

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/227/2000

Starred Decision No: 51/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

*Mr Damien Abbott,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

so as to arrive by 17th July 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

1. My decision is that the decision of the tribunal given on 17 August 1999 is erroneous in point of law and accordingly I set it aside. I direct that the case be reheard by a differently constituted tribunal, who will have regard to the matters mentioned below.

2. This is an appeal on behalf of the Secretary of State against the decision of the tribunal of 17 August 1999. The claimant's Husband attended the hearing of the appeal held before me. The claimant was unable to attend because of ill health. She was represented by Mr P Bagshaw from the Merseyside Council for Voluntary Services. The Secretary of State was represented by Miss R Rayner of the Solicitor's Office of the Department of Social Security. I am grateful to them both for their helpful submissions.

3. On 26 June 1997 the claimant, then aged 52, became incapable of work by reason of malignant melanoma and associated depression. Following the receipt of statutory sick pay, she claimed incapacity benefit which, by a decision dated 22 January 1998, was awarded from 11 January 1998. Her GP's statement dated 3 February 1998 diagnosed malignant melanoma, depression, atrial fibrillation and noted details of medication and ongoing hospital treatment. In reply to the incapacity for work questionnaire, the claimant described how her conditions affected the performance of the prescribed activities. Her GP completed form Med 4 on 18 December 1998 and diagnosed depression and hypertension, and reported that she had a history of melanoma with related severe stress dating from September 1996.

4. On 12 March 1999 the claimant was examined by a medical officer ("EMP") of the Benefits Agency Medical Services in respect of the All Work Test. He listed diagnoses of anxiety, depression, hypertension, cervical spondylosis and malignant melanoma (affecting left leg and abdomen).

5. On 23 March 1999 the adjudication officer reviewed the award to the claimant of incapacity benefit, and decided that from and including 23 March 1999 she did not satisfy the All Work Test nor could she, from that date, be treated as incapable of work, with the result that, from and including 23 March 1999, the claimant ceased to be incapable of work and was no longer entitled to incapacity benefit. The claimant appealed to the tribunal.

6. The claimant and her Husband attended the hearing of the appeal. She was represented by Mr Bagshaw. The adjudication officer had allowed no points under the physical descriptors and 6 points under the mental descriptors, whereas in order to satisfy the All Work Test the claimant required at least 15 points for combined physical and mental descriptors or at least 10 points under the mental descriptors. In the event the tribunal accepted Mr Bagshaw's submission and allowed the appeal. The statement of material facts and reasons for decision read so far as relevant:-

"2. The Appellant's Representative made reference to the adjudication officer's decision ... This stated that the grounds for review were that the Applicant was capable of work.

3. The Tribunal considered that this decision, i.e. finding that the Appellant was capable of work cannot be grounds for reviewing the capacity for work, before that decision itself has been taken.

4. The AO cannot make such a decision until he has established grounds for review for her capacity for work in the first place .."

7. On 9 November 1999 a full-time chairman granted the Secretary of State's representative leave to appeal to the Commissioner against the tribunal's decision. Section 14(10)(a) of the Social Security Act 1998 ("the Act") provides that the person considering the application for leave to appeal should be the person who was, or who chaired, the tribunal whose decision is challenged. However this is modified by regulation 58(6) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 made pursuant to section 14(11) of the Act and permits another person to consider the application where "it is impracticable, or it would be likely to cause undue delay". Mr Bagshaw submitted that in the present case there was nothing to show that the application of regulation 58(6) was justified so as to permit a chairman who had not been the legal member of the tribunal to grant the necessary leave. As a result the leave to appeal was invalid.

8. Miss Rayner submitted that there was a presumption in favour of a chairman that the conditions of regulation 58(6) were satisfied, subject to any evidence to the contrary. In the present case there was no such evidence and as a result the leave to appeal was valid. In support she referred me to the House of Lords judgment in T C Coombs and Co., v. Inland Revenue Commissioners [1991] 3 All ER. That was a case of judicial review in which the Inland Revenue Commissioner's decision could only be challenged on the grounds of irrationality or unreasonableness. As a public official the House of Lords held that there was a presumption in his favour that he had not acted unreasonably without evidence to the contrary. As there had been no previous reference to this judgment, I granted Mr Bagshaw 30 days in which to submit a written submission in reply. I now have that submission before me.

9. Mr Bagshaw argued that the Coombs judgment did not apply in the present case because Lord Lowry, who gave the lead judgment, went on to hold at page 639 line 8 "of course, different considerations could arise if the commissioner's decision were to be attacked on other grounds, such as want of jurisdiction, bias or disregard of natural justice". In the present case the chairman's leave to appeal was being challenged for want of jurisdiction in the light of regulation 58, which conferred jurisdiction upon the chairman of the tribunal against which leave to appeal was sought to make decisions on such applications, except in the circumstances described in paragraph (6). He referred me to Volume III of Administration Adjudication and the European Dimension by Rowland and White which states at page 159:-

".. Although reg 58(6) permits another person to consider the application in a prescribed case .. it does not permit regional chairmen, or other full-time members of the panel, routinely to sit as a Court of Appeal from their colleagues decisions. However, with what appears to be a blatant disregard of the terms of reg 58(6) the Appeal Service have decided that all applications for leave to appeal should be considered by full-time legally qualified panel members".

I reject Miss Rayner's submission and accept the above quoted passage as a correct interpretation of the law. If it is considered that regulation 58(6) should be invoked, full reasons should be given at the time such application for leave is determined. I agree with Mr Bagshaw that the leave to appeal in the present case was invalid and of no effect. However, as I consider the tribunal's decision was fundamentally flawed for the reasons set out below, I now grant the necessary leave as I am empowered by section 14(10)(b) of the Act. It should be noted that with effect from 19 June 2000 regulation 58(6) was amended by

regulation 33 of the Social and Child Support (Miscellaneous Amendments) Regulations 2000 (S.I. 2000 No. 1596) which reads:-

“33. In regulation 58(6) after the words ‘of that tribunal’, shall be inserted the words ‘or if the President considers it necessary or expedient for the purpose of supervising panel members or in the monitoring of decision-making by panel members’.

If a chairman wishes to invoke the amendment when determining the application for leave to appeal, he should specifically refer to any Practice Direction the President may have given on this issue.

10. It is not in dispute that the Secretary of State’s notice of appeal was outside the one month time limit prescribed by regulation 13(1) of the Social Security Commissioners (Procedure) Regulations 1999, which expired on 15 December 1999. Arguments were addressed to me as to the validity of the Commissioner’s acceptance of that notice. However as I have determined that the grant of leave to appeal by that chairman was invalid, it is not now necessary for me to consider this issue.

11. I now turn to the substantive law in this appeal. It is not in dispute that the claimant’s incapacity for work was subject to the All Work Test imposed by section 171C of the Social Security Contributions and Benefits Act 1992 and regulations 24-26 of the Social Security (Incapacity for Work) (General) Regulations 1995 (“the Regulations”). Regulation 28(1) provides so far as relevant:-

“(1) Where the All Work Test applies, the test shall, if the conditions set out in paragraph (2) are met, be treated as satisfied until a person has been assessed.”

12. In paragraph 28 of the Common Appendix to decision CIB/16092/96 and others, the Commissioner explained at paragraph 28 the effect of regulation 28 as follows:-

“.. Regulation 28 merely deems a claimant to satisfy the All Work Test, not to be incapable of work .. A decision must still be made by an adjudication officer that, on the basis that the All Work Test is applicable under section 171C of the Contributions and Benefits Act, the claimant is incapable of work. It is only a decision on incapacity for work which gives conclusive effect by regulation 19. I conclude therefore that once there is an actual assessment under the All Work Test and the deeming of regulation 28 falls away, there must still be a review of the earlier decision that the claimant is incapable of work if that decision is to be altered.”

13. As the claimant satisfied the condition set out in regulation 28(2) of the Regulations the adjudication officer decided on 22 January 1998 that the claimant could be treated as incapable of work from and including 11 January 1998. Incapacity benefit was paid accordingly. On 23 March 1999 he reviewed that decision under the provisions of section 25(2)(b) of the Social Security Administration Act 1992 because there had been a relevant change of circumstances. The decision referred to the assessment under the All Work Test and noted that the claimant “does not satisfy the All Work Test from and including 20.3.99”. The decision identified the change of circumstances giving rise to the review as “[the claimant] is capable of work”.

14. Miss Rayner submitted that the tribunal erred in law in concluding that the adjudication officer's decision was incorrect because it found the claimant capable of work before grounds for review of incapacity for work were established. In her view the terms of the decision clearly indicated that the All Work Test had to be satisfied and the assessment carried out before the award of incapacity benefit could be reviewed. The tribunal further erred in law because having concluded that the adjudication officer's decision was defective they should have proceeded to consider whether there had been a change of circumstances justifying a review. If they concluded that there was, it was then incumbent on the tribunal to determine the merits of the appeal so as to bring finality to the case.

15. Mr Bagshaw argued to the contrary. He submitted that the relevant change of circumstances for the purposes of section 25(1)(b) of the Social Security Administration Act 1992 was the application of the All Work Test. The grounds of review had to be established at that time. It was not enough to recite that the All Work Test had taken place. The decision clearly identified the grounds justifying the review as "that [the claimant] is capable of work". The adjudication officer's decision was manifestly wrong. Although he conceded that the tribunal had jurisdiction to substitute its own grounds for review, they were not obliged to do so. Their failure in the present case did not constitute an error of law. Similarly, even if they had considered that there were grounds for review, it would not be incumbent upon them to proceed to consider the merits of the case. There was no authority to the contrary.

16. I accept Mr Bagshaw's submission that the adjudication officer's decision was erroneous because it failed to establish the correct grounds for reviewing the initial decision awarding the claimant incapacity benefit. However, I reject his subsequent submission and agree with Miss Rayner, that the tribunal in the present case erred in law in failing to determine the issue of review of the initial decision and to proceed to determine whether or not the claimant was entitled to incapacity benefit from and including 23 March 1999. This issue was considered by a Tribunal of Commissioners in R(IS) 2/97. At paragraph 5 of the Appendix it was held:-

"If the review had not been correctly carried out, the tribunal should consider whether they have adequate material to reconsider and redetermine the awards themselves and if possible do so .."

In the present case it was not in dispute that the All Work Test had been carried out so as to give rise to the issue of a review under the provisions of section 25(1)(b) of the Social Security Administration Act 1992. There was also sufficient evidence before the tribunal to enable them to proceed to consider the merits of the appeal. They failed to do so and in my view this constituted an error of law. To allow an appeal on a technicality as in the present case seems to me to be a pointless operation. The purpose of an appeal before a tribunal is to determine whether or not a claimant is entitled to benefit. The tribunal should operate so as to fulfil this purpose and it is a waste of time and public money to do otherwise.

17. As a result I direct the new tribunal to determine whether in the light of the evidence there were grounds to review the initial decision awarding the claimant incapacity benefit. If they are satisfied that there were, they should review the adjudication officer's initial decision awarding the claimant incapacity benefit and then proceed to consider whether the adjudication officer's revised decision was correct. The new tribunal should ensure that they

record full findings of fact and reasons for their decision so as to comply with the statutory requirements.

18. It would be helpful if the claimant or her representative could obtain additional medical evidence as to the claimant's condition on 23 March 1999. Such evidence should be addressed to the physical and mental descriptors relevant to the All Work Test.

19. The appeal is allowed and I give the decision set out in paragraph 1.

(Signed) Mrs. R F M Heggs
Commissioner

(Date) 30 March 2001