

### INVALIDITY BENEFIT

**Failure to attend RMO examination—findings necessary when considering whether disqualification is appropriate.**

The claimant who suffers from chronic backache has been in receipt of benefit since 16.8.80. He was requested to attend for a routine medical examination by a Divisional Medical Officer of the DHSS on 31.8.84. He did not attend. The adjudication officer disqualified the claimant from receiving invalidity benefit from 21.9.84 to 25.10.84 on the ground that he had failed without good cause to attend for examination as provided by regulation 17(1)(b) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983. The claimant appealed. In the written submission to the appeal tribunal the adjudication officer submitted that the claimant had also, or alternatively, failed to observe the rule of behaviour prescribed in regulation 17(1)(d)(ii).

*Held that:*

- (1) the tribunal's recorded findings of the material facts and their decision did not convey the reason for the decision or on which arm of the regulation the appeal had been dismissed (paragraphs 9 and 10);
- (2) as it was impossible to tell what evidence had been accepted a breach of regulation 19(2)(b) of the Social Security (Adjudication) Regulations had occurred (paragraphs 9 and 10);
- (3) the decision of the appeal tribunal was set aside and the case was remitted for rehearing by an entirely differently constituted tribunal (paragraph 11);
- (4) there is no rule of law to preclude a fresh tribunal from having before them the proceedings of an earlier tribunal whose decision has been set aside (paragraphs 13 and 14).

1. My decision is

- (1) the claimant's appeal is allowed
- (2) the decision of the social security appeal tribunal dated 7 March 1985 is set aside and
- (3) the claimant's appeal from the adjudication officer's decision dated 2 October 1984 is remitted for rehearing by a social security appeal tribunal which must (as to each of its members) be constituted differently from the social security appeal tribunal which gave the decision referred to in sub-paragraph (2) above.

*Nature of the appeal*

2. This is a claimant's appeal, brought with my leave, against the decision of a social security appeal tribunal dated 7 March 1985. It raises questions as to the matters on which findings are necessary when considering whether a claimant should be disqualified on the ground that he has failed to attend for medical examination and as to the propriety of a fresh tribunal having before them the proceedings of an earlier tribunal which heard the same appeal and whose decision has been set aside.

3. The claimant having received sickness benefit for the period 16 August 1980 to 27 February 1981 had been in receipt of invalidity pension since 28 February 1981 by reason of chronic backache. In accordance with routine control action on benefit claims a claimant is periodically requested to attend for a medical examination by a doctor of the Divisional Medical Office of the Department of Health and Social Security. As the claimant had failed to attend appointments on 2 earlier occasions a further appointment was arranged for 31 August 1984. The claimant did not attend. Form RM9 was subsequently returned by the Divisional Medical Office on 7 September 1984 endorsed "DID NOT ATTEND". It is in these circum-

stances that the adjudication officer gave the decision of 2 October 1984 referred to in paragraph 1(3) above.

*The adjudication officer's decision*

4. On 2 October 1984 the adjudication officer disqualified the claimant for receiving invalidity benefit from 21 September 1984 to 25 October 1984 (both dates included) on the ground that he had failed, without good cause, to comply with a written notice given by or on behalf of the Secretary of State requiring him to attend for and submit himself to medical or other examination on 31 August 1984, being a date not earlier than the third day after the day on which the notice was sent, at a time and place specified in that notice.

*The appeal tribunal's decision*

5. The claimant appealed against the decision of the adjudication officer to a social security appeal tribunal. In his written submission to the tribunal on this appeal the adjudication officer submitted that the claimant, besides failing to attend for medical examination without good cause had also, or alternatively, failed to observe the rule of behaviour that required him to refrain from being absent from his place of residence without leaving word where he might be found.

6. The relevant regulation relating to these issues is regulation 17 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [S.I. 1983 No. 1598] which is set out in Part 1 of the First Appendix to this decision.

7. The claimant did not attend the tribunal hearing. He was, however, represented and his representative made detailed submissions, which are set out in the chairman's note of evidence. He submitted, among other matters, that the Department knew that the claimant's address at the time notice was given was in Oldham, but they sent the notice to Peterborough. The claimant was away from Peterborough from 19 August and came back at the end of September.

8. (1) The tribunal's unanimous decision was:

“Disallowed 21.9.84–25.10.84”

(2) The tribunal's recorded findings of the material facts were:

“Claimant was away from home and didn't attend medical examination and admits he didn't notify Department of Health and Social Security. Claimant is on telephone”

(3) The tribunal's recorded reasons for their decision were:

“Claimant has not shown good cause for complying with notice [sic].”

9. The adjudication officer now concerned submits that these entries on the record do not convey the reasons for the decision or on which arm of the regulation the appeal was dismissed i.e. the claimant's failure to comply with a written notice to attend the interview or his being absent from home without leaving word where he could be found. He submits that where such a breach of regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No. 451 as amended by S.I. 1984 No. 1991] has occurred, the Commissioner has a discretion to send the case back to another tribunal for rehearing or to substitute his own final decision (cf R(U) 3/63, which was given by a Tribunal of Commissioners). In the interests of justice, the former course is submitted to be the more appropriate and I am invited to set aside the decision of the appeal tribunal and to remit the appeal for re-hearing. The claimant has stated that he has no further comments.

10. (1) I agree with this submission.
- (2) Regulation 19(2)(b) which is set out in Part 2 of the First Appendix to this decision, requires reasons for a tribunal's decision to be recorded together with the material facts. It is impossible to tell from the record whether the tribunal had considered that the claimant had been given a proper notice and without good cause failed to comply with it by attending for medical examination or whether he had not been given such a notice but was in breach, without good cause, of the rule of behaviour requiring him to leave word where he could be found. One is left guessing as to whether the claimant's evidence was accepted and, if it was, why there was not good cause? If the claimant's story was rejected, what were the facts which the tribunal did accept? The record of the decision leaves anyone reading it entirely in the dark on these crucial points. Accordingly there has been a clear breach of the regulations.
- (3) This is not an appropriate case for me to exercise my discretion to decide the case myself. The adjudication officer now concerned has asked me to remit the case to another tribunal and to this suggestion the claimant has raised no objection. If I were to decide the case myself, it would be necessary, in my view, to have an oral hearing. It is clearly more convenient, in these circumstances, for the case to be re-heard locally. The claimant is entitled to have a local hearing conducted and recorded in accordance with the regulations and to have proper findings made. See further, paragraph 12 below.

*Directions to the fresh tribunal*

11. The fresh tribunal to whom the case is now remitted should be entirely differently constituted. This will be a complete rehearing.

12. Findings will require to be made on the following points:

- (1) Did the notice to attend the medical examination comply with regulation 17(1)(b) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983? Two points arise. First, it should be ascertained that the contents of the notice satisfy the requirements of the regulation and that the date, time and place at which the claimant was to attend were specified in the notice: see the wording of regulation 17, which is set out in Part 1 of the First Appendix, and Decision R(S) 1/64, which emphasises the importance of these points and that such notices are strictly construed. No copy of the notice sent has been produced and there is no evidence in the case papers on these points. Secondly, was such notice, which must be in writing, "given by or on behalf of the Secretary of State" and what was the "day on which the notice was sent"? Proof of the date of posting establishes the day on which the notice was given and sent: see section 79(6) of the Social Security Act 1975. But that section contains no provision as to where the notice is to be sent, in order for it to be treated as effectively given. Section 1(5) of the Social Security (Adjudication) Regulations contains such a provision but only applies to notices or other documents sent to a person under the provisions of those regulations. Section 7 of the Interpretation Act 1978, however, provides that where an Act authorises or requires a document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary

intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document. It can accordingly be shown that the notice (assuming it is in due form) was effectively "given" by the Secretary of State by evidence that it was properly addressed, pre-paid and posted.

- (2) If the notice to attend did comply with regulation 17, the next question is whether the claimant, who has not disputed that he did not attend for examination, had "good cause" for his failure to comply with the notice. The onus of proof in this respect lies on the claimant.
- (3) If good cause has not been shown, what should the period of disqualification be? The tribunal has a discretion, since the regulation provides that disqualification shall be for a period not exceeding 6 weeks. Reasons should be given for the period chosen, since the tribunal are exercising a discretion: cf *Eagil Trust Co Ltd v Piggott Brown and Another* [1985] All E.R. 119 and *Lennard v International Institute for Medical Science* The Times Law Report April 29, 1985 (where the Court of Appeal, applying the *Eagil Trust* case, held that they had no option but to set aside the decision of Mr. Justice Nourse (as he then was) because of his failure in this respect. See also, Decision R(U) 8/74, which is that of a Tribunal of Commissioners.
- (4) If the claimant does not fall to be disqualified under regulation 17(1)(b) the tribunal should go on to consider whether he has failed, without good cause, to observe the rule of behaviour set out in regulation 17(1)(d), which is set out in Part 1 of the First Appendix to this decision. This involves making findings as to his place of residence, as to which see Decision R(S) 7/83. It will then be necessary to find the facts as to any absence over the period of the notice and as to whether the claimant had failed to leave word as to where he could be found. If the claimant was absent from his place of residence during the notice period without leaving word as to where he could be found, it will then be necessary for the claimant to show that he had good cause for not leaving word. If he fails to establish this, and the onus here is on him, it will then be necessary to exercise the discretion as to disqualification, with reasons, in the way already explained in paragraph (3) above.

#### *Documents to be placed before the tribunal*

13. The fresh tribunal should, in any case, have before it all the material that was before the tribunal whose decision has now been set aside; and they should have the entire record of the decision of the tribunal of 7 March 1985, including the chairman's note of evidence. The notice requiring the claimant to attend for medical examination should also be in evidence: see paragraph 12 above. If the tribunal is not provided with copies of these documents, they should ask for them. I direct the fresh tribunal to disregard paragraph 4 of Commissioner's decision CSB 972/1984 as inconsistent with authority and with their statutory functions.

#### *Decision CSB 972/1984*

14. (1) It was held by a Commissioner, in decision CSB 972/1984 (unreported) that where a decision of a tribunal had been set aside its legal effect was "to make it, in the eyes of the law, as if it had never been. . . . It was therefore not. . . . as a matter of law permissible for the tribunal to see, still less to act upon, the

chairman's note of evidence in the earlier and intermediately set aside proceedings." The full text of the relevant paragraph of this decision (paragraph 4) is set out in the Second Appendix to the present decision.

- (2) No authority is cited in support of the law laid down in that paragraph; and the law there expounded is inconsistent with the duties of the statutory authorities (who include the social security appeal tribunal as the successors to local insurance tribunals) as explained by the Divisional Court in *R v Deputy Industrial Injuries Commissioner ex parte Moore* [1965] 1 Q.B. 456 at page 486 *et seq* and with the views and practice of other Commissioners.
- (3) The jurisdiction of the statutory authorities (the adjudication officer, the social security appeal tribunal—formerly the local tribunal—and the Commissioner) is investigatory or inquisitorial. A social security appeal tribunal is exercising quasi-judicial functions and forms part of the statutory machinery for investigating claims in order to ascertain whether the claimant satisfies the statutory requirements which entitle him to be paid benefit. It is not restricted, as in ordinary litigation where there are proceedings between parties, to accepting or rejecting the respective contentions of the claimant on the one hand and the adjudication (formerly insurance) officer on the other: see the judgment of Lord Justice Diplock, as he then was, at page 486 of *ex parte Moore*. Its investigatory function has as its object the ascertainment of the facts and the determination of the truth: see decision R(S) 4/82 at paragraph 25 (this is the decision of a Tribunal of Commissioners). It would be inconsistent with the tribunal's investigatory function that it should be shut out from all knowledge of what has happened in earlier proceedings relating to the appeal before them.
- (4) It is a requirement of the rules of natural justice that the decisions of the statutory authorities (including the tribunal) be based upon evidence. But in this context "evidence" is not restricted to what would be admitted in a court of law. The technical rules of evidence form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based on material which tends logically to show the existence or non-existence of the facts relevant to the issue to be determined or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant: see Lord Justice Diplock's judgment at pages 487–8 of the report in *ex parte Moore*. Applying these principles to the case before them, it was held to be entirely in order for medical opinions in other cases to be put to the claimant's witnesses; and it was held that if the claimant had refrained from requesting a hearing, he would have waived his right to comment on the material saying, in effect, "The written documents contain all that we want to say in relation to the appeal; we leave it to you to reach a just decision and for that purpose to base it upon whatever evidentiary material you think fit"; see letters A and B at page 490 of the report. Accordingly, I see no reason why a claimant should not be referred to the chairman's note of his evidence given before a previous tribunal, whose decision has been set aside. If he does not attend the fresh hearing, after due notice, the tribunal would be entitled, following the principles enunciated by

Lord Justice Diplock, to take that note of evidence into account, provided that the claimant had had prior notice, by its inclusion in the case papers of which he has a copy, that the chairman's note of evidence in the prior proceedings formed part of the material before the tribunal. The weight of such evidence will, of course, be a matter for the tribunal to evaluate.

- (5) The Commissioner himself decides appeals in national insurance and other non-means tested benefit cases which he could, in his discretion, set aside and refer to another tribunal on the ground of irregularity in the previous proceedings, although he is fully aware of those proceedings. In supplementary benefit cases, where the Commissioner's jurisdiction to decide an appeal himself, after setting the tribunal decision aside, can only be exercised if the tribunal has found the material facts (see Decision R(SB) 11/82), the Commissioner would indeed be unable to give any decision at all, if he could not look at the tribunal decision.
  - (6) In my judgment, there is no rule of law that the proceedings before a tribunal whose decision has been set aside (whether under the Correction of Errors Regulations—now repealed—or the Adjudication Regulations or by the Commissioner) are to be treated as though they had never been and excluded from the case papers in the remitted appeal.
15. My decision is set out in paragraph 1.

(Signed) V. G. H. Hallett  
Commissioner

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**THE FIRST APPENDIX**

**PART 1 (SEE PARAGRAPH 6)**

Regulation 17 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 provides that:

“17.—(1) A person shall be disqualified for receiving sickness or invalidity benefit for such period not exceeding 6 weeks as may be determined in accordance with sections 97 to 104 if—

(a) . . . .

(b) he fails without good cause to comply with a notice in writing given by or on behalf of the Secretary of State requiring him to attend for and to submit himself to medical or other examination on a date not earlier than the third day after the day on which the notice was sent and at a time and place specified in that notice; or

(c) . . . .

(d) he fails without good cause to observe any of the following rules of behaviour, namely:—

(i) . . . . ;

(ii) not to be absent from his place of residence without leaving word where he may be found

(iii) . . . . .

(2) In computing the period of notice required to be given by paragraph (1)(b) Sunday shall not be disregarded.”

**PART 2 (SEE PARAGRAPH 10)**

Regulation 19(2) of the Social Security (Adjudication) Regulations 1984 (as amended and in force at the date of the tribunal's decision) provides that:

“(2) The chairman of an appeal tribunal shall—

(a) . . . .

(b) include in the record of every decision a statement of the reasons for such decision and of their findings on questions of fact material thereto;

(c) . . . . .”

**THE SECOND APPENDIX (SEE PARAGRAPH 14)**

“4. To a significant extent a claimant who does not attend a tribunal’s hearing of his appeal stays away “at his own risk” (unless involuntarily prevented from attending, when if he applies to have the decision given in his absence set aside the application is likely to be dealt with as one of merit). However, where a tribunal is considering a claimant’s appeal from a decision given at the first tier of the determining authorities—now an adjudication officer—not upon an adjournment of its own proceedings but “from scratch”, it is a requirement under the principles of natural justice that it shall do and be seen to do just that. A tribunal is not bound by the formal rules of evidence but must nevertheless discriminate as to what does and does not constitute evidential material before it of which it is proper to take account. What, unfortunately, is demonstrated by the tribunal’s record of decision is that they paid heed to one matter (at least) their cognisance of which stemmed from there being amongst the case papers before them the chairman’s note of evidence of the proceedings which had taken place on 5 January 1984. Now, those proceedings had, as I have indicated, been set aside and the legal effect of that setting aside was, as I hold, to constitute it an error of law for the tribunal to rely upon matters recorded in that earlier chairman’s note of evidence, whether or not the claimant had ever seen it (and there is no evidence before me that he had). For the legal effect of setting aside a particular judicial proceeding is to make it, in the eyes of the law, as if it had never been—notwithstanding that so long as it stood un-set aside it had stood as a valid decision. It was therefore not, in my judgment, as a matter of law permissible for the tribunal to see, still less to act upon, the chairman’s note of evidence in the earlier and intermediately set aside proceedings. And even if I should be wrong as to their having seen it vitiating their own decision, I would still hold as I have above held to be my decision upon the footing that justice has not been seen to be done in the circumstances. For whilst what the tribunal picked out of the material note of evidence was, in the event, material going in the claimant’s favour, one is left with the clear impression that the tribunal were not to a sufficient extent “bringing their minds fresh to the task in hand” and deciding the claimant’s appeal solely upon the evidential materials properly before them. It would be permissible in particular circumstances to put to a claimant “did you not say so-and-so on an earlier occasion”; but that is not this case.”