Bullch, 178
Dunn J

CI/1605/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Leeds appeal tribunal dated 7 January 2002 and I refer this case to a differently constituted appeal tribunal for determination. Further action is required before this case is reheard and I draw the attention of the Secretary of State and the clerk to the appeal tribunal to paragraph 25 below

REASONS

2. I directed an oral hearing of this appeal. The claimant, having indicated that he would be on holiday on the date fixed for the hearing but that he did not mind the hearing taking place in his absence, neither appeared nor was represented. The Secretary of State was represented by Mr Leo Scoon of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions.

3. Section 103(1), (5) and (6) of the Social Security Contributions and Benefits Act 1992 provides –

> "(1) ... an employed earner shall be entitled to disablement pension if he suffers as the result of the relevant accident from loss of physical or mental faculty such that the assessed extent of the resulting disablement is not less than 14 per cent. ...
>
> "(5) In this Part of this Act, "assessed", in relation to the extent of disablement, means assessed in accordance with Schedule 6 to this Act; ...
>
> "(6) A person shall not be entitled to a disablement pension until after the expiry of the period of 90 days (disregarding Sundays) beginning with the day of the relevant accident."

Section 106 introduces Schedule 7, which makes provision for benefits that are being phased out. Paragraph 11 of Schedule 7 provides –

> "(1) ... an employed earner shall be entitled to reduced earnings allowance if –
>
> (a) he is entitled to a disablement pension or would be so entitled if that pension were payable where disablement is assessed at not less than 1 per cent.; and
>
> (b) ...
>
> but a person shall not be entitled to reduced earnings allowance to the extent that the relevant loss of faculty results from an accident happening on or after 1st October 1990 ..."

Sections 108 and 109 allow disablement pension and reduced earnings allowance to be paid in respect of prescribed industrial diseases and personal injuries, notwithstanding that the diseases or injuries have not been caused by accident. Schedule 2 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, as adapted to take account of the replacement of earlier legislation by the 1992 Act, provides that, *inter alia*, sections 94 to 107

of the 1992 Act are to be modified in their application to benefits in respect of prescribed diseases and injuries so that –

> "... references to accidents shall be construed as references to prescribed diseases and references to the relevant accident shall be construed as references to the relevant disease and references to the date of the relevant accident shall be construed as references to the date of onset of the relevant disease."

Regulation 6 provides –

> "(1) For the purposes of the first claim in respect of a prescribed disease suffered by a person, the date of onset shall be determined in accordance with the following provisions of this regulation, and ... that date shall be treated as the date of onset for the purposes of any subsequent claim in respect of the same disease suffered by the same person, so however that –
>
> (a) ...
>
> (b) if, on consideration of a claim, the degree of disablement is assessed at less than one per cent., any date of onset determined for the purposes of that claim shall be disregarded for the purposes of any subsequent claim.
>
> "(2) Where the claim for the purposes of which the date of onset is to be determined is –
>
> (a) ...;
>
> (b) a claim for disablement benefit (except in respect of occupational deafness), the date of onset shall be the day on which the claimant first suffered from the relevant loss of faculty on or after 5th July 1948; ..."

Section 1 of the Social Security Administration Act 1992 makes it a condition of entitlement to benefit that a claim have been made for the benefit within the prescribed time, which, by virtue of regulation 19(1) of, and paragraphs 4 and 5 of Schedule 4 to, the Social Security Claims and Payments) Regulations 1987, is three months in the case of both disablement pension and reduced earnings allowance.

4. The claimant in the present case claimed disablement benefit in respect of prescribed disease A11 (vibration white finger) on 25 April 2000. He was examined by a medical practitioner on 28 June 2000, when he told the doctor that he first "had trouble" with his hands in 1988. The doctor decided he was not suffering from the prescribed disease and the Secretary of State adopted that opinion. The claimant appealed and, on 7 November 2000, an appeal tribunal allowed his appeal, deciding that from 1 January 1991 the claimant had suffered a loss of faculty due to prescribed disease A11 and that the resulting disablement was to be assessed at four per cent. from 16 April 1991 for life. Neither party sought a statement of reasons for that decision or sought leave to appeal.

5. On 25 January 2001, the claimant claimed reduced earnings allowance. The Secretary of State disallowed the claim on the ground that the onset of the disease had been after 1 October 1990. The claimant appealed and the tribunal dismissed his appeal on 7 January 2002, relying on the finding by the tribunal on 7 November 2000 that the claimant had

suffered a loss of faculty due to the prescribed disease only since 1 January 1991. It is against the decision of 7 January 2002 that the claimant now appeals with my leave.

6. It is plain that the proviso at the end of paragraph 11(1) of Schedule 7 to the 1992 Act, as modified by Schedule 2 to the 1985 Regulations, does have the effect that a person is not entitled to reduced earnings allowance if the date of onset of the prescribed disease is after 1 October 1990. The issues that arises on this appeal are whether the tribunal sitting on 7 January 2002 were bound to conclude, in the light of the decision of the tribunal sitting on 7 November 2000, that the date of onset of the claimant's vibration white finger was 1 January 1991 and, if so, whether there was any course of action they should have taken other than immediately determining the appeal before them in the way they did.

7. The question whether a decision as to the date of onset of a disease made in the context of a claim for disablement benefit is binding in respect of a claim for reduced earnings allowance was recently considered in *Secretary of State for Work and Pensions v. Whalley* [2003] EWCA Civ 166 (reported as R(I) 2/03), on appeal from the decision of Mr Commissioner Williams in CI/6027/99. Consideration of the present case was deferred to await the Court of Appeal's decision but the context in which that decision was given means that the reasoning of the Court has to be considered with care.

8. One matter that the Court did clearly decide, albeit *obiter*, is that the consequence of reading section 1 of the Social Security Administration Act 1992 with paragraph 11(1) of Schedule 7 to the Social Security Contributions and Benefits Act 1992 is that a person cannot be entitled to reduced earnings allowance unless he has claimed disablement pension in respect of the relevant period and either the claim has succeeded or the only reason he has not been awarded disablement pension is that the assessment of disablement is too low. Mr Commissioner Williams, who had decided to the contrary, appears not to have been referred to earlier Commissioners' decisions on the point.

9. It follows that, before any award of reduced earnings allowance can be made, there must have been a decision on a claim for disablement pension. If the claim is in respect of a prescribed disease, a finding that the claimant has not suffered from the prescribed disease will be fatal to the claim for disablement pension and the consequent lack of entitlement to disablement pension will be fatal to the claim for reduced earnings allowance. If, on the other hand, it is found that the claimant is suffering from a loss of faculty as a result of a prescribed disease, a finding as to the date of onset of the prescribed disease made in respect of the claim for disablement pension will be binding in respect of the claim for reduced earnings allowance, by virtue of regulation 6(1) of the 1985 Regulations.

10. The Court of Appeal in *Whalley* did not explicitly rely on regulation 6(1) but, in my view, that is because the issue before them was not simply whether a decision as to the date of onset in respect of disablement benefit was conclusive for the purposes of reduced earnings allowance. The primary issue before the Court was the effect of a decision that the claimant had *not* suffered from a prescribed disease, so that there was *no* date of onset. Mr Whalley had claimed disablement benefit in 1991 and an adjudicating medical authority had decided that he was not suffering from prescribed disease A11 on 6 September 1991 and had not suffered from that condition since 1985. He did not appeal against that decision but he claimed both disablement pension and reduced earnings allowance in 1995 and, eventually, on 10 March 1998, it was decided by a medical appeal tribunal that he was suffering from prescribed disease A11 and had been since 1 January 1986. The decision of the medical appeal tribunal was then "corrected" to show the date of onset as 7 September 1991 and Mr Whalley appealed against that decision to Mr Commissioner Williams. It was common

ground before Mr Commissioner Williams that the medical appeal tribunal's decision was erroneous in point of law, because the correction was defective on procedural grounds, and that the case should be remitted to another tribunal. However, he was invited to explain how the tribunal should deal with the questions of entitlement to disablement pension and reduced earnings allowance, given the 1991 decision. He held that the 1991 decision was binding in respect of disablement pension but not in respect of reduced earnings allowance. The Secretary of State appealed to the Court of Appeal because he did not agree.

11. It is important to appreciate that the relevant decisions had all been given before the Social Security Act 1998 came into force in respect of industrial injuries benefits on 5 July 1999. Before then, Section A of Part IV of the Social Security (Adjudication) Regulations 1995, like earlier legislation, provided for a "diagnosis question" to be determined as a free-standing decision. Regulation 44(2)(a) had the effect that section 60 of the Social Security Administration Act 1992 applied to such a decision. Section 60(1) provided that, subject to appeals and reviews, a decision was final. Subsection (2), provided –

> "Subsection (1) shall not make any finding of fact or other determination embodied in or necessary to a decision, or on which it is based, conclusive for the purpose of any further decision".

Regulation 53(1) provided for a decision on a "diagnosis question" to be reviewed on the ground of error of fact, but only if there was "fresh evidence". It is apparent from Mr Commissioner Williams' decision, but not from the Court of Appeal's decision, that, in October 1998, Mr Whalley had applied unsuccessfully for a review of the 1991 decision. A medical appeal had decided on 18 May 1999 that there was no "fresh evidence".

12. It had been common ground before Mr Commissioner Williams that the effect of section 60(1) of the Social Security Administration Act 1992 was that the 1991 disallowance of disablement benefit prevented there being any award of disablement benefit on the 1995 claim in respect of a period before 7 September 1991, but Mr Commissioner Williams, relying on section 60(2), held that the 1991 decision did not prevent a tribunal from finding a date of onset before 1 October 1990 which would have effect for the purposes of the claim for reduced earnings allowance. As the claimant did not seek disablement pension in respect of any period more than three months before the date of claim for disablement pension, it was, of course, irrelevant to the question of entitlement to disablement pension whether the date of onset was before 7 September 1991 or not.

13. The Court of Appeal disagreed with Mr Commissioner Williams and held that the 1991 decision on the "diagnosis question" was final, for the purposes of section 60(1), and for that reason was binding for the purposes of reduced earnings allowance, notwithstanding section 60(2). They did not expressly explain why their conclusion that the decision was final meant that the finding that the claimant was not suffering from the prescribed disease was conclusive for the purposes of the claim for reduced earnings allowance, given the distinction drawn in section 60 between finality and conclusiveness (see R(CR) 1/02), but the reason is clear enough. Because it was final, the free-standing decision that the claimant had not suffered from the prescribed disease up to 6 September 1991 precluded a finding in the 1995 claim for disablement pension that the claimant had been suffering from the prescribed disease earlier than 7 September 1991 (which is no doubt why there had been the attempt to correct the 1998 medical appeal tribunal's decision). It followed that, on the 1995 claim for disablement pension, it was impossible to determine a date of onset (which was a facet of a "diagnosis question" – see R(I) 5/95) earlier than 7 September 1991. Whatever date was set would be binding in respect of the reduced earnings allowance claim, by virtue of regulation

6(1) of the 1985 Regulations, and would inevitably be such as to prevent entitlement to reduced earnings allowance.

14. I set all this out to show why section 60(1) of the 1992 Act was considered important in *Whalley*. Under the 1998 Act, decisions made in respect of diagnosis are not free-standing decisions that can be final for the purpose of section 17(1) of the 1998 Act, which has replaced section 60(1) of the 1992 Act. It is only the consequential allowance or disallowance of benefit that is final. However, any finding as to the date of onset of a prescribed disease is made conclusive by regulation 6(1) of the 1985 Regulations. This is consistent with section 29(4) of the 1998 Act, which makes any declaration that an accident was or was not an industrial accident conclusive for the purposes of any claim for industrial injuries in respect of that accident. Regulation 6(1) and section 29(4) provide exceptions to the general rule – implicit in section 17(2) of the 1998 Act, whereas it was explicit in section 60(2) of the 1992 Act – that findings of fact are not conclusive for the purposes of later decisions.

15. Returning to the present case, in the light of regulation 6(1) it is plain that, if the medical appeal tribunal decision of 7 November 2000 incorporated a determination that the date of onset of the claimant's vibration white finger was 1 January 1991, that determination was binding on the tribunal sitting on 7 January 2002. When I directed the oral hearing, I raised a number of questions arising out of the fact that the decision merely stated that, from 1 January 1991, the claimant was suffering from a loss of faculty, there being no mention of a date of onset of the prescribed disease. It appears that the tribunal chairman completed only the form of decision notice relevant to what used to be known as the "disablement questions" and not also the form relevant to what was formally known as the "diagnosis question", even though diagnosis had been the original issue on the appeal. In particular, I asked whether, in the light of paragraph 7 of Schedule 6 to the Social Security Contributions and Benefits Act 1992, the tribunal of 7 November 2000 should have assessed disablement for any period more than three months before the date of claim for disablement benefit and, therefore, whether they should have determined the date from which the claimant had suffered a loss of faculty any more precisely than "more than three months plus 90 days (excluding Sundays) before the date of claim" (i.e., the time allowed for claiming plus the waiting period established by section 103(6)). Paragraph 7 of Schedule 6 provides that, in recording an assessment of disablement –

> "the percentage and the period shall not be specified more particularly than is necessary for the purposes of determining in accordance with section 103 above and Parts II and IV of Schedule 7 to this Act the claimant's rights as to disablement pension ... and reduced earnings allowance (whether or not a claim has been made)."

16. Mr Scoon did not dispute that it had been unnecessary for the purposes of a claim for disablement benefit alone to specify the date from which the claimant was suffering from a loss of faculty more precisely than I had suggested, but he relied on the words in parenthesis at the end of paragraph 7 of Schedule 6, which, he submitted, always require it to be determined on a first claim for disablement pension whether the date the claimant first suffered from a loss of faculty in respect of the relevant disease was before 1 October 1990 or not, because it is always possible for a claimant later to make a claim for reduced earnings allowance. I accept that that is so.

17. It seems to me to follow that, although the chairman of the tribunal sitting on 7 November 2000 did not expressly state that 1 January 1991 was the date when the claimant *first* suffered from a loss of faculty due to the relevant disease, that that must have been what the tribunal decided. It also seems to me that, although the tribunal chairman did not

expressly record that 1 January 1991 was the date of onset of the prescribed disease, that was the necessary consequence of the tribunal's decision and nothing is to be gained by holding that some further decision was required. I have considered the possibility that, if a decision as to the precise date of onset was not actually made on a disablement pension claim, because it was irrelevant to entitlement to disablement pension, it could be made in the context of a later reduced earnings allowance, claim when it had become relevant. However, I have come to the conclusion that that is not possible. Regulation 6(1) of the 1985 Regulations requires that the date of onset be determined "[f]or the purposes of the *first* claim in respect of a prescribed disease" (my emphasis) and regulation 6(2) makes no provision for a date of onset to be fixed in a claim for reduced earnings allowance. I do not consider the latter point to be an oversight. It was unnecessary to make provision for the date of onset to be fixed in a claim for reduced earnings allowance when any such claim must be preceded by a claim for disablement pension which must be determined in the claimant's favour before the reduced earnings allowance claim can be. The "first claim" (which must be read as the "first claim which is successful at least to the extent that it is found that the claimant was suffering from a loss of faculty due to the prescribed disease", because otherwise there is no date of onset that can be determined) must therefore always be a claim for disablement pension.

18. Accordingly, I am satisfied that the decision of 7 November 2000 did amount to a decision that the date of onset of the claimant's vibration white finger was I January 1991 and that that decision, until replaced by another decision, was conclusive for the purposes of the reduced earnings allowance claim before the tribunal on 7 January 2002.

19. This approach makes it necessary for a claimant, who wishes, or may wish in the future, to claim reduced earnings allowance and who is dissatisfied as to date from which it has been found that that he had first suffered from a loss of faculty as a result of a prescribed disease, to challenge the decision in respect of disablement pension even if he is content with the outcome in terms of his actual entitlement to disablement pension. However, apart from the possibility of appeal or revision, it is possible to have a decision on a claim for disablement pension superseded under section 10 of the 1998 Act at any time on the ground of error of fact, without it being necessary to produce "fresh evidence". Insofar as any such supersession may affect entitlement to disablement pension, the date from which it effective will be determined by section 10(5) of the 1998 and regulations made under section 10(6), but, I accept Mr Scoon's submission that determination of the date of onset is conclusive for the purposes of any further decision in respect of reduced earnings allowance, even if that decision is in respect of a period before the effective date of the supersession, provided, of course, that the claimant had at the material time the necessary entitlement to disablement pension or was not entitled only due to the degree at which disablement had been assessed. This is because the new determination of the date of onset, being only a finding of fact within a decision, is not a material change of circumstances. It is merely new evidence, which is capable of showing, and – because it is conclusive – does show, that an earlier decision was wrong in point of fact from a date before the evidence came into existence.

20. In the present case, the claimant did not claim reduced earnings allowance until 25 January 2001, which was after his claim for disablement pension had been determined by the tribunal on 7 November 2000. In his claim for reduced earnings allowance, the claimant stated that he had first suffered from the prescribed disease on 1 June 1988. It seems to me that it would have been open to the Secretary of State to make a decision, superseding or refusing to supersede the decision of the tribunal, before making a decision on the reduced earnings allowance claim. However, I do not consider that he was bound to do so. He was entitled simply to reject the reduced earnings allowance claim on the basis of the tribunal's decision, which is what he did, and then wait and see whether the claimant made a clearer

challenge to the tribunal's decision. The claimant's reaction was to appeal against the Secretary of State's decision, saying –

> "You say that I cannot claim reduced earnings allowance because the onset was after 1-10-90.
>
> "I have been suffering from vibration white finger since mid-1988. This is also confirmed on the DTI examination."

This prompted a further written explanation, dated 2 August 2001, for the decision in respect of reduced earnings allowance, including an explanation of the right of appeal against the tribunal's decision. It was correctly pointed out that an appeal against a tribunal's decision lay only on a point of law and it was also implied, not entirely accurately, that it was too late to appeal. No mention was made of the possibility of an application for supersession and I suspect that it did not occur to the writer of the explanation that supersession was possible. In my view, the claimant's letter of appeal should have prompted a supersession or a refusal to supersede. When the case came before the tribunal on 7 January 2002, the claimant made it even clearer that he did not consider that the decision of 7 November 2000 was correct. Still nothing was said about the possibility of supersession.

21. Mr Scoon submitted that it was not the function of tribunals to give advice. It is true that it is unwise for a tribunal to advise a claimant whether or not to pursue a certain course of action, but I see nothing wrong in a tribunal explaining what the possible courses of action are. Indeed, if a claimant has explained his position, on an issue relevant to a tribunal's decision, to the Department and the Department has failed either to take appropriate action or explain how the claimant might obtain a remedy, it seems to me it would be quite unacceptable for a tribunal who realised what the claimant's remedy was deliberately to say nothing and allow the claimant to lose benefit through his ignorance of the social security procedural rules. That, of course, is not what happened here. I have no doubt that the possibility of supersession simply did not occur to the tribunal. However, in my view, it should have occurred to them.

22. If a supersession of the decision of 7 November 2000 as regards the date of onset of the claimant's vibration white finger was to lead to entitlement to reduced earnings allowance from the earliest date from which the claim could be effective, it was necessary for the supersession decision to be given before the tribunal gave a decision on the claim for reduced earnings allowance. As the tribunal sitting on 7 January 2002 had no power to supersede the decision of 7 November 2000 themselves, it was necessary for them to adjourn the hearing before them while the Secretary of State considered the question of supersession. That is because, once a decision was made on the claim for reduced earnings allowance, it would be final until it was itself superseded and such a supersession would not be effective from the beginning of the original claim.

23. That is not to say that the tribunal were bound to adjourn. Adjournment is always a matter of discretion, to be exercised judicially. They could have explored the claimant's case for supersession and, had they considered it unarguable, they could properly have refused to adjourn. However, if they thought the case for supersession to be arguable, I do not see how, in the circumstances of this particular case, they could properly have exercised their discretion in any way other than by adjourning. Their decision is erroneous in point of law because they did not even consider an adjournment when the circumstances required them to do so. I therefore set aside the tribunal's decision.

24. On the material before me, I do not consider that the claimant's case is unarguable. It is true that the claimant has to show that the tribunal's decision was erroneous in point of fact, either through ignorance or mistake (see regulation 6(2)(c) of the Social Security and Child Support (Decision and Appeals) Regulations 1999). It is unfortunate that there is no statement of the tribunal's reasons and so it is unclear to what extent the tribunal considered the precise date of onset to be a live issue before them requiring them to make relevant findings. However, if the claimant satisfies the Secretary of State that, before 1 October 1990, he was suffering from a loss of faculty, assessed at not less then one per cent., as a result of vibration white finger, the Secretary of State will be entitled to draw the conclusion that the tribunal sitting on 7 November 2000 did make an error of fact.

25. In those circumstances, I refer this case to a differently constituted tribunal. The case need not be listed for hearing until the Secretary of State informs the clerk that he has either superseded or refused to supersede the decision of the tribunal dated 7 November 2000. The Secretary of State should either take action leading to supersession on his own initiative or else should invite the claimant to apply for supersession within a specified time. In the circumstances, it would seem appropriate for the claimant to be called for examination by a medical practitioner who will be able to take a history from the claimant and assess its significance, paying particular regard to the date of onset. If the claimant is dissatisfied with the Secretary of State's decision, he will be able to appeal and that appeal should be linked to this reduced earnings allowance appeal.

(Signed) **MARK ROWLAND**
Commissioner
30 July 2003