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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CI/531/2000

on whether had
prescribed disease
or not.

Starred Decision No: 27/01

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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 Newcastle appeal tribunal held on 11th November 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 particular, if the tribunal diagnoses the prescribed disease, it must consider whether to exercise its discretion under section 12(8)(a) of the Social Security Act 1998 to assess disablement.

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 my leave. The Secretary of State supports the appeal.

The issues

- 3. Two issues arise on this appeal

Reasons

- 4. The first issue concerns the tribunal's reasons.
- 5. The claimant claimed disablement benefit in respect of prescribed disease D7. The claim was refused by the Secretary of State on the ground that the claimant did not have the prescribed disease. That decision was based on the opinion of a medical adviser. The claimant appealed against the refusal to an appeal tribunal. The tribunal found that the claimant had suffered from the prescribed disease for an inclusive period. That period ran from 1st April 1967. According to the decision notice, it ran to 31st April 1975, but according to the full statement of the tribunal's decision it ran to 31st March 1975. After 31st March or April, the tribunal decided that the claimant's 'ongoing symptoms are not due to his original exposure and sensitising'.
- 6. The tribunal's reason are inadequate for two reasons. First, they contradict the decision notice by identifying a different period for the diagnosis from the decision notice. Second, they do not explain why the claimant's symptoms are no longer occupational in origin.

Jurisdiction

- 7. The second issue concerns the tribunal's jurisdiction.

8. The Secretary of State's submission to the tribunal contained this standard passage:

'The only issue before the tribunal is whether [the claimant] is suffering from PD D7. If the tribunal decide that [he] is suffering from PD D7 it should end its consideration of the case at that point and not go on to consider whether to make an award of benefit. This is because in order to make his decision, the decision maker did not need to consider the assessment of disablement and it would be necessary for this to be determined before an award of benefit could be considered. As the decision maker has not considered the assessment of disablement it is not possible for the tribunal to do so either. If the tribunal finds against the decision maker the case should be referred back to him to decide the disablement issue and such further decision will itself carry dispute and appeal rights.'

The 'dispute ... rights' referred to are the Secretary of State's practice of looking at a decision again when an appeal is made in order to decide whether it should be revised or superseded.

9. In granting leave, I directed the Secretary of State to comment on whether that submission is correct. The Secretary of State submits that that standard passage is wrong in law. I accept that submission.

10. Disablement had not been considered by the Secretary of State. But that did not prevent the tribunal dealing with the issue. The tribunal is not limited to dealing with the issue considered by the Secretary of State. The decision under appeal is set out in the submission. It was that the claimant was not entitled to disablement benefit because he had not been diagnosed as suffering from the prescribed disease. The claimant appealed against that decision, arguing that he was suffering from the prescribed disease. The tribunal was entitled to decline to deal with any issue that was not raised by the appeal: see section 12(8)(a) of the Social Security Act 1998. However, that provision contains a discretion to consider other issues. The tribunal was entitled to exercise that discretion. But it had to exercise it judicially.

11. Three are at least three factors that are relevant to whether a tribunal should deal with disablement if it has not been considered by the Secretary of State.

12. First, it is obviously sensible for a tribunal that diagnoses a prescribed disease to deal also with the resulting disablement. If a disease is diagnosed, it is necessary to identify a date of onset. It would not be sensible to diagnose a disease and leave it to the Secretary of State, advised by an examining doctor who might not agree with that diagnosis, to identify a date of onset. Also, the date of onset is the first date on which a claimant experienced disablement of at least 1%: see regulation 6 of the 1985 Regulations read with section 103(5) of the Social Security Contributions and Benefits Act 1992. So, it is necessary to deal with disablement in order to give a complete decision on diagnosis. Diagnosis and disablement are more closely connected than the Secretary of State's standard submission suggests.

13. Second, a discretion cannot be exercised judicially if it involves a breach of natural justice. If the submission contains the standard passage, the tribunal must warn the claimant that disablement may be considered. And, in deciding whether to assess disablement, it must take account of any representations that the claimant makes.

14. Third, a tribunal needs to take care in exercising its discretion to consider other issues, as this will deprive the claimant of an appeal on the facts; an appeal lies to a Commissioner, but only on issues of law.

Summary

15. As the appeal tribunal's decision is erroneous in law, it must be set aside. I cannot give my own decision, because the expertise of the medically qualified panel member will be needed on the issue of diagnosis. 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.

16. 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
12th February 2001**