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claim - Reg 28 law says

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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/1031/2000

Starred Decision No: 25/01

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

Mr P Cichosz,
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 4th June 2001

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

Decision:

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.
- 1.1 The decision of the Coventry appeal tribunal held on 16th September 1999 is erroneous in point of law.
- 1.2 Accordingly, I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal to the tribunal, I refer the case to a differently constituted tribunal for determination.
- 1.3 I direct the tribunal that rehears this case to conduct a complete rehearing in accordance with my analysis of the law.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of Mr Commissioner Pacey. The Secretary of State supports the appeal.

The history of the case

3. The claimant's entitlement to incapacity benefit was terminated on review from and including 12th February 1999. This decision followed an assessment under the all work test by questionnaire and medical examination and report. It was confirmed on appeal by a social security appeal tribunal on 29th May 1999. The tribunal commented that the claimant's condition had deteriorated since the adjudication officer's decision, but that this could not be taken into account on the appeal.

4. The claimant made a new claim for incapacity benefit on 28th May 1999. An adjudication officer decided that the claimant could not be treated as incapable of work under regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995 and that he was incapable of work on the basis of the assessment made on his earlier claim. The claimant applied for a review of that decision, but an adjudication officer decided that there were no grounds for review. The claimant appealed against both decisions to an appeal tribunal.

5. The appeal was heard by an appeal tribunal on 16th September 1999. The tribunal confirmed the adjudication officer's decisions. It dealt only with regulation 28.

Regulation 28

6. There are detailed provisions in the Social Security (Incapacity for Work) (General) Regulations 1995 that govern when a claimant is, or is to be treated as, incapable of work. The normal procedure on a claim for incapacity benefit is that the claimant is treated as incapable of work on the basis of a medical certificate until a full assessment of capacity for work is undertaken: see regulation 28(1) and (2)(a).

7. However, that provision is subject to qualifications in regulation 28(2)(b). They apply if the claimant's capacity for work has been determined within the previous 6 months. The heads relevant to this case are (i) and (ii). They deal with cases in which a relevant change has occurred since that determination. Head (i) applies if the claimant is now suffering from a new disease or disablement. Head (ii) applies if his disablement has 'significantly worsened'.

Significantly worsened

8. The tribunal was clearly wrong on this issue. It stated that the previous tribunal had taken deterioration into account. That was wrong. It had not done that and had stated that it had not. As a result of misunderstanding what the previous tribunal had done, the tribunal wrongly excluded relevant evidence that the claimant's disablement had worsened.

9. However, the question arises: worsened since when? The answer is: since the date when the determination was made that the claimant was not incapable of work. But when was that? Was it the decision of the adjudication officer in February 1999 or of the social security appeal tribunal in May 1999? The Secretary of State argues that it is the former. I agree, although the reasoning is more complicated than that used in the submission.

10. Under the law as it stood before the Social Security Act 1998, the decision of the Tribunal of Commissioners in R(I) 9/63, paragraph 19 was relevant. That suggested that the relevant determination was that of the social security appeal tribunal. The reason is that even when a decision is confirmed on appeal, the decision under appeal is set aside and the claimant's rights are thereafter governed by the decision on the appeal.

11. However, that decision is no longer good law following the Social Security Act 1998, at least for the purposes of regulation 28. The reason lies in section 12(8)(b). That provides that on appeal an appeal tribunal cannot take account of circumstances not obtaining at the date of the decision under appeal. Applying that prohibition, the social security appeal tribunal in May 1999 could not take account of deterioration. However, if that tribunal's decision were the relevant determination under regulation 28, the regulation would only apply to significant worsening after the date of hearing. Any worsening that occurred between the decision under appeal and the date of hearing would be ignored. That cannot be right. The reasoning of the Tribunal of Commissioners is no longer valid, at least to regulation 28.

The relationship between regulation 28 and the all work test

12. In this case, the claimant's representative argued that both of those heads were satisfied. The tribunal rejected both arguments. On appeal to the Commissioner, the representative argues that the tribunal should have gone on to consider whether the claimant satisfied the all work test.

13. The Secretary of State submits that this is not necessary. The reasoning is this. The tribunal found that there was no new disease or disablement and no significant worsening of the claimant's disablement. Given those findings, it was not possible for him to score any further points than under the previous all work test that he had failed to satisfy.

14. I reject the Secretary of State's argument. It overlooks at least two, and perhaps three, possibilities. The first possibility is that the tribunal dealing with the new claim could take a

more favourable view of the evidence used on the first assessment than did the previous tribunal. The second possibility is that there could be evidence available on the new claim that shows the assessment under the previous assessment was wrong. The third possibility is that there may have been a worsening that is not significant but is sufficient for the claimant to score the additional points needed to satisfy the all work test. I am doubtful about this last possibility, because it may be that a worsening that is sufficient to achieve that would be significant.

15. The Secretary of State relied in support of the submission on my decision in CIB/3125/1997. I agree with the claimant's representative that that decision does not deal with this point. In that case, I had set aside a tribunal's decision, because it dealt only with the all work test and had failed to deal with regulation 28(2)(b) at all.

16. If regulation 28 does not apply, that does not mean that the claimant must be refused. The claim has to be considered by applying the detailed provisions on capacity for work. The evidence obtained will vary according to the circumstances of the case. Sometimes a further medical examination and report will be needed. Sometimes it will be reasonable to rely on the previous medical. In this case, a new medical was not arranged.

17. So, I accept the claimant's argument that the tribunal's decision was wrong in law to limit its consideration to regulation 28.

Summary

18. As the appeal tribunal's decision is erroneous in law, it must be set aside. I cannot give my own decision, because further investigation of the facts is needed and the experience of the medically qualified panel member at the rehearing will be relevant in assessing the evidence. There must, therefore, be a complete rehearing of this case before a differently constituted appeal tribunal. The appeal tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions.

19. As my jurisdiction in this case has been limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the appeal tribunal on the law to apply.

Signed on original

**Edward Jacobs
Commissioner
8th February 2001**