary basis and then he drifted into paid work. The period during which he had been employed doing the paid work was from the week ending 18 May 1985 to the week ending 4 January 1986. He received approximately £444 in wages during that period. The number of hours which he worked each week varied and these were determined by his own initiative, how he was feeling at the time and the amount of work which was required to be done. There were a number of weeks when he was unable to do any work at all. There is a schedule of the hours worked and the amounts paid to the claimant; pages 31 and 33 of the case papers. It shows irregular hours of working and of payment. If the amounts are averaged the claimant was receiving approximately £23 a week over the period in question, but the bulk of that money was earned in the summer and early autumn and during that time he was earning considerably more than the average. There are letters at pages 49 and 50 of the case papers from officials of the cricket club. These support the claimant's contention that he was given this work only because of the special circumstances, namely his interest in cricket and his previous involvement with the club; and I accept that they support his evidence that he was allowed to make his own hours, and work when he was able to do so.

5. I now turn to the medical evidence. On 22 October 1985 the claimant was examined by a medical officer of the Department of Health and Social Security. The doctor was of the opinion that, although the claimant was not capable of work at his previous occupation of plumber, he was capable of work within certain limits. He should avoid lifting, bending, carrying, digging or heavy manual work and prolonged hours of work. It was noted by the doctor that he suffered from lumbar and spinal arthritis, a permanent problem which in his opinion would never improve. His general practitioner was still of the opinion that he was incapable of any work. The claimant was again examined on 8 January 1986 by another doctor from the Department who was of the opinion that he was incapable of work as a plumber but was capable of work within certain limits. The doctor thought he could do a sedentary job or a job involving light walking about. It was noted that he can drive a car or a light van. In addition to sick notes there are two letters from his general practitioner. On 26 August 1986 the doctor said that in his opinion the small amount of work that he did at the cricket ground could be regarded as therapeutic and was a great help to his morale. He was still under treatment and in the doctor's view not fit enough for any heavy work which was all that he was qualified to do. In the letter of 8 December 1986, page 47 of the case papers, the doctor goes into more detail and describes the claimant as having a problem of longstanding backache for which no real cause could be found. In the opinion of the doctor he had two problems; one of pain and another, a psychological one which is either hysterical or emotional, in the opinion of the doctor the latter being related to the emotional changes that take place in association with longstanding pain. The doctor's letter continues:-

"Which I absolutely agree the best thing one could do for him would be to get him back to work; one has to face the fact that only light work is possible and that his health and the level of his symptoms are variable. I doubt very much whether a reasonable employer would be able to employ a man who can only work on his own terms; and in my opinion he cannot work consistently enough to be paid on an 8 hour basis about 5 days a week.

If he could find a job on his own terms it would be a great benefit to him emotionally. I think too that a sense of desperation can and has crept in - which makes these

patient difficult to handle, and indeed do things which they would not do if they were really stable emotionally."

I have also taken account of the letter from the osteopath which appears at page 39 of the case papers.

6. I have reminded myself of the provisions of section 17(1)(a)(ii) of the Social Security Act 1975 which makes it an essential condition of entitlement to invalidity benefit that on the relevant day the claimant must be either actually incapable of work by reason of some specific disease or bodily or mental disablement, or if he is not actually incapable of work he must fall within the protection of the regulations made under the Act. In so far as the instant case is concerned it is regulation 3(3) of the Social Security (Unemployment, Sickness, and Invalidity Benefit) Regulations 1983 which fall for consideration; it is as follows:-

"A person who is suffering from some specific disease or bodily or mental disablement but who, by reason only of the fact that he has done some work whilst so suffering, is found not to be incapable of work by reason thereof may be deemed to be so incapable if that work is:

- (i) work which is undertaken under medical supervision as part of his treatment where he is a patient in or of a hospital or similar institution; or
- (ii) work which is not so undertaken and which he has good cause for doing,

and from which, in either case, his earnings did not ordinarily exceed £23.50."

The amount became £25.00 from 25 November 1985.

7. A valuable discussion of the matters to be considered in a case of this nature is to be found in the decision of a Tribunal of Commissioners in R(S)2/82 and I have borne these in mind. R(S)2/82 was followed by the Commissioner in R(S)7/85 and he spoke of the necessity to take account of some of the qualifications contained in that decision. He said at paragraph 3:-

"Only work which the claimant can reasonably be expected to do has to be taken into account. And it is clear from paragraph 10 of the above decision that exotic work undertaken only by very few can be ignored and a fortiori work that because no work of that nature exists is not taken on by anybody at all can be ignored. And later in the same paragraph:

"Further I consider that it emerges from paragraphs 8(3) and (4) of the same decision that the Tribunal of Commissioners consider that it was not necessary to take into account capacity for work which, if offered at all, would be offered only on compassionate grounds."

I remind myself that the claimant's incapacity is to be judged in the concept of work he can reasonably be expected to do. I remind myself that in a case such as the instant one where the adjudication officer seeks to revise an existing award the onus is on him to establish the claimant's capacity for work. Mr Price has submitted that this is a case which requires consideration to be given as to what work the claimant may have been capable of at the material time. It is conceded that he cannot return to his original work that of a plumber. It seems to me having regard to the medical evidence and the circumstances of the case and to the fact that the adjudication officer seeks to establish the claimant's capacity for other work I would have been assisted if specific job descriptions had been provided; in the absence of such I find it difficult to decide against the claimant because it is virtually impossible to say with precision what work he would be able to do. Of course one

occupation does fall for consideration, namely an assistant groundsman at a cricket club which is work for which an employer would be willing to pay in normal circumstances. I accept the claimant's evidence that he has to accommodate his work to the state of his health on a given day. He may be able to work for a number of hours or he may only be able to work for an hour. On certain days he may not be able to work at all. It is true that work as used in the section would include remunerative part-time work, but I have to ask myself whether any hypothetical employer would employ the claimant and remunerate him when his attendance would be both irregular and uncertain. I do not think an employer would. The claimant's own evidence is corroborated by the letter from his doctor dated 18 December 1986. It is true that he did have employment as an assistant groundsman during the second part of 1985 and that he made his own hours of work which depended on his condition at the time. But that work was given to him in very exceptional circumstances. The cricket club was in difficulty because the regular groundsman was in bad health and needed a person to help out as a temporary measure. The claimant describes how he was drawn into paid work. He did it first on a voluntary basis. In the circumstances it was expedient for the cricket club to accept the very limited work which he could do. I am also satisfied that there was an element of compassion in the decision to pay him. He had been a county cricketer. He was a keen member of the club and he was down on his luck. No doubt a cricket club would be prepared to pay an assistant groundsman but it does not appear to me that such a body would be prepared to remunerate a person such as the claimant whose disability permitted him only to work at irregular times, to miss days and to leave work at frequent intervals to be decided upon by himself. The claimant's capacity for work was limited in this way and while it is true that he was employed by the cricket club, it seems to me that the evidence shows that such employment arose from a mixture of expediency and compassion. For the reasons aforesaid I do not regard the claimant's capacity to perform such work as he did in the second part of 1985 to be such as to fall within the capacity of work envisaged by the section. The adjudication officer has not introduced any specific job descriptions which would help me to decide whether or not there was other work which the claimant might be capable of. The onus lies on the adjudication officer to establish capacity for work in order that the original decision might be revised and he has not discharged it.

8. I now consider the effect of regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 in so far as the claimant's case is concerned. In view of my decision on the first aspect of the case it is unnecessary for me to say more than that the relaxation of the general rule allowed by the paragraph does not fall for consideration because the work done by the claimant was not such that by reason of it he is to be found not to be incapable of work. If it had been for consideration then I would have held that (ii) of the paragraph was satisfied. It is conceded by Mr Price that (i) is not satisfied. However I find that the claimant had good cause for doing the work, on the basis of his own evidence and what is said in his doctor's letter of 26 August 1986.

9. I am satisfied that the decision of the adjudication officer could be reviewed under the provisions of section 104(1)(a), but for the reasons which I have given such decisions are not to be revised.

10. As a consequence of my findings no question of repayment arises, but it is pertinent to observe that Mr Price conceded that he would find it difficult to argue that the claimant had shown due care and diligence to avoid overpayment.

(Signed) J J Skinner
Commissioner

Date: 8 October 1987