SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CI/2087/2000 & CI/2088/2000

Starred Decision No: 101/00

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Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
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101/00

CI 2087 / 2088 2000

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I grant leave to appeal to the claimant in both appeals and allow the appeals.

2 The application and appeal are against two decisions of the Barnsley appeal tribunal taken together on 7 April 2000. With the consent of the parties, the the applications are also treated as the appeals. The tribunal's decision in the first appeal (CI 2087 2000) was that the decision of the Secretary of State was confirmed and that the claimant has at no time suffered from prescribed disease A12 (carpel tunnel syndrome). The tribunal's decision in the second appeal (CI 2088 2000) was that the decision of the Secretary of State was confirmed and that the claimant has at no time suffered from prescribed disease A11 (episodic blanching). The two appeals were heard together by the tribunal, and it is expedient that I give a joint decision.

3 For the reasons given below, both decisions of the tribunal are erroneous in law. I therefore set them. My formal decision in each appeal is:

> **CI 2087 2000**
> **The decision of the tribunal is erroneous in law. I therefore set it aside. I refer the case to a freshly constituted tribunal to determine the appeal in accordance with this decision.**
>
> **CI 2088 2000**
> **The decision of the tribunal is erroneous in law. I therefore set it aside. I refer the case to a freshly constituted tribunal to determine the appeal in accordance with this decision. The case is to be heard either concurrently with or consecutie to the appeal in CI 2087 2000 as the chairman of the tribunal considers appropriate.**

4 I held an oral hearing of the two appeals, together with the appeal in case CI 1132 2000 (the linked case) in Manchester County Court on 23 November 2000. The claimant was present and was represented by Mr Douglass of the National Union of Mineworkers. The Secretary of State was represented by Mr Cooper of the Office of the Solicitor to the Department of Social Security, accompanied by departmental officials. I granted leave for Mr Cylock of the Lancashire County Council Welfare Rights Office, the representative of the claimant in the linked case, to be heard in this appeal also. I refused an application, made shortly before the hearing, from Ms Clarke, solicitor to the Child Poverty Action Group, for the Group to be added as a party to the hearing. But I directed that the fax in which the request was made should form part of the papers in the appeals, and invited argument on it. I am grateful to all parties for the helpful skeleton arguments and for their active cooperation in considering these cases.

Background to the appeals

5 The claimant was a miner from 1979 to 1989. The facts are best summarised by a short chronology:

14. 9. 98	Claim for prescribed disease A11 (A11)
28. 9. 98	Claim for prescribed disease A12 (A12)
1. 10. 98	A11 prescribed for claimant
3. 11. 98	A12 prescribed for claimant

7. 12. 98	Examining medical practitioner examines for A11 and finds A12 Awards 10% from 19.4.93 to 18.4.01
16. 12. 98	Adjudication officer confirms decision
15. 1. 99	Examining medical practitioner examines for A12 and finds both A11 and A12. Awards 4% from 19.4.93 to 18.4.00
?	Adjudication officer confirms decision totalling 14%
5. 7. 99	Social Security Act 1998 (the 1998 Act) takes effect
19. 7. 99	Protest letter received from representative
19. 8. 99	Medical report for DTI concluding both vascular and sensorineural hand arm vibration syndrome present and suggestion of carpel tunnel syndrome
8. 12. 99	Application to decision maker in form LT54 of decision of 16.12.98
10. 12. 99	"claim disallowed" by decision maker on form LT54 (the LT54 decision)
7. 4. 00	Decision of appeal tribunal finding no A11 or A12

6 The decision notice of the tribunal stated: "The decision of the Secretary of State is confirmed" on both appeals but, as is all too common, failed to identify which decision was confirmed by reference to the relevant date. But there is a full record of proceedings and a statement of material facts and reasons for the tribunal's decision signed by the chairman of the tribunal. It is clear from these that the tribunal was considering the LT54 decision of 10 December 1999 as the decision under appeal. In its statement, the tribunal notes the confusion over the two examining medical practitioner reports, and concludes "we have therefore considered both prescribed diseases afresh today." It sets out its findings and conclusions from that examination. For the purposes of considering the application I note that is accepted The representative's grounds of appeal object both to the procedure undertaken in reaching the decisions in these cases, and that the tribunal reached a decision in both cases which appeared to ignore the medical evidence other than that of its own examination. The representative particularly takes issue with the fact that the tribunal ignores the expert report prepared for the DTI.

7 I directed an oral hearing of these cases as the same time as CI 1132 2000 because, in part, it raises the same problem of the nature of the decision on the LT54, which was in these cases the decision that the tribunal considered it was dealing with in the appeal. The problem in these cases is what decision, if any, was taken by the "decision maker", and what relevance it had to the appeal. The second question, again as in CI 1132 2000, was that if the decisions under appeal were the original decisions, then the appeal was late. By contrast, if the appeal was against the LT54 decisions, then the appeal was made before the decisions.

Did the claimant appeal?

8 I can deal rapidly with one problem. I described the representative's letter of 4. 7. 99 as a protest letter, for that is what it was. It was not in terms an appeal letter. The representative explained that he did not consider an appeal appropriate because in his view the only operative decisions were in his client's favour, and an appeal would put them at risk of reversal. The protest was because Benefits Agency officers refused to accept this. Nonetheless, the Secretary of State's representative, making what I termed at the oral hearing a most helpful written submission in these cases, conceded that "since the confusion in this case is entirely the responsibility of the Benefits Agency" the letter should be treated as a duly made appeal

against both original adjudication officer decisions, so that matters could be sorted out. I agree, and so treat it.

"Part of the appeal process"

9 The next problem is the status of the LT54 decisions. The claimant's appeals were presented in the Secretary of State's submissions to the tribunal as appeals against the LT54 decision. This raises issues about the use of form LT54, some of which are common to those considered in my decision CI 1132 2000. The key difference is that CI 1132 2000 was about a purported reconsideration decision on a request for a review (or revision, or supersession, after the 1998 Act took effect) separate from an appeal, while this was a reconsideration initiated by the Secretary of State during the course of an appeal.

10 Section 29 of the Social Security Administration Act 1992 prevented a review of a decision under appeal before the 1998 Act took effect, unless the review decision gave the claimant all that he or she was seeking from the appeal. That limitation has now gone, and has been replaced by powers to revise or supersede both during the appeal process and after it. A reconsideration of a decision is therefore now a legitimate response to a claimant's appeal. In seeming emphasis of this, the submission to the tribunal states:

> "Another decision maker reconsidered the claim on 10. 12. 99 as part of the appeal process".

In a direction before hearing, I asked for the legislative authority for stating that the reconsideration was part of the appeal process. I was told in response that this was not a matter of statute, but an administrative process. That may be so, but administrators cannot make something "part of the appeal process" if it is not. In adopting this approach, it appears to have been overlooked that the actions of the Secretary of State, if they are to be viewed as part of the appeal process, become part of the legal proceedings, and cease to remain merely administrative, with the necessary legal consequences.

11 Section 12 entitles a claimant to appeal a decision of the Secretary of State to the appeal tribunal. While there is much to be said in favour of the Secretary of State reconsidering any decision under appeal, it must be made clear that a reconsideration such as that on the form LT54 used in these cases is not "part of the appeal process". The reconsideration is a response by one party to an appeal to the issues raised by the other party. It seems entirely reasonable that the Secretary of State, as a party to an appeal, should consider if the grounds give rise to grounds to alter the decision under appeal without having to go through the whole appeal process. But it is most important that this been seen as an administrative response to the appeal, not a judicial one.

12 If reconsideration is truly part of the appeal process, then it must be treated as part of a legal proceeding. Section 7(1) of the Human Rights Act 1998 allows a claimant to rely on a Convention right "in any legal proceedings". That must, in my view, include all stages of the proceedings and, on the submission made, would therefore include the reconsideration by the Secretary of State. If that is so, two important consequences follow. First, the actions of the Secretary of State in reconsidering the matter are subject to article 6 of the European Convention on Human Rights. If so, a claimant will be able to contend in every case that article 6 is broken simply because the Secretary of State cannot be "an independent and impartial

tribunal" on an appeal from himself. There is also a possibility that the involvement of the Secretary of State "as part of the appeal process" might be argued to call into question the independence of the whole of the appeal process, particularly where the Secretary of State uses reconsideration to lapse an appeal. Second, and of direct relevance to this case, if the action of the Secretary of State in reconsidering is part of the legal proceedings on the appeal , then it may fall within the retrospective scope of the Human Rights Act 1998 provided by section 22(4) of that Act as a part of a legal proceeding brought by a public authority within the scope of the definition in section 7(6) and therefore within the scope of section 7(1)(b) and section 22(4). If that is the case, the decision of the "decision maker" (alias the Secretary of State) in this case would be open to challenge as in breach of article 6 of the Convention and the Human Rights Act 1998. Nor could the Secretary of State make any other valid decision about these awards until the appeal has been determined finally. That would negate the intention of reversing the effect of section 29 of the 1992 Act under the 1998 system.

13 If the Secretary of State is excluded by the Human Rights Act 1998 from the process of revision "as part of the appeal process", a revision could only be made by a tribunal. But a tribunal has no power under the 1998 Act to carry out a revision. It follows that there are no valid powers under the Social Security Act 1998 for anyone to revise a decision "as part of the appeal process".

14 I do not accept that analysis, or that the actions of the Secretary of State in conducting a reconsideration, revision or supersession are part of the legal proceedings on an appeal. As the Secretary of State's representative conceded, there is no direct provision to that effect in the Social Security Act 1998. Nor can indirect authority for the assumption by the Secretary of State of judicial functions related to appeals against his own decisions be implied from that Act. Further, I am not prepared to assume that Parliament, in passing the Social Security Act 1998 intended to authorise a system incompatible with article 6 of the European Convention on Human Rights. The true position is that actions of the Secretary of State (or decision makers) are not part of the appeal process, and are therefore not to be regarded as part of the appeal proceedings for the purposes of applying Convention rights and the Human Rights Act 1998. Indeed, my view is that article 6 of the Convention does not apply to a decision of the Secretary of State about revision because such decisions and the actions related to them are not "determinations" for the purposes of article 6.

15 This conclusion does not remove the obligation on the Secretary of State to comply with section 6 of the Human Rights Act 1998, under which it is unlawful for a public authority to act in a way incompatible with a Convention right. As applied to the current context, it is the duty of the Secretary of State under section 6 to ensure that the rights of appeal given to claimants under section 12 of the Social Security Act 1998 are conducted properly in accordance with article 6 of the Convention. This means, in my view, that the use of the phrase "part of the appeal process" as in this case is wrong in law under both the Social Security Act 1998 and the Human Rights Act 1998 and if it is still used its use should stop.

Reconsideration, revision and supersession

16 I considered the new structure of the 1998 Act replacing reviews with new claims, revisions and supersessions in my decision CI 1132 2000, following the same hearing as that for these cases. I adopt that analysis and those conclusions for the purpose of my decision in these cases. It was submitted by the Secretary of State's representative that in these cases the LT54

decision was a revision decision because of official error under section 9, which empowers revision decisions, and the regulations made under it.

17 Section 9, so far as relevant, provides:

> (1) ... any decision of the Secretary of State under section 8 above ... may be revised by the Secretary of State -
> (a) either within the prescribed period or in prescribed cases or circumstances; and
> (b) either on an application made for the purpose or on his own initiative;
> and regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.
>
> (3) Subject to subsections (4) and (5) and section 27 below, a revision under this section shall take effect from the date on which the original decision took (or was to take) effect.
>
> (4) Regulations may provide that, in prescribed cases or circumstances, a revision under this section shall take effect as from such other date as may be prescribed.
>
> (5) Where a decision is revised under this section, for the purposes of any rule as to the time allowed for bringing an appeal, the decision shall be regarded as made on the date on which it was revised.
>
> (6) Except in prescribed circumstances, an appeal against a decision of the Secretary of State shall lapse if the decision is revised under the section before the appeal is determined.

18 The regulations made under that section about occasions to revise are in regulations 3 - 5 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the DA Regulations) . The prescribed period for revision is one month: regulation 3(1). But regulation 3(5)(a) permits a revision of a decision of the Secretary of State "which arose from official error" at any time. Regulation 3(6) prevents a revision on the grounds of a change of circumstances. In these cases, the decision maker appears to have acted, as the Secretary of State submitted, on the grounds of an official error. Accordingly, regulation 3(5) empowers the Secretary of State to revise at any time. The revision can take effect from the date of the original decision under section 9(3) of the Act. For appeal purposes, the decision is regarded as being made on the date of the revision decision, 10 December 1999: section 9(5).

Appeals against revised decisions

19 Section 9(5) restarts the clock on an appeal period, expressly protecting the right of appeal from being lost by reason of a revision by the Secretary of State. Nonetheless, the general rule in section 9(6) is that a revision of a decision causes any appeal against that decision to lapse "except in prescribed circumstances".

20 Regulations under section 9(5) are made by regulation 30 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the DA Regulations). Regulation 30 provides:

> (1) An appeal against a decision of the Secretary of State shall not lapse where the decision is revised under... section 9 before the appeal is determined and the decision is not more advantageous to the appellant than the decision before it was revised.
>
> (2) [lists cases where a decision is more advantageous]
>
> (3) Where a decision as revised ... under section 9 is not more advantageous to the appellant than the decision before it was revised, the appeal shall be treated as though it had been brought against the decision as revised.
>
> ...

21 It is clear from these provisions that a tribunal considering a revised decision where the revision is not more advantageous to the claimant must consider the revised decision. But it must necessarily also consider the decision to revise. The primary question before the tribunal in these cases was therefore whether the Secretary of State was right to revise the decisions on the basis that they were said to be revised.

The LT54 decision

22 The decision in these cases was made on a form LT54 identical to that considered by me in CI 1132 2000. It has the same deficiencies. It purported to be an application to the decision maker to reconsider (but not revise or supersede) a decision on 16 December 1998 about both A11 and A12. The decision of the decision maker was:

> "Claim disallowed from and including 19. 4. 93."

23 The Secretary of State now accepts that the LT54 decision dealing with the A12 award was defective. However, the submission is that the tribunal had jurisdiction to correct the error and did so, or at any rate any residual error is not such as to invalidate the decision. The Secretary of State also submits that the LT54 decision did deal with the decision of 16 December 1998 about A11 and that, again, the tribunal had jurisdiction to, and did, correct the errors in that decision. The submission for the claimant was that it was not clear what, if any, decision had been taken.

24 Before leaving the decision of the decision maker, it must be pointed out that the form of the decision in these cases is wrong in law for a reason not so far raised. The actual decision states (using standard wording on the form) that "claim disallowed from...". But the claim was not in existence at that time, so it could not be disallowed. In this way also, the wording of form LT54 erroneously carries forward the 1992 scheme when it no longer applies. I take the decision to mean "award disallowed ...". Even that fails to note that this is a revision decision, as the standard wording on the form referring to revisions is ignored. The reasons given on the form for the decision make things a little clearer:

> The original decision was made in error as he was found to be suffering PDA12 due

to constitutional changes not EEE [employment in employed earner's employment].

The tribunal decisions

25 The tribunal confirmed the decision of the Secretary of State, purportedly stopping the award of both A11 and A12. It was looking, as it should have done, at the revised decision. This is clear from the chairman's comment recorded in the record of proceedings that "you have nothing at the moment". The tribunal noted the various errors, but then concluded that "we have therefore considered both prescribed diseases afresh today." Unfortunately, in so deciding, it erred in law. For that reason I grant leave to appeal and set aside the appeal.

26 The first task of the tribunal was to consider the revision decision actually taken, and whether there were grounds for that revision. If it had considered the LT54 decision properly, it would have seen that the decision applied only to the decision on 16 December 1998. That was the decision of the adjudication officer prescribing A11 for the claimant. It was therefore clear on the face of the LT54 decision that the reasons did not justify the decision. The tribunal should have identified that error and reached a conclusion about which decision, if any, had been revised. It should then have considered whether the Secretary of State had shown grounds to revise, the burden being on the Secretary of State to show grounds.

27 While the attempt of the tribunal to introduce common sense and to start again should be commendable, it unfortunately led the tribunal to another error. The tribunal had no power to "consider the matter afresh today". It was required to look at the matter subject to the constraints of section 12(8)(b) of the 1998 Act. That puts a constraint on the circumstances to be taken into account by the tribunal, and prevents its approach of considering the whole matter afresh at its hearing from working. For that reason also, I do not accept the submissions that the tribunal decision should be upheld.

Directions to the new tribunal

28 I refer the cases to a new tribunal to reconsider. The tribunal must first identify what effective decision, if any, was taken in December 1998, and how far, if at all, that decision revised the original decisions awarding benefit for A11 and A12 to the claimant. Having identified the decision or decisions under appeal, the tribunal must consider whether there were grounds for any revision that is effective. If the tribunal is satisfied that either of the original decisions was revised, and that there were grounds for the revision, then it should consider the appeal against the decision as revised. If it is not satisfied that there was an effective revision of either decision, or that there were no grounds justifying such a revision, then the tribunal should consider whether there are any other grounds for appeal against the original decision in issue and, if so, consider them. In doing so, it should note that the representative's letter, now treated as the letter of appeal, was asking for proper implementation of the medical awards. The tribunal should take account of the full submission of the Secretary of State's representative to the Commissioner on both appeals, in the light of this decision.

David Williams
Commissioner
20 December 2000

DW/fff