

MRJ/l/JK

Commissioner's File: CS/196/1988

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [REDACTED]

Appeal Tribunal: Cannock

Case No: [REDACTED]

[ORAL HEARING]

1. My decision is that the claimant is entitled to sickness benefit for the inclusive period from 13 May to 10 November 1983.
2. I held an oral hearing of this appeal on 22 February 1990, when the claimant, who was not present, was represented by Mr D Allsop of the Wolverhampton Citizens Advice Bureau. The adjudication officer was represented by Mr A D Easton of the office of the Chief Adjudication Officer. I am grateful to both Mr Allsop and Mr Easton for their assistance.
3. The claimant appeals with leave of the Commissioner against the unanimous decision given by the local tribunal on 23 September 1983 confirming the decision of the insurance officer, dated 6 July 1983, that sickness benefit was not payable to the claimant for the inclusive period from 13 May to 24 November 1983, because the claimant was not incapable of work by reason of some specific disease or bodily or mental disablement (section 14(1) and 17(1)(a)(i) of the Social Security Act 1975 and regulation 3 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975).
4. The reason why this matter has taken so long is that after the local tribunal hearing the claimant was refused leave to appeal to the Commissioner, firstly by the tribunal chairman on 21 October 1983, and secondly by the Commissioner in May 1984. On 1 July 1985 the claimant made a further application for sickness benefit, which was again disallowed by the adjudication officer and, on appeal, by the social security appeal tribunal on 18 November 1985. However, on that occasion the claimant was granted leave to appeal to the Commissioner whose decision dated 28 July 1987 (on file number CS/46/1986) was to dismiss the appeal on the ground that the claimant did not satisfy the "second contribution condition." It is plain from the claimant's letter dated 1 August 1987 that he was under the misapprehension that his appeal had been against both tribunals' decisions and,

after further investigation, on 14 November 1988 the Commissioner varied the decision of May 1984 and granted the claimant leave to appeal out of time. On 12 January 1990 the Commissioner directed an oral hearing.

5. As the local tribunal's decision was issued prior to the Social Security Act 1986 coming into force on 6 April 1987, this appeal is by way of a rehearing on fact as well as law.

6. The claimant, who was born in 1926, had poliomyelitis in childhood which left him with a wasted right leg. It would seem that he received medical advice that he should never do work of any sort but he appears to have made unsuccessful attempts to find employment when he left school and eventually set himself up - or perhaps was set up - as a self-employed grocer, in which he had been engaged for about 25 years at the time of the hearing in 1983. On 13 May 1983 he claimed, not for the first time, sickness benefit. He tendered in support a certificate from his general practitioner dated 13 May 1983 advising him to refrain from work for twenty eight weeks, that is to say until 24 November 1983, and it was for that period that the claim was considered.

7. Mr Easton helpfully pointed out to me that paragraph 12 of Schedule 1 to the Social Security (Medical Evidence) Regulations 1976 provides that the "period specified" under regulation 2 as days of incapacity to which the claim relates shall, save in circumstances which do not apply here, "not exceed 6 months". The doctor's certificate is accordingly defective, and I therefore deal with the matter on the basis that the specified period ended on 10 November 1983, the maximum permitted.

8. Regulation 3(3) of the 1983 Sickness and Invalidity etc Regulations provided at the material time that where a claimant was found not to be incapable of work because he has in fact done some work he may nevertheless be deemed to be incapable of work if his earnings therefrom did not ordinarily exceed a specified sum (at the time in question £20 a week) and it is either -

"(i) work which is undertaken under medical supervision as part of his treatment while 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".

9. Although the Commissioner in his decision on file number CS/46/1986 disposed of the appeal on another point, he nevertheless informally considered substantially the same issues as those before me, and it is helpful to see what he said in paragraph 7 -

"it is not suggested that the work fell within sub-paragraph (i)...it is contended that it falls within sub-paragraph (ii) as being work which...he had good cause

to do. The notion of "good cause" in this context is a trifle obscure...In Merrigan v Insurance Officer reported as decision R(S) 3/86, Kerr L J indicated that it was not limited to cases where the work was done under medical advice or even to cases where it could be shown to be of therapeutic value. In the present case there is evidence that the claimant's doctor, though he did not actually advise it, recognises that it helped the claimant considerably both mentally and physically...and I should have been inclined to accept that, if there was nothing else about the work, it was work that the claimant had good cause to do".

The Commissioner continued in paragraph 8 of his decision by examining the work which the claimant in fact did - and his motive for doing it - and concluded -

"I think that the question whether in these circumstances the work is work that the claimant had good cause to do is nicely balanced".

10. At the time the Commissioner was considering CS/46/1986 he found that the "profits left after paying his wife...do not amount to as much as £23.50 per week", which was the prescribed sum at the material time under regulation 3(3), and he went on, "But they are greater than they would be if his wife had to employ someone to do what the claimant does...He drives his wife (and himself) to the shop. He spends a limited amount of time sitting behind the till...And he does work on the accounts". Certainly the evidence in the instant case is to the same effect, but the way it was put to me was that latterly the Inland Revenue had required the accounts to be professionally prepared (which had apparently been the "last straw" for the precarious economy of this "corner shop" which ceased trading in September 1987, when the claimant was again admitted to hospital), so that his bookkeeping duties had decreased. Further it was said that the claimant went to the shop every day firstly because he had to take his wife, who could not drive, and secondly to get himself out of the house, where he became depressed, and that he spent a considerable amount of time at his brother's house next door to the shop. Further it was contended that some three-quarters of their modest business took place on Saturdays, when they had an extra member of staff to help, so that over the week the claimant's actual involvement in running the shop was extremely small, and certainly less than it might at first sight appear.

11. I have carefully considered all the submissions, both written and oral, which have been made to me, and the authorities to which I have been referred by Mr Allsop and Mr Easton, and I find myself in complete agreement with the views expressed, albeit obiter, by the Commissioner in CS/46/1987 - particularly his opinion that whether or not the claimant can establish good cause for doing the work he did is "nicely balanced". However, the delay that has occurred has had the advantage that I can look at the matter with hindsight. I have examined the accounts for 1983 and 1984 which, in my opinion, show that the business was

berely viable. I take into account that the claimant has throughout been in receipt of mobility allowance, which is indicative of a substantial degree of disablement, I note that the claimant has osteoarthritis and that he has apparently been incapable of any work since September 1987. In my judgment he kept the business going in the hope that it would prosper, because it provided some sort of a living for him and his wife and, above all, because it gave him a purpose in life. In the particular and somewhat unusual circumstances of this case I have come to the conclusion that the claimant's involvement with the shop was in a broad sense therapeutic. The balance accordingly swings in the claimant's favour and in my judgment he has established throughout the period in issue that he had good cause for doing the work he did.

12. The claimant's appeal is allowed and my decision is set out in paragraph 1.

(Signed) M K Johnson
Commissioner

Date: 5 April 1990