



Commissioner's File: CS/154/1989

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

Name: [REDACTED]

Appeal Tribunal: Birkenhead

Case No: [REDACTED]

[ORAL HEARING]

1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal given on 7 March 1987 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that there were no grounds for reviewing the current award of invalidity benefit, and accordingly the claimant continued to be entitled to invalidity benefit for the inclusive period from 14 June 1988 to 18 June 1988.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 7 March 1989. The claimant asked for an oral hearing, a request which was acceded to. The claimant did not appear, but was represented by Mr Nicholas Warren a solicitor from the Birkenhead Resource Unit, whilst the adjudication officer appeared by Mr N Butt of the Solicitor's Office of the Departments of Health and Social Security. I am indebted to both of them for their submissions.

3. The claimant, born on 14 February 1931, had been in receipt of sickness/invalidity benefit from 17 November 1987 by reason of chronic dyspepsia and deformed feet when in accordance with normal practice he was on 7 June 1988 examined by an examining medical officer of the Divisional Medical Office of the Department of Health and Social Security. The latter expressed the view that the claimant was not incapable of work as a shipyard - rigger's mate and stated that "his duodenal ulcer appears to be quiescent, - not necessary any treatment/deformity

of toes in infancy - some ache on prolonged standing". On 10 June 1988 the claimant was advised of the outcome of the examination and invited to see his doctor to discuss the examining medical officer's findings. In the event, his general practitioner issued a final medical statement dated 15 June 1988, advising him that he would be fit to resume work on 20 June 1988. On 17 June 1988 the adjudication officer decided that invalidity benefit was not payable for the inclusive period from 14 June 1988 to 18 June 1988 because the claimant had not proved that he was incapable of work by reason of some specific disease or bodily or mental disablement. In due course, the claimant appealed to the tribunal who in the event dismissed the appeal.

4. To complete the claimant's medical history I should mention that on 17 November 1987 his general practitioner issued a certificate advising him to refrain from work for six months by reason of chronic dyspepsia and deformed feet. Moreover, on 19 May 1988 he issued a further certificate covering the claimant for an additional period of six months, the diagnosis being "congen. deformed feet chronic dyspepsia". As regards that last period the doctor had further thoughts because on 15 June 1988, after he had heard the result of the examining officer's examination, he restricted the period when the claimant should refrain from work to 20 June 1988. However he annotated the certificate "unfit for prolonged standing, irregular meals".

5. Until 11 April 1988 regulation 11 of the Social Security (Claims and Payments) Regulations 1979 [S.I. 1979 No.628] applied, and this provided that a claim for invalidity benefit based on a medical statement should be treated as a claim by the claimant for the period covered by that medical statement. However, pursuant to regulation 11(1)(b) the adjudication officer did not necessarily have to make an award covering the entire period. He could make a partial award, and leave for the moment the residue of the claim open for further decision. As it would seem before 11 April 1988 to have been the invariable practice of every adjudication officer, when he felt that a claimant no longer qualified on medical grounds for an award, to disallow benefit from a specified date, presumably he did not normally make an outright award covering the period specified in the certificate, but limited the award to the period for which it was actually paid. That way it was open to him at any time to make a fresh decision, and from the relevant date he would decide that the claimant was no longer entitled to benefit. However, with effect from 11 April 1988 the system changed. For regulation 17 of the Social Security (Claims and Payments) Regulations 1987 [S.I. 1987 No.1968] came into operation, and this provided, so far as is relevant for the present case, as follows:-

- " 17. - (1) Subject to the provisions of this regulation and of section 20(6) of the Social Security Act 1986 (Family Credit) a claim for benefit shall be treated as made for an indefinite period and any award of benefit on that claim shall be made for an indefinite period.

- (2)
- (3) If it would be inappropriate to treat a claim as made and to make an award for an indefinite period (for example where a relevant change of circumstances is reasonably to be expected in the near future) the claim shall be treated as made and the award shall be for a definite period which is appropriate in the circumstances.
- (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.
- (5) ..."

6. Now, Mr Warren's contention before me, as, I understand, it had been before the tribunal, was that the effect of regulation 17(1) was to require a claim, as from 11 April 1988, to be treated as made for an indefinite period. He pointed out that this was the general rule, and that although the period might be made finite in the circumstances envisaged by paragraph (3) of regulation 17, such circumstances certainly did not apply in the present instance. By issuing the two certificates on 17 November 1987 and 19 May 1988, each covering the claimant for a period of six months, the doctor had proceeded, Mr Warren submitted, on the basis that the condition was chronic, and the only reason why he had not specified an indefinite period was because the code of practice, which controlled the issue of certificates by doctors, set a limit of 26 weeks. The effect of regulation 17(1) was important in that if, as here, the claim had to be treated as one for an indefinite period, it could only be terminated on review pursuant to paragraph (4), and a review could only take place if the adjudication officer had established that the claimant was no longer incapacitated. In other words, the onus of proof fell on the adjudication officer. Whereas in cases where a new award had to be made the burden was on the claimant to show that he was incapable of all forms of work, on a review it was for the adjudication officer to demonstrate that the claimant had ceased to qualify for benefit. I accept those submissions, both as to the interpretation of the new legislation and as to the period for which the claim in question was to run.

7. It follows that the tribunal had to decide whether the award, which was to be treated as of indefinite duration should be reviewed. They made the following findings of fact:-

"It was held that the Department's decision to disqualify was justified in view of the decisions made by the 2 doctors

concerned, although it was noted that [the claimant's] own doctor had originally held a different view.

The Department's decision to disqualify [the claimant] from entitlement should be regarded as a review curtailing his claim for an indefinite period."

However, the lucidity of this conclusion is undermined by what the tribunal said in Box 3:-

"The appeal fails. No entitlement to Invalidity Pension from 14-18 June 1988."

8. Now, it is clear from the adjudication officer's decision of 17 June 1988 that he had purported to refuse an award for the period from 14 June to 18 June 1988, and to regard any existing award as having come to an end prior to 14 June 1988. In doing so, he erred in point of law. For, as explained above, I am satisfied that the claim was for an indefinite period, and it could only be terminated on review. Moreover, the tribunal themselves appear, from their findings, to have accepted this contention. But instead of overturning the adjudication officer's decision, and in accordance with their view of the facts disallowing on review benefit from 14 June 1988 onwards, they appear to have endorsed the misconceived approach of the adjudication officer. The position has been left in a muddle, and I have no option but to set aside the tribunal's decision, a conclusion supported by Mr Butt.

9. However, I do not think it is necessary for me to remit the matter to a new tribunal for rehearing. I can conveniently dispose of the matter myself. Mr Warren contended that it had not been in dispute that the claimant was incapable of work up to 14 June 1988, and his later claim made on 30 August had been successful. It was surprising, in the extreme, then, if his condition temporarily improved for a period of a few months and then deteriorated. He also brought to my attention a subsequent report by an examining medical officer of the Department dated 27 February 1989 which reinforced his contention. I understand that this report was not brought to the notice of the tribunal by the Department. I do not understand why this was the case. For although the report was made some eight months after the period with which I am concerned, it did have some relevance, particularly as the claimant had been successful in August of 1988 (see in this connection R(SB) 18/83 paragraph 11). The examining medical officer in his report dated 27 February 1989 stated that there was no need to refer again.

10. This is something of a borderline case. It is clear that the examining medical officer who carried out the medical examination on 7 June 1988 was satisfied that the claimant was not incapable of work, and he appears to have carried the claimant's own doctor with him. However, against that, it is odd in the extreme that, if the claimant was unfit for work until 14 June 1988 and similarly incapacitated from 30 August 1988 onwards (his condition, apparently from the report of

27 February 1989, growing worse), he was during the interval between 14 June 1988 and 29 August 1988 capable of some form of employment. Accordingly, I reach the conclusion, albeit with some hesitation, that on the balance of probability the claimant was at all times unfit for work, and as a consequence there were no grounds for a review of the current award.

11. It follows that the claimant continued to be entitled to invalidity benefit for the inclusive period from 14 June to 18 June 1988, and in so far as any unemployment benefit was paid for this period it must be treated as having been paid on account of invalidity benefit.

12. My decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

(Date) 13 February 1990

