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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CI/3370/1999

Starred Decision No: 14/01

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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

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14/01

CI/3370/1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Sutton social security appeal tribunal dated 20 November 1998 is erroneous in point of law, for the reasons given below, and I set it aside. The case is referred to an appeal tribunal constituted under the Social Security Act 1998 and regulation 36(2)(b)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 for determination in accordance with the directions given in paragraphs 22 to 25 below (Social Security Act 1998, section 14(8)(b)).

The background

2. This case has a long and complicated history. A claim for disablement benefit was made on 9 February 1996. The claimant referred to the injury involved as nodules on her vocal cords, and to cumulative exhaustion and damage to her vocal cords caused by conditions at work. She had been a teacher, most recently Head of Business Studies at Phoenix High School in the Borough of Hammersmith and Fulham. After making some enquiries the adjudication officer on 10 April 1996 issued the following decision:

> "It has not been established that there was either
> (i) an event which in itself is identifiable as an accident, or
> (ii) a particular occasion on which personal injury was suffered by [the claimant] which would constitute an accident.
> Accordingly a declaration of an industrial accident under Section 44(2) of the Social Security Administration Act 1992 cannot be made and industrial injuries disablement benefit is not payable."

It is now known that on the same date the adjudication officer also issued the following decision:

> "I accept that the accident on 17.5.95 was an industrial accident as follows:
> [The claimant] was teaching in a classroom when one of the pupils threatened to lock her in a cupboard causing a confrontation which resulted in disciplinary action being taken against [the claimant] causing stress."

So far as one can tell the two decisions were issued on the same claim.

3. The claimant appealed against the first decision. In her written submissions she identified a number of particular events which she said constituted accidents causing personal

injury. These were (a) an incident on 1 November 1994 when she was locked in a stock cupboard by pupils and had to shout for some time before being released; (b) "mayhem" on the last day of term on 7 April 1995; (c) an incident on 17 May 1995 (by mistake the date was typed as 18 May 1995) when she was trapped in a stock cupboard by a pupil and had to shout before escaping; and (d) days on which fire alarms were set off many times, 3 October 1994, 2 December 1994, 15 February 1995 and 16 February 1995. The submissions also relied on a letter dated 12 September 1996 from an ENT Senior Registrar at St Thomas' Hospital, which expressed the opinion that on a balance of probabilities the claimant's bilateral vocal cord nodules were "likely to have been sustained during episodic intense vocalisation" and were not "a function of chronic low intensity abuse". She had also been examined by a Registrar on 12 July 1995 and the results of that examination were put forward.

4. A social security appeal tribunal (SSAT) dismissed the claimant's appeal on 14 January 1997. The events on 1 November 1994 and 17 May 1995 were described as incidents and not accidents. That decision was set aside as erroneous in point of law by Mr Commissioner Goodman on 20 April 1998 (CI/2543/1997). He referred the case to a new SSAT for rehearing and gave the following guidance:

> "The real question in this case whether or not the incidents which the claimant has identified and must describe in detail to the new tribunal are to be regarded as `accidents' within the general law on that topic. Prima facie, if the claimant is able to identify to the new tribunal's satisfaction that there were a number of incidents occurring at work which caused her injury in the sense of damage to her vocal cords because of having to shout extremely loudly then she is entitled to the declaration of industrial accident(s) which she seeks. If on the other hand the new tribunal comes to the conclusion that no such incident can be identified but that the claimant's problems with her voice arise solely from gradual process and were not caused or exacerbated by any specific incidents then they must deny her the declaration."

The Commissioner also referred to the second decision issued on 10 April 1996 and to a pending appeal to a medical appeal tribunal (MAT) against a resulting assessment of disablement. He suggested that it might be better for the hearing of that appeal to deferred until after the SSAT had reheard the appeal in the present case, so that the claimant could (if relevant) submit that her voice injuries were also due to the incident of 17 May 1995.

The SSAT's decision under appeal

5. The rehearing took place on 20 November 1998. There was a

long and detailed hearing, following which the SSAT dismissed the appeal again and confirmed the adjudication officer's decision under appeal.

6. The claimant now appeals against the SSAT's decision with my leave. The appeal was not supported in the submission dated 21 December 1999 on behalf of the Secretary of State (who has taken over the functions of adjudication officer's). The claimant's request for an oral hearing was granted. She attended and was represented by her husband, as at all stages below. The Secretary of State was represented by Mr Jeremy Heath of the Office of the Solicitor to the Departments of Health and Social Security. I am grateful to all present for their assistance. Following the hearing, I directed further written submissions on some questions of law. I regret that that, combined with an unfortunately-timed spell of sick leave, has led to some further delay.

7. At the centre of the SSAT's decision was its conclusion that the only matter before it was the incident of 1 November 1994 (see paragraph 2(f) of the statement of material facts and reasons). This was based on its understanding that the claimant's husband had said, following a break in the hearing of evidence, that they would concentrate on the main incidents and not pursue any incidents apart from those of 1 November 1994 and 17 May 1995, as owing to their extreme nature these were likely to be the accidents which caused the injury. The SSAT then seems to have assumed that because there had already been a accident declaration in respect of the incident of 17 May 1995, it could only deal with the incident of 1 November 1994. The statement records a highly detailed analysis and assessment of the evidence, leading to a finding (paragraph 6(p)) that the claimant had identified an incident at work on 1 November 1994 which lasted five to seven minutes, but had not established that the duration and intensity of that incident caused her injury in the sense of damage to her vocal cords. The reasons for that finding were set out in paragraph 7(e) and (f). These were, in brief, that (i) she consulted her GP in December 1994 complaining of hoarseness since September 1994; (ii) the evidence about the immediate effects of the incident was inconsistent and in any event suggested less serious effects than would have been expected if there had been damage to the vocal cords from as intense use as was alleged; and (iii) the examinations by ENT Registrars were eight months and 22 months after 1 November 1994 and "there were incidents other than that of 1 November 1994 which may have led to his diagnosis".

Did the SSAT err in law?

8. I do not need to consider all the points of law which have been raised on behalf of the claimant. I do not even have to consider whether there was a misunderstanding of what the claimant's husband had said. He was emphatic that he had not

made any concession about withdrawing reliance on incidents other than those of 1 November 1994 and 17 May 1995. He had merely suggested that, in the light of the copious documentary evidence, further oral evidence should be limited to those two incidents. It could be argued that, if such a concession had been made, the SSAT was still bound to look at all the relevant evidence already in existence. But even if consideration had been properly limited to the two incidents, I am satisfied that the SSAT erred in law in ignoring the interaction of the two incidents and in saying nothing about the effect of the existing declaration. Mr Heath did not seek to argue to the contrary at the oral hearing.

9. The existence of the accident declaration in respect of the incident of 17 May 1995 gives rise to some legal difficulties, which form part of the subject of the further submissions after the oral hearing. It appears, from what was said to the SSAT, that the adjudicating medical authority (AMA) found the loss of faculty to be impaired cerebral function and made an assessment of 2% disablement for a limited period. It is not clear whether consideration was given then to the question of whether the loss of faculty should include the effect of nodules on the claimant's vocal cords. Was the AMA prevented from doing that by the terms in which the accident declaration was made, referring only to stress from disciplinary action following the incident? In my view the Secretary of State's representative was right in the written submission dated 15 September 2000 to give a negative answer, in which he was supported by the claimant's husband.

10. I think that that follows from section 60(3) of the Social Security Administration Act 1992 (now section 30(1), and (2) of the Social Security Act 1998), providing that a decision that an accident is an industrial accident is to be taken as determining only that paragraphs (a), (b) and (c) of section 44(6) are satisfied. Section 44(6) (now section 29(6) of the 1998 Act) provided:

> "(6) For the purposes of this section (but subject to section 60(3) below), an accident whereby a person suffers personal injury shall be deemed, in relation to him, to be an industrial accident if--
> (a) it arises out of and in the course of his employment;
> (b) that employment is employed earner's employment for the purposes of Part V of the Contributions and Benefits Act;
> (c) payment of benefit is not under section 94(5) of that Act precluded because the accident happened while he was outside Great Britain."

Thus whatever is said in a decision that an accident is an industrial accident about what personal injury is suffered in the accident is not binding when the resulting loss of faculty

and disablement is determined. Under section 103(1) of the Social Security Contributions and Benefits Act 1992, a claimant is entitled to disablement benefit if she suffers loss of physical or mental faculty "as a result of the relevant accident" and the resulting disablement is at least 14%.

11. It also follows that once a decision has been made that an accident is an industrial accident, even if it refers only to a specific type of personal injury, there is no room for making any additional declaration in relation to the same accident. That again was the view of the Secretary of State's representative and the claimant's husband. Thus, the SSAT was right in its assumption that, as an accident declaration had been made in respect of the incident of 17 May 1995, it could not make any further determination, one way or the other, about that incident. However, in view of the complicated legal position and what it knew about the limited basis of the assessment of disablement made by the AMA, it was unsatisfactory for the SSAT to leave matters as it did. An adequate statement of reasons needed to set out why no further determination could be made about the incident of 17 May 1995 (and ideally how that affected what the medical adjudicating authorities could do in identifying the relevant loss of faculty and assessing disablement).

12. The SSAT also needed to say whether it thought, as a matter of fact, that the claimant's vocal cords might have been damaged in the incident of 17 May 1995. The argument that the damage was the cumulative effect of a number of incidents needed to be addressed. Paragraph 7(f) of the full statement does not logically support the SSAT's conclusion. It is not obvious why the gap between 1 November 1994 and the ENT examinations should point to that incident not being at least one of a series of incidents causing the damage. And it cannot be legitimate to argue that, looking at each individual incident, other incidents might have caused the damage. The possibility of damage caused by the cumulative effect of a series of specific incidents must be allowed.

13. The SSAT's assessment of the evidence surrounding the incident of 1 November 1994 remains as a factor supporting its decision. That was an assessment which the SSAT was entitled to reach and was fully explained. However, I have concluded that overall there is a sufficient gap in the reasoning to amount to an error of law which requires the SSAT's decision to be set aside.

14. There was a further error of law, although it would not have done the claimant much good if it had been the only thing to be corrected. This stems from section 60(3)(b) of the Social Security Administration Act 1992 (now section 30(4) and (5) of the Social Security Act 1998):

> "(b) a decision that an accident was an industrial accident may be given, and a declaration to that effect be made and recorded in accordance with section 44 above, without its having been found that personal injury resulted from the accident (saving always the discretion under subsection (3) of that section to refuse to determine the question if it is unlikely to be necessary for the purposes of a claim for benefit)."

Having made the findings in paragraph 6(p)(i) and (ii) about the incident of 1 November 1994, the SSAT should at least have considered making a declaration of industrial accident under section 60(3)(b). There would seem no reason why such a declaration should not have been made. But the reason it would have done the claimant little good for that to be done is that, in order for there to be entitlement to disablement benefit in respect of the results of a relevant accident, at some point there has to be a determination that the relevant accident caused some personal injury. That was under the pre-1998 division of jurisdiction a matter for the non-medical adjudicating authorities. Thus, if the SSAT had made a declaration based on its findings in paragraph 6(p)(i) and (ii), the claimant would still have been left with the burden of proving the causation of personal injury.

The Commissioner's decision

15. For the reason given above, the decision of the SSAT of 20 November 1998 must be set aside as erroneous in point of law. The next question is whether the case should be referred to a new appeal tribunal for rehearing or whether I should substitute a decision on the appeal against the adjudication officer's decision of 10 April 1996. The claimant's husband submitted that I should substitute a decision. Mr Heath in the end did not oppose that course if I considered that the existing evidence justified it. In many ways this has been the most difficult part of this decision. I have concluded that I should not substitute a decision.

16. If I had still been concerned with the pre-1998 division of jurisdiction, I would have had no real choice in the matter. If I had answered the question of whether there had been an industrial accident or a series of accidents which had caused personal injury in favour of the claimant, the conclusion that a personal injury had been caused by the accident or accidents would not have been binding when the questions of loss of faculty and disablement were determined by the medical adjudicating authorities (ie AMA, MAT and Commissioner). And I would have had no jurisdiction to determine the questions of loss of faculty and disablement, so that there would have been no point in referring the industrial accident question back to an appeal tribunal. Once a decision had been made by an AMA on

the disablement questions, the pending appeal to the MAT could be heard, with any appeal against the further AMA decision being heard at the same time.

17. However, the Social Security Act 1998 has swept away the division of jurisdiction between the ordinary adjudicating authorities and the medical adjudicating authorities. Under section 8(1) of the 1998 Act it is for the Secretary of State to decide any claim for a relevant benefit. There is no reference to particular questions arising on a claim: decisions are to be made on claims. Under regulation 12 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, the Secretary of State may refer certain issues arising on claims for industrial injury benefits to a medical practitioner for report (in addition to the general power in section 19 of the 1998 Act to refer claimants to a medical practitioner for examination and report). But the decision on the claim is given by the Secretary of State. Then there is a right of appeal to an appeal tribunal under section 12(1) against a decision on a claim under section 8(1). By virtue of paragraph 6 of Schedule 12 to the Social Security Act 1998 (Commencement No 8, and Savings and Consequential and Transitional Provisions) Order 1999, an appeal to a SSAT or a MAT made before 5 July 1999 which has not been determined before that date is to be treated as "an appeal duly made to an appeal tribunal in relation to a decision of the Secretary of State under section 8".

18. In the present case, my setting aside of the decision of the SSAT of 20 November 1998 leaves the claimant's appeal against the adjudication officer's decision issued on 10 April 1996 outstanding and undetermined. Therefore, the appeal is to be treated as an appeal against a Secretary of State's decision under section 8 of the 1998 Act. That seems to mean that the appeal to the SSAT must be treated as an appeal against the decision on the claim, of which all elements of the conditions of entitlement are potentially part. If I were to give the decision on the appeal against the adjudication officer's negative decision issued on 10 April 1996, I would be subject to the same provision. I am clearly not in a position to determine the disablement questions. It can be argued that I should therefore refer the case for rehearing by a new appeal tribunal, which can deal with all the elements of the claim and combine its rehearing with the hearing of the outstanding appeal against the AMA's 2% assessment.

19. However, section 12(8)(a) of the 1998 Act is also relevant:

> "(8) In deciding an appeal under this section, an appeal tribunal--
> (a) need not consider any issue that is not raised by the appeal;"

That provision must apply to Commissioners when exercising the power under either head of section 14(8)(a). I consider that in a case where a claim has been disallowed on a particular ground, section 12(8)(a) gives an appeal tribunal and a Commissioner, on an appeal against that disallowance, the discretion to consider only that ground of disallowance. Thus, if the decision is that entitlement to the benefit in question is not precluded on the ground of the initial disallowance, the consequential questions of whether the other conditions of entitlement are met need not be covered in the appeal. Those questions can be left to be determined by the Secretary of State, with a fresh right of appeal arising against whatever decision he reaches. Of course, there may be circumstances in which it is right for the consequential questions to be determined. It is a matter of judicial discretion.

20. In the present case I have concluded that I should not exercise the discretion under section 12(8)(a) so as to exclude consideration of the consequential issues of loss of faculty and assessment of disablement. The advantage for the claimant in my substituting a decision in her favour limited to the industrial accident question would be that she would have that decision in the bank, so to speak. But it would not bind the Secretary of State to find any loss of faculty from the accidents identified. And there would be some difficulties in the Secretary of State's making an assessment without being able to consider the accident of 17 May 1995 (because of the pending appeal against the AMA's assessment in relation to that accident). There might then be further complications when that pending appeal was decided by an appeal tribunal, if it took a different view of the effect of any earlier accidents. It is that factor which has tipped the balance to persuade me that the better course is for the whole case to be referred to a new appeal tribunal. The new appeal tribunal can combine the rehearing of the present appeal with the hearing of the appeal against the AMA's assessment and make whatever assessment is appropriate in the light of what it finds on the question of an accident or series of accidents causing personal injury. Although that deprives the Secretary of State of the opportunity to make a decision on the disablement questions after getting medical reports, and the claimant of any advantage in having such a decision to challenge if necessary, I think that the advantage of being able to deal with the case as a whole still tips the balance.

21. Accordingly, I refer the case to an appeal tribunal constituted under the 1998 Act and regulation 36(2)(b)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 for determination in accordance with the directions given below. No-one who was a member of the SSAT of 20 November 1998 (or of the SSAT of 14 January 1997) is to be a member of the new appeal tribunal. The membership of the new

appeal tribunal is to be determined under regulation 36(2)(b)(i) because will not be solely concerned with an application for a declaration of industrial accident, as opposed to a claim for disablement benefit. Given the history of the case, it would seem to be suitable for there to be two medically qualified members. In any case it would helpful if an ENT consultant was on the appeal tribunal.

Directions to the new appeal tribuna

22. There must be a complete rehearing of the claimant's appeal against the adjudication officer's decision of 10 April 1996, on the evidence presented and submissions made to the new appeal tribunal, which will not be bound by any findings made or conclusions expressed by the SSATs of 20 November 1998 or 14 January 1997. The rehearing is to consider all elements of the claim for disablement benefit. It is to be combined with the hearing of the claimant's appeal against the AMA's 2% assessment.

23. The new appeal tribunal must accept that the claimant suffered an industrial accident resulting in personal injury in being locked in the stock room on 17 May 1995, in accordance with the decision of the adjudication officer to that effect. Otherwise, the new appeal tribunal must first consider whether any other incidents or a series of incidents constitute industrial accidents. The legal approach set out above must be followed. In particular, if satisfied that a series of identifiable incidents (which are capable of being accidents) in their cumulative effect caused the claimant personal injury, although it cannot be said that any individual incident caused any particular injury, the new appeal tribunal should find the whole series of incidents to be industrial accidents causing personal injury. That is in accordance with the principles derived from Commissioners' decisions R(I) 77/51 and R(I) 43/55 and the decision of the House of Lords in Burrell and Sons Ltd v Selvage (1921) 126 LT 49. The latter decision was cited without disapproval by the House of Lords in Chief Adjudication Officer v Faulds [2000] 2 All ER 961, at 976h). The emphasis in Faulds on the necessity for identifying a specific accident or accidents causing personal injury does not undermine those principles. See also the form of decision approved by the Commissioner in CI/105/1998.

24. I must not seek to fetter the expert medical judgment which will be brought to bear on the evidence by the members of the new appeal tribunal. However, it seems to me that there will be little difficulty in finding that the incidents put forward by the claimant did occur on the dates put forward and have the quality of accidents. The real issue will be whether any incident or the series of incidents caused personal injury, in the light of the ENT Senior Registrar's opinion of 12 September 1996 that the claimant's vocal cord nodules were likely to have been sustained during episodic intense

vocalisation, in addition to any further evidence put forward, including oral evidence which the claimant and her husband might give at the rehearing. It should also be noted that the fact that a claimant may have suffered some form of injury by process, rather than accident, does not mean that there has not been an accident or accidents causing personal injury (possibly in a quite closely related form).

25. The new appeal tribunal must then go on to decide what loss of faculty the claimant suffered as a result of the incident of 17 May 1995 and of any other incidents accepted as industrial accidents, without being bound by the finding of the adjudication officer in relation to the incident of 17 May 1995 that the personal injury caused was stress. It will be a matter for the expert judgment of the members of the new appeal tribunal how any loss of faculty is apportioned between any industrial accidents which have been identified. The disablement resulting from the relevant loss or losses of faculty must then be assessed in accordance with the well-established principles on that issue. The claimant's own evidence of the effect of her condition on her over the years will be particularly relevant. She may also wish to consider putting forward further medical evidence, or, say, copies of health records held by her general practitioner.

(Signed) J Mesher
Commissioner

Date: 15 December 2000