

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Secretary of State, brought with the permission of Mr. Commissioner Mesher, against a decision of the Manchester Appeal Tribunal made on 31 October 2003. For the reasons set out below that decision was in my judgment erroneous in law and I set it aside. In exercise of the power in s.14(8)(a)(ii) of the Social Security Act 1998 I make the further findings of fact set out below and make the following decision in substitution for that made by the Tribunal:

**The Claimant's appeal against the decision of the Secretary of State made on 7 May 2003, as revised by the decision made on 20 June 2003, is allowed. The original decision awarding incapacity benefit from 4 August 2000 is superseded, but only with effect from 7 May 2003, on the ground that the Claimant returned to work on 4 September 2001 and that work was not exempt work. The Claimant was entitled to incapacity benefit until 6 May 2003 but not thereafter.**

### *Introduction*

2. The Claimant was awarded incapacity benefit from 4 August 2000. In February 2001 that decision was superseded when the Claimant failed the personal capability assessment, but the Claimant appealed. In September 2001 the Claimant returned to work. In December 2002 an appeal tribunal allowed the Claimant's appeal against the February 2001 decision, holding that the Claimant was in February 2001 incapable of work. In May 2003 a further decision was made superseding the original August 2000 decision as from September 2001 on the ground of the Claimant's return to work.

3. The issue in this appeal is whether in May 2003 the Secretary of State was entitled to supersede the award of incapacity benefit by reason of the Claimant's return to work, and if so from what date. The appeal raises questions as to the construction and effect of Reg. 7(2)(c) (relating to the date from which a supersession on the ground of a change of circumstances takes effect) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("the 1999 Regulations").

4. I held an oral hearing of the appeal at Bury County Court at which the Claimant was represented by her husband and the Secretary of State by Mr. Malcolm Jarvis of counsel. Since the hearing I have received further written submissions on the issue of the date from which the supersession took effect, which was not discussed at the hearing but was dealt with in a draft decision which I issued shortly after the hearing.

### *The facts in detail*

5. The Claimant became incapable of work on 18 January 2000. She was paid statutory sick pay until 3 August 2000 and incapacity benefit from 4 August 2000. The latter decision would have been on the basis that the Claimant was treated as capable of work under reg. 28 of the Social Security (Incapacity for Work)(General) Regulations 1995 ("the 1995 Regulations")

6. On 20 February 2001, following actual assessment, a decision was made superseding and removing the award of incapacity benefit from that date on the ground that the Claimant did not satisfy the personal capability assessment.

7. The Claimant appealed against that decision, but on 2 August 2001 an appeal tribunal ("the First Tribunal") dismissed that appeal. However, the Claimant sought and obtained permission to appeal to a Commissioner against the First Tribunal's decision.

8. On 4 September 2001 the Claimant returned to work for 3 days a week. The Claimant's husband informed me at the hearing that the Claimant worked for 21 hours a week, and I therefore find that that work was not exempt work for the purpose of Reg. 17 of the 1995 Regulations. Under Reg. 16 of those Regulations the Claimant therefore became treated as capable of work from 4 September 2001.

9. On 29 August 2002, after an oral hearing on 7 August 2002, Mr. Commissioner Williams set aside the First Tribunal's decision as erroneous in law and remitted the matter for rehearing by a new appeal tribunal.

10. On 18 December 2002 the appeal was reheard and on this occasion was allowed. The Secretary of State was not represented at the hearing. The decision notice of that appeal tribunal ("the Second Tribunal") stated:

"The appellant is incapable of work from and including 20 February 2001. The BAMS doctor's evidence had important inconsistencies which required the doctor to justify. He was unwilling to attend to give evidence before us and in our view his report can therefore have no evidential weight. On this basis there was no evidence to justify the decision to supersede the original award."

11. On 6 February 2003 a telephone call was made to the Claimant to check her bank account details for the purpose of making payment of arrears of incapacity benefit in consequence of the Second Tribunal's decision. During this conversation the Claimant mentioned that she had returned to work. She was unable in that conversation to state the precise date when she had returned to work, and was asked to ascertain it. The Claimant's husband telephoned and stated that the Claimant had started to work 3 days a week from 4 September 2001.

12. On 19 February 2003 a payment of £2,343.53 in respect of incapacity benefit for the period from 20 February 2001 to 3 September 2001 was made. The Secretary of State's submission to the tribunal whose decision is now under appeal to me stated that "no formal decision notification was issued stating that she had no entitlement to incapacity benefit from 4 September 2001 as it was assumed that it would be obvious that there was no entitlement once she had returned to work."

13. On 21 February 2003 the Claimant's husband wrote to the local office stating that the chairman of the Second Tribunal had stated at the hearing that the Claimant would need to complete a new form IB 50 and have a new medical before her benefit would cease, and that "the payment now made effectively seeks to override the decision of the [Second] Tribunal."

14. The local office replied on 27 February 2003 stating that a statement of the reasons for the Second Tribunal's decision had been requested by the Secretary of State and would need to be examined before a substantive reply could be given.

15. On 26 March 2003 the local office wrote to the Claimant's husband saying that the fact that the Claimant had returned to work on 4 September 2001 was a change of circumstances which might entitle the Secretary of State to supersede the award of incapacity benefit, but that the Claimant might be entitled to take advantage of the exemption for therapeutic earnings if she worked less than 16 hours a week and earned no more than £60.50 per week. The letter asked whether the hours and earnings exceeded this amount so that a decision could be issued.

16. The Claimant's husband replied on 28 April 2003 stating that the Second Tribunal had been aware that the Claimant had returned to work, and that the Secretary of State had been directed to send a presenting officer to the Second Tribunal, but had not done so. The letter continued:

"You are now seeking to re-open what has already been decided by the Tribunal. The Benefits Agency had the opportunity to present their case to the Tribunal, including the fact that my wife had returned to work, which they would have known about from the collection of National Insurance Contributions if nothing else, but they decided not to do so. The Benefits Agency also decided not to appeal the decision of the Tribunal to the Commissioners if they thought that the Tribunal's decision was wrong in law."

The letter contended that as a result incapacity benefit should be paid "up to a date a new decision is reached, which according to the Tribunal chairman would be after a further Medical Examination."

17. On 7 May 2003 a decision was issued in the following form:

"This decision is given in respect of [the Claimant's] claim for incapacity benefit. She is treated as capable of work from and including 4 September 2001. This is because she has worked and there is no evidence that that work falls within a permitted work category.

I have superseded the decision awarding incapacity benefit from and including 4 August 2000. There has been a relevant change of circumstances. This was that [the Claimant] returned to work on 4 September 2001.

My superseded decision is that [the Claimant] is not entitled to incapacity benefit from and including 4 September 2001."

18. However, the decision maker, having obtained further advice, issued a further decision on 20 June 2003 as follows:

"I have revised the decision dated 7 May 2003 because it arose from an official error. This was that the [Second Tribunal's] decision should have been superseded on the ground that the [Second Tribunal] were ignorant of the material fact that [the Claimant] had returned to work on 4 September 2001.

My superseded decision is that [the Claimant] is treated as capable of work from and including 4 September 2001. This is because she has worked and there is no evidence that the work can be treated in a permitted work category.

As a result [the Claimant] is not entitled to incapacity benefit from and including 4 September 2001.”

19. On 15 July 2003 the Claimant appealed, contending that the Second Tribunal had been aware that the Claimant had returned to work on 4 September 2001 and that the ground for supersession stated in the revised decision of 20 June 2003 was therefore wrong as a matter of fact.

20. On 31 October 2003 the Tribunal whose decision is now under appeal to me (“the Third Tribunal”) allowed the Claimant’s appeal. The Decision Notice stated simply that the appeal was allowed and that “the decision of the Secretary of State issued on 20 June 2003 is revised”. The Statement of Reasons stated simply that the Tribunal accepted the Claimant’s husband’s evidence that the Second Tribunal knew of the fact that the Claimant was working.

21. The Secretary of State sought permission to appeal to a Commissioner, contending that the Third Tribunal’s decision was wrong in law because

“there are no focussed findings of fact. The Tribunal seems primarily concerned with whether the Secretary of State was aware that the Claimant was working. I submit that the Secretary of State does not dispute that the Claimant was working, however, the issue is whether that work fell into an exempt category. Thus the Tribunal’s findings should have included whether the Claimant had undertaken the work on the advice of her doctor and if so, did her earnings and hours fall within the prescribed limits.”

22. That ground of appeal appeared entirely to miss the point that the Third Tribunal’s decision had been made on the ground that, contrary to what was stated in the decision of 20 June 2003, the Second Tribunal had been aware that the Claimant was working.

23. However, Mr. Commissioner Mesher granted permission to appeal on other grounds, identifying three particular issues on which submissions were required.

24. I find it most convenient to proceed straight away to my own analysis of the position.

25. The decision under appeal to the Third Tribunal was the decision of 7 May 2003, as revised by the decision of 20 June 2003. The law applicable for the purpose of determining the powers of the Secretary of State, on 7 May 2003, to supersede a previous decision, and the effect of any such supersession, was therefore the law in force on 7 May 2003.

*Which decision needed to be superseded by the May 2003 decision?*

26. There are two candidates. The first candidate is the original decision awarding incapacity benefit from 4 August 2000. The second is the decision of the Second Tribunal on 18 December 2002 holding that as at 20 February 2001 (the date of the decision under appeal to it) the Claimant was incapable of work under the personal capability assessment. In other words, did the original decision awarding benefit on the basis of reg. 28 continue to subsist, or

had it been superseded by the Second Tribunal's decision, based on a carrying out of the personal capability assessment?

27. I am persuaded by the Secretary of State's submission that the decision which required to be superseded in May 2003 was the original decision awarding incapacity benefit from 4 August 2000. In CIB/451/2004 Mr. Commissioner Mesher discussed the question whether, where a decision is made that the claimant is incapable of work following actual assessment under the personal capability assessment, and so continues to be entitled to incapacity benefit, the original decision based on deemed incapacity under reg. 28 either can or should be superseded. He found it unnecessary to reach a conclusion on that question in order to decide the case before him, and so do I in this case. The reason why I find it unnecessary is that, even if the Second Tribunal's decision should have superseded and replaced the original decision awarding incapacity benefit, I do not think that it purported to do so. What the Second Tribunal decided was simply that the Claimant satisfied the personal capability assessment and therefore that the original decision awarding incapacity benefit should *not* be superseded.

*Was the Secretary of State entitled to supersede the original decision awarding incapacity benefit?*

28. It is clear that he was. The Claimant's return to work on 4 September 2001 was a change of circumstances which had occurred both since the date when the original decision was made and since the date when it had effect. The Secretary of State was entitled to supersede the original decision under Reg. 6(2)(a) of the 1999 Regulations.

*The position if the decision which needed to be superseded was the Second Tribunal's decision*

29. This does not arise on the view which I have taken, but I consider it briefly simply in order to show the result is the same.

30. Until 4 May 2003 Reg. 6(2)(a)(i) applied where the decision to be superseded "is one in respect of which there has been a relevant change of circumstances since the decision *was made*." However, with effect from 5 May 2003 (2 days before the relevant date) it was amended to read: "the decision to be superseded is one in respect of which there has been a relevant change of circumstances since the decision *had effect*."

31. The Second Tribunal's decision had effect from 20 February 2001, the date of the decision under appeal to it. The Claimant's return to work on 4 September 2001, although it took place after the Second Tribunal's decision, was therefore a change of circumstances since the date when the Second Tribunal's decision *had effect*. (I would add that it had been held by Mr. Commissioner Rowland in CDLA/2050/2002 that even the previous wording of Reg. 6(2)(a)(i) permitted supersession of an appeal tribunal's decision on the ground of changes of circumstances between the date of the decision under appeal to the tribunal (here the decision of 20 February 2001) and the date of the appeal tribunal's decision (here the decision of the Second Tribunal)). The Claimant's husband relies in his written submission on the fact that on 26 June 2003 the Secretary of State responded to a request for a copy of the legislation which had been applied by supplying a copy of the previous version of Reg. 6. That, however, cannot affect the validity of the decision of 7 May 2003.

32. In any event, even if one assumes (as the decision maker on 20 June 2003 did) that the Second Tribunal did not know that the Claimant had started work on 4 September 2001, that

could not have formed a basis for superseding its decision. Reg. 6(2)(c) applies where the decision to be superseded “is a decision of an appeal tribunal .....that was made in ignorance of, or was based on a mistake as to, some material fact.” The fact that the Claimant had started work on 4 September 2001 was not a fact “material” to the Second Tribunal’s decision because that tribunal was by s.12(8)(b) of the Social Security Act 1998 prohibited from taking into account circumstances after 20 February 2001.

33. Even if (contrary to my view) the decision which needed to be superseded was that of the Second Tribunal, the Claimant’s return to work on 4 September 2001 was a relevant change of circumstances since the date when that decision had effect and therefore was a ground for supersession of that decision under Reg. 6(2)(a).

*The effect of my conclusions so far*

34. The effect of my conclusions so far is therefore that the decision of 7 May 2003 was correct in superseding the original decision awarding incapacity benefit on the ground of a change of circumstances. The second thoughts of the decision maker on 20 June 2003, namely that the decision to be superseded was that of the Second Tribunal, and that the ground for supersession was mistake of fact, were wrong.

*The date from which the supersession took effect.*

*(a) Introduction*

35. In the decision of 7 May 2003 reliance was placed on Reg. 7(2)(c)(iii) of the 1999 Regulations. Reg. 7(2) provides, so far as material, as follows:

“(2) Where a decision under section 10 is made on the ground that there has been, or it is anticipated that there will be, a relevant change of circumstances since the decision had effect, the decision under section 10 shall take effect

.....

(c) where the decision is not advantageous to the claimant –

(ii) in the case of a disability benefit decision, or an incapacity benefit decision where there has been an incapacity benefit determination (whether before or after the decision), where the Secretary of State is satisfied that in relation to a disability determination embodied in or necessary to the disability benefit decision, or the incapacity determination, the claimant or payee failed to notify an appropriate office of a change of circumstances which regulations under the Administration Act required him to notify, and the claimant or payee, as the case may be, knew or could reasonably have been expected to know that the change of circumstances should have been notified,

(aa) from the date on which the claimant or payee, as the case may be, ought to have notified the change of circumstances, or

(bb) .....

(iii) in any other case, except in the case of a decision which supersedes a disability benefit decision, or an incapacity benefit decision where there has

been an incapacity determination (whether before or after the decision), from the date of change.”

36. Where Reg. 7(2)(c)(iii) applies the supersession operates from the date of the change of circumstances. If that provision applied the decision of 7 May 2003 was therefore correct in superseding the original decision with effect from 4 September 2001.

(b) *Did Reg. 7(2)(c)(iii) apply?*

37. In determining whether the present case was excepted from Reg. 7(2)(c)(iii) it is necessary to look at the following definitions in Reg. 7A:

““incapacity benefit decision” means a decision to award a relevant benefit ...embodied in or necessary to which is a determination that a person is or is to be treated as incapable of work under Part XIIA of the Contributions and Benefits Act.

“incapacity determination” means a determination whether a person is incapable of work by applying the personal capability assessment .....

38. The decision which in my view fell to be superseded by the decision of 7 May 2003 (i.e. the original decision awarding incapacity benefit) was plainly an “incapacity benefit decision.” That definition expressly covers cases where the claimant is *treated* as incapable of work.

39. It is further clear that by the date of the superseding decision of 7 May 2003 there had been an “incapacity determination”, namely the determination on 20 February 2001 that the Claimant was not incapable of work (subsequently reversed by the Second Tribunal).

40. On the face of it, therefore, and subject to the Secretary of State’s submission which I consider in paras. 49 to 52 below, the present case was excepted from Reg. 7(2)(c)(iii).

(c) *Did Reg. 7(2)(c)(ii) apply?*

41. It only did so if

“in relation to ..... the incapacity determination the claimant failed to notify an appropriate office of a change of circumstances which regulations under the Administration Act required him to notify, and the claimant or the payee, as the case may be, knew or could reasonably have been expected to know that the change of circumstances should have been notified.”

42. The Claimant’s husband argues that the Secretary of State would have been aware of the return to work by virtue of the resumption of payment of national insurance contributions. However, they are paid to the Inland Revenue, not to the Department for Work and Pensions. The Claimant’s husband further says that mention of the return to work was made at the hearing before Mr. Commissioner Williams on 7 August 2002 (at which a representative of the Secretary of State would have been present), and at the Second Tribunal hearing on 18 December 2002 (at which no representative of the Secretary of State was present). He does not, however, contend that any actual disclosure of the return to work was made in or shortly after September 2001.

43. The “regulations under the Administration Act” referred to in Reg. 7(2)(c)(ii) are the Social Security (Claims and Payments) Regulations 1987, reg. 32(1) of which (as in force in September 2001) provided as follows:

“.....every beneficiary and every person by whom or on whose behalf sums payable by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State ....may determine .....such information or facts affecting the right to benefit or to its receipt as the Secretary of State .....may require ....., and in particular shall notify the Secretary of State ....of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, or to its receipt, as soon as reasonably practicable after its occurrence, by giving notice in writing (unless the Secretary of State ...determines in any particular case to accept notice given otherwise than in writing) of any such change to the appropriate office.”

44. Reg. 7(2)(c)(ii) only applies in the case of a failure to notify a change of circumstances “in relation to the incapacity determination.” For these purposes the “incapacity determination” was the determination in February 2001 that the Claimant was *not* incapable of work, and then from 18 December 2002 the decision of the Second Tribunal that the Claimant was incapable of work.

45. In my view the Claimant’s return to work on 4 September 2001 cannot be described as a *change* of circumstances “in relation to” the determination in February 2001 that she was *not* incapable of work. That is my view even though that determination (or rather the decision on incapacity benefit embodying it) was under appeal. I therefore think that, even if under Reg. 32 the Claimant was obliged, shortly after 4 September 2001, to disclose her return to work, Reg. 7(2)(c)(ii) did not apply because there was not a “change of circumstances” “in relation to the incapacity determination”.

46. Further, and in any event, does a claimant whose award of incapacity benefit has been superseded on the ground that he does not satisfy the personal capability assessment, and who is appealing against that decision, have an obligation under Reg. 32 to notify the Secretary of State that he has since the date of the decision returned to work? As a matter of common sense, a person in the Claimant’s then position might well think that there was no point in disclosing the fact that she had started work because the Secretary of State had already decided that she did not qualify for benefit in any event, and payment of benefit had ceased being made.

47. I will assume in favour of the Secretary of State, for present purposes, that the Claimant, at the time of the original award of incapacity benefit, would have received information specifically requiring a return to work to be disclosed. The first question which arises under Reg. 32 is whether, by 4 September 2001, the Claimant was either a “beneficiary” or a “person by whom or on whose behalf sums payable by way of benefit are receivable”, in each case within the meaning of Reg. 32(1). I think that, in the context of a regulation imposing a duty to disclose, these expressions must be judged by reference to the facts as they had then been decided by the Secretary of State to be, and not as they were subsequently held by the Second Tribunal to be. By September 2001 the Secretary of State had decided that the Claimant was not entitled to benefit, and there was therefore in my view probably no obligation to disclose facts which would become relevant if and when that decision were held to be wrong.

48. The position may have changed after the Second Tribunal's decision on 18 December 2002 that the Claimant had not in February 2001 been incapable of work. However, even if (contrary to the Claimant's contentions) the fact of the return to work had not been disclosed by 18 December 2002, the Secretary of State undoubtedly became aware of it during the telephone conversation on 6 February 2003, and I do not think there can be said to have been any failure to disclose after 18 December 2002.

*(d) The Secretary of State's submission on the construction of Reg. 7(2)(c)*

49. My conclusions thus far lead to the result that neither sub-paragraphs (ii) nor (iii) of Reg. 7(2)(c) applied, with the result that the primary rule in s.10(5) of the 1998 Act applied and the supersession effected by the decision of 7 May 2003 took effect only from that date. The result is that the Claimant became entitled, by virtue of the Second Tribunal's decision, to incapacity benefit down to 6 May 2003 (but not thereafter).

50. That is obviously a deeply unattractive conclusion. The Claimant should plainly not be entitled to incapacity benefit in respect of the period after her return to work on 4 September 2001 (and she has not so far been paid it in respect of that period, so that no question of overpayment arises).

51. Unsurprisingly, the Secretary of State's representative, in the further written submission made since the hearing, seeks to escape from my conclusion. She contends that I have misconstrued Reg. 7(2)(c). I should set out the relevant part of that submission in full:

"4. In my submission, the terms defined in regulation 7A must be read in the context of the provision in regulation 7(2)(c), to which they expressly apply. The definitions in 7A(1) relate to the decision to be superseded, not the superseding decision. The purpose of these provisions is to allow the supersession of an award either from the date a claimant ought to have reported a change of circumstances under regulation 7(2)(c)(ii), or from the date of the decision under s.10(5) of the Act, depending on whether the claimant reasonably ought to have notified a change in his condition. This issue arises where the reason for the supersession is that a disability or incapacity determination is in question. That interpretation is set out in the explanatory note to SI 1999/1623, which amended the Decisions and Appeals Regulations and introduced the current provisions.

5. All other cases are covered by regulation 7(2)(c)(iii). If this were not the case, it would not be possible to supersede an award of incapacity or disability benefit where the relevant change was unconnected with the claimant's medical condition, other than from the date of the decision, as the Commissioner now suggests. *In my submission, the exclusion of incapacity and disability benefit decisions from the scope of paragraph (2)(c)(iii) does not apply where changes other than in the claimant's condition are the ground for supersession.* I submit that Parliament cannot have intended otherwise. In the present case, the relevant change is that the claimant started work which is not permitted work. That is not a change in her condition. It leads to a determination that she is treated as capable, but I submit that this is not an incapacity determination within the scope of the definition of regulation 7A."

52. I do not find all of that submission particularly easy to follow, but as I understand it the essence of it is in the sentence which I have italicised. However, I am afraid that I cannot

accept it. The general rationale for excluding cases of a change of circumstances following an incapacity determination from sub-para. (iii), and dealing with them under sub-para (ii), was obviously that it was considered that where the relevant change of circumstances is an improvement in the claimant's condition the supersession should only take place from the date of the superseding decision unless the improvement was one which he was under a duty to notify. However, in my view it is quite clear that the exclusion from Reg. 7(2)(c)(iii) applies to all cases where the superseded decision was an incapacity benefit decision and there has been an incapacity benefit determination, and not to only some such cases. I think that this blanket exclusion will lead to unfortunate results in relatively few case, where the facts are (as in the present case) rather unusual, but some redrafting of the provision may be considered desirable.

*Conclusion*

53. The decision of the Third Tribunal, under appeal to me, was wrong in law because it simply allowed the Claimant's appeal. Its Decision Notice would appear to have had the effect that there was no valid termination all of the Claimant's entitlement to incapacity benefit. The Third Tribunal should have made a decision to the effect set out in paragraph 1 above.

**(Signed) Charles Turnbull  
Commissioner**

**6 September 2004**