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Commissioner's File: CSIS/92/94

SOCIAL SECURITY ADMINISTRATION ACT 1992**APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY
APPEAL TRIBUNAL UPON A QUESTION OF LAW****DECISION OF SOCIAL SECURITY COMMISSIONER**

1. My decision is that the decision of the social security appeal tribunal dated 16 September 1993 is erroneous in law and is set aside. The claimant's case is referred to another tribunal for reconsideration.
2. This is an appeal by the claimant with leave on a question of law against the above mentioned tribunal decision.
3. The claimant is a single parent with a young child. She has been in receipt of supplementary benefit followed by income support for a number of years. She submitted evidence of incapacity for work on the ground of a back problem from 6 April 1990. The narrative of facts before the adjudication officer indicates that after 28 weeks of the submission by her of evidence of incapacity a disability premium was added to the claimant's income support award, as provided by paragraphs 11 and 12 of Schedule 2 to the Income Support (General) Regulations 1987 and paragraph 5 of Schedule 1 to those regulations. Following an examination of the claimant by a medical officer of the Benefits Agency who considered that she was not incapable of suitable alternative employment to her previous employment as a printer's table worker the claimant was found not entitled to the disability premium in her income support as from 17 June 1993 upon the basis that she was no longer incapable of work. The claimant appealed to a social security appeal tribunal.
4. The tribunal who heard the claimant's appeal on 16 September 1993 unanimously refused it. The tribunal made the following findings of fact:-
 - "1. The appellant had back pain. She had difficulty with her legs her right arm and right hand. Her neck was also affected.
 2. The appellant had help with her household chores. She managed with her child although she had difficulty bending and picking up.
 3. The appellant stated that she could be a care assistant as this did not affect her back as it did not entail carrying.
 4. The appellant's depression was clearing up."

The tribunal's reasons were stated as follows:-

"In terms of Commissioner's Decision R(S)1/53, the appellant herself stated she was fit for some work, therefore she is not entitled to Disability Premium."

5. The decision of the tribunal is I regret to say wholly inadequate to deal with the issues which arose upon the claimant's appeal and is plainly erroneous in law. The claimant's entitlement to the disability premium was founded upon her satisfaction of the provisions of paragraph 12(1)(b) of Schedule 2 to the Income Support (General) Regulations which require that the circumstances of the claimant fall and have fallen for a continuous period of not less than 28 weeks within paragraph 5 of Schedule 1.

6. Paragraph 5 as in force at the material time specified a person who provided evidence of incapacity for work "... provided that an adjudication officer has not determined that that person is not incapable of work ..." (my emphasis). As the adjudication officer now concerned with the case points out there thus required to be a primary decision on the claimant's capacity for work before there could be a review of the claimant's entitlement to the disability premium in her income support. Despite the purported terms of the adjudication officer's decision narrated at the beginning of the AT2 form there was no evidence of a decision of an adjudication officer determining that the claimant was no longer incapable of work. The unsatisfactory nature of the documents and statements in this case in that connection has been summarised by the adjudication officer now concerned with the case in paragraph 4 of his submission in the following terms:-

"a) The "decision" appealed against was not the decision recorded in part 1 of form AT2. The appeal was made in response to the letter of 18 March 1993 (page 16) which advised the claimant of the result of her medical examination.

b) Paragraph 5.5 of the summary of facts (page 4) does not state that the income support adjudication officer determined that the claimant was not incapable of work.

c) The recorded adjudication officer's decision at page 26 of the bundle does not contain a categorical decision about the claimant's capability to work.

d) At paragraph 6.3 of his submission to the tribunal the adjudication officer states:-

"The Adjudication Officer considered that [the claimant] is not incapable or work and decided that for him to continue to receive Income Support he would have to be available for employment." (sic)

This contradicts the correct statement in the summary of facts that the claimant was not required to be available for employment because she is a lone parent."

The tribunal failed to deal with these inconsistencies and irregularities which cast considerable doubt on the validity of the decision under appeal.

7. Further I accept the point taken by the adjudication officer now concerned with the appeal in paragraph 8 of his submission in which he points out that the local adjudication officer in making a submission upon the appeal to the tribunal had wrongly placed the burden of proof on the question of incapacity for work upon the claimant. It may be that the tribunal were not misled by this but their decision does not make this clear. Furthermore I am unable to accept the tribunal's reasons for their decision in the terms stated. The tribunal state that they are

proceeding in terms of reported decision R(S)1/53 in treating a statement by the claimant that she was fit for some work as in effect being conclusive against her. No doubt in many cases if a claimant at a tribunal hearing gives evidence that he or she consider themselves fit for some work, very little more will be required to justify a conclusion to that effect. However in this case the reference to decision R(S)1/53 in this connection is somewhat baffling as that decision contains no dictum as to the effect to be given to a claimant's own evidence on this subject. It follows that the tribunal's reasoning on this subject is quite inadequate and that is a further error of law.

8. The adjudication officer now concerned with the case also submits under reference to the decisions on files CIS/251/93 and CIS/627/92 that regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987 upon which the original adjudication officer placed reliance was not available as the review authority. The view was expressed in those decisions that it could not be held for the purposes of regulation 17(4) that the "requirements for entitlement" to an award were not satisfied unless those requirements affected entitlement to the whole award. In this case the claimant continued to satisfy the requirements for income support albeit without a disability premium. I consider this argument further in giving directions to the new tribunal below. It suffices to say here that the tribunal in the present case were not referred to those authorities for any such argument and I would not consider their failure to deal with it necessarily to amount to an error of law.

9. Nevertheless for the other reasons mentioned above the decision of the tribunal is clearly erroneous in law and must be set aside. The claimant's case must be referred to another tribunal for reconsideration. The first matter which the new tribunal will require to consider is whether the award of a disability premium was validly terminated. This will involve reconsideration of the unsatisfactory documents and information referred to in paragraph 6 above and the question whether regulation 17(4) was available as the reviewing authority in the circumstances of this case. The approach of the Commissioners in CIS/215/93 and CIS/627/92 may not be applicable. The adjudication officer's narrative of facts in this case shows that the claimant was awarded the disability premium by review of her existing income support award. Moreover it appears that by the date when the adjudication officer sought to terminate the claimant's entitlement to the disability premium she was not required to be available for work because she had become a lone parent. In those circumstances a decision on the claimant's capacity for work did not result in her requiring to be available for work and thus did not alter the basis of her entitlement to income support other than in relation to the disability premium. In my view the tribunal will be entitled to regard the reference in regulation 17(4) to the requirements for entitlement to that award as being in the circumstances of this case a reference to the requirements for entitlement to the disability premium. Even if those requirements fall to be regarded as just part of the overall requirements for the award of income support I would in any event be disposed to treat a failure in the requirements affecting the premium as sufficient to warrant the operation of regulation 17(4), bearing in mind that that paragraph is not expressed in words which restrict review to cases where the revision necessarily leads to determination of the whole award of income support.

10. If the tribunal find, on enquiry, that an adjudication officer's decision was made determining that the claimant was no longer incapable of work from 17 June 1993 they will of course proceed to reconsider the issue of incapacity in the light of the evidence in the normal way as part of their adjudication on the merits of the appeal. Clearly the decision on incapacity, if made, underlay the revision of the award and must be capable of being reconsidered and if

appropriate overridden by a contrary conclusion of the tribunal. Any other result would lead to the possibility of inconsistent decisions subsisting side by side.

11. If however the tribunal find that the termination of the claimant's right to the disability premium proceeded only on the basis of an opinion about the claimant's capacity for work the tribunal will necessarily conclude that the decision under appeal was not validly made under the terms of regulation 17(4) and the paragraphs referred to above governing entitlement to the disability premium because the running of the claimant's entitlement to the premium in terms of paragraph 5 of Schedule 1 will not have been interrupted. In that event it will not be necessary for the tribunal to do more than to make findings to that effect and allow the claimant's appeal. It would not serve any useful purpose for the tribunal to go on to consider the substantive issue of incapacity even if the tribunal were to decide against the claimant on that issue. This is because such a decision, although finding the claimant not incapable of work from 17 June 1993, could not have effect as a determination made for the purposes of paragraph 5 of Schedule 1 from any date earlier than the date on which the tribunal made it. Furthermore regulation 17(4) does not authorise retrospective review of a forward award from any date prior to the date when it is decided that the requirements for the award have ceased to be satisfied.

12. As for any further possible question of the claimant's incapacity for work subsequent to June 1993 which might, depending upon the tribunal's decisions on the matters discussed above, be thought to arise, any such question should in my judgment be left for fresh consideration by an adjudication officer in the light of up to date medical evidence.

13. To the extent indicated by this decision the appeal of the claimant is allowed.

(signed)

J G Mitchell
Commissioner

Date: 25 November 1994