(17)
Bulletin 170

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CI/6027/99

Starred Decision No: 145/01

*Commissioners' decisions are identified by **case references** only, to preserve the privacy of individual claimants and other parties.*

***Starring** denotes only that the case is considered to be of general interest or importance. It does not confer any additional status over an unstarred decision.*

***Reported** decisions in the official series published by DSS are generally to be followed in preference to others, as selection for reporting implies that a decision carries the assent of at least a majority of Commissioners in Great Britain or in Northern Ireland as the case may be. Northern Ireland Commissioners' decisions are published by The Stationary Office as a separate series.*

*The practice about official reporting of Commissioners' decisions in **Great Britain** is explained in reported case R(I) 12/75 and a Practice Memorandum issued by the Chief Commissioner on 31 March 1987. The Chief Commissioner selects decisions for reporting after consultation with Commissioners. As noted in the memorandum there is also a general standing invitation to comment on the report-worthiness of any decision, whether or not starred for general circulation. However, a decision will not be selected for reporting if it is known that there is an appeal pending against it. The practice in **Northern Ireland** is similar, decisions being selected for reporting by the Northern Ireland Chief Commissioner.*

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

Ms Kimberli Jones,
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 6th March 2002

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

Commissioners' case no : CI 6027 1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal.

2 The appellant is appealing against the decision of the Newcastle-on-Tyne appeal tribunal on 10 March 1998 with my permission. The decision of the tribunal was that the appellant was suffering from prescribed disease A11 (PD A11), commonly known as vibration white finger, from a date taken as in 1991.

3 For the reasons below, the tribunal's decision is erroneous in law. I set it aside. I refer the appeal to a new tribunal to consider the matter afresh in the light of this decision.

4 There was an oral hearing of this appeal on 21 August 2001 in Gateshead County Court, together with CI 3170 1999, CI 3887 1999, CI 4332 1999 and CI 5477 1999. In a pre-hearing direction I directed that this was to be treated as the "lead case" for full argument of the main issues. The appellant did not attend but was represented by Mr Duran Seddon of counsel, instructed by Browell, Smith and Co, solicitors, Newcastle on Tyne. The Secretary of State was represented by Ms D Haywood of the Office of the Solicitor to the Department for Work and Pensions (the successor to the Department of Social Security), accompanied by a departmental official. Because of arguments raised by Mr Seddon of which Ms Haywood had had inadequate notice (for reasons for which counsel was not responsible), I directed a further round of written submissions following the oral hearings. I am grateful to both for their help at the hearings and in the submissions.

Background to the appeal

5 The appellant worked as a miner from 1970 to 1987. In January 1991 he claimed industrial injuries disablement benefit ("disablement benefit") for PD A11. He stated that the date of onset was 8. 8. 85. He was medically examined, and the medical practitioner reported that the appellant did not have PD A11. He was examined by an adjudicating medical authority (AMA) who reported, on 6 September 1991, that the appellant did not have PD A11. The main reason given was that the blanching did not occur throughout the year.

6 The appellant made a further claim that he had PD A11 in October 1995. That claim eventually went to a medical appeal tribunal on 10 March 1998. The tribunal decided that the appellant had PD A11 and that he had suffered a loss of faculty since 1986, the onset date being expressly accepted as 1 January 1986. However, at some stage the tribunal felt obliged to change its decision assessing a level of disablement to reflect the 1991 decision. The decision notice was "corrected" to show a date of onset of 7 September 1991. There are two versions of the decision notice in the papers, suggesting that the notice was "corrected" after issue.

7 In October 1998 the appellant asked for a review of the decision of September 1991, for "fresh evidence". This was refused by an adjudicating medical authority and, on appeal, by a tribunal on 18 May 1999. The details of the earlier appeal were put to this tribunal. The tribunal decided that there was no "fresh evidence". Faced with the refusal of the 1999 tribunal to provide the remedy they sought, the solicitors for the appellant sought late leave to appeal the 1998 tribunal decision, which I granted.

The 1998 tribunal decision

8 The "corrected" decision notice states that the date of onset was 7. 9. 91. The full statement states "we accept an onset date of 1 January 1986." While a copy of the decision notice was changed, the changed notice does not appear to have been issued to all parties and the statement was not issued in changed form. Nor was the "correction" explained. It may be that it was the result of inappropriate action by a local social security office as in CI 4332 1999. Whether or not that was so, for the reasons I set out in CI 3887 1999 this is not a valid use of the correction power. The decision record is fundamentally flawed and the decision must be set aside. This was not in dispute at the oral hearing of this appeal. The real dispute was which of the two dates should have been given by the tribunal. Was the date of onset in 1986 or in 1991? The distinction was important to the appellant, I was told, because the current claim is not for disablement benefit but for reduced earnings allowance (REA). The appellant accepted that he is not entitled to disablement benefit for PD A11 unless (or until) his disablement worsens. But if the date of onset was before 1990, his claim for REA can be considered.

Determining date of onset of PD A11

9 This case, and those with which it was heard, illustrate graphically that there is considerable doubt about correctly determining a date of onset of PD A11. First, there appears to be doubt about the occasion that is to be taken as the date of onset on a first claim. Is it when there is the first experience of any symptom (such as "pins and needles"), when the disease first causes a loss of faculty, or when it first becomes prescribable? Second, these decisions and others I have seen suggest doubt within the medical profession about the date of onset as a matter of fact, even given a clear definition of the relevant event. In this case, in CI 3170/5477 1999, and in CI 3887 1999, a later tribunal was satisfied on the evidence that the date of onset predated a previous decision of an AMA that there was no PD A11 present. Different weights were given to history and examination. The adjudicating medical authorities and tribunals were all comprised of different doctors, so this was not a repeated professional view of one or two individuals. A third source of doubt arises from the second, namely how far a later decision maker is required to follow the decision of an earlier decision maker about the presence of the disease and its date of onset.

The "date of onset"

10 PD A11 is a prescribed disease only when quantitative tests as to the extent of the disease are met. An individual will usually have been suffering from vibration white finger in the medical sense for some time before it becomes extensive enough to be

prescribed as PD A11. It is therefore important to clarify what the law defines as the "date of onset".

11 Regulation 5 of the Social Security (Industrial Injuries)(Prescribed Diseases) Regulations 1985 ("the PD Regulations") provides that, on a claim being made for disablement benefit for a prescribed disease, "the disease shall, for the purposes of such claim, be treated as having developed on a date (hereafter in these regulations referred to as "the date of onset") determined in accordance with " regulations 6 and 7 of those regulations. Regulation 6 provides, so far as relevant:

> "(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, save as provided in regulation 7, 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) subject to the provisions of section 117(4), as modified by paragraph 1 of Schedule 3 to the Adjudication Regulations, any date of onset determined for the purposes of that claim shall not preclude fresh consideration of the question whether the same person is suffering from the same disease on any subsequent claim for or award of benefit; and
>
> (b) if, on the 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 - ...
>
> (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 5 July 1948 ..."

Section 117(4) of the Social Security Act 1975 was replaced by section 60(4) of the Social Security Administration Act 1992. Neither are relevant here. PD A11 became a prescribed disease on 1 April 1985. That date replaces 5 July 1948 for current purposes: regulation 43 of, and Schedule 4 to, the PD Regulations. R (I) 4/96 emphasises that a claimant cannot suffer from a prescribed disease before it is listed as a prescribed disease.

12 The parties to this appeal agreed that the date of onset of PD A11 is that in regulation 6(2)(b) above - the date when there is first a "relevant loss of faculty". A loss of faculty is relevant if it results from the relevant disease (section 122 of the Social Security Contributions and Benefits Act 1992, read with section 109). On this basis the Secretary of State submits that:

> "the date of onset must be the date when the disease reached the extent necessary to meet the prescribed amount set down in the schedule of prescription".

Counsel for the claimants agrees. So do I. The same conclusion was reached recently by a deputy Commissioner in CSI 382 2000. That decision opined that there was

nothing inherently wrong, unusual or illogical about a person only being determined to have a prescribed disease when there was a loss of faculty, even of 14% or more, on prescription. I respectfully agree with that also.

Applying the test

13 How is that test to be applied? In cases of doubt, the question is from what date it is more probable than not that the disease has reached the necessary extent, applying the "annual test" prospectively (that is, it will from that date meet the test), not retrospectively. There may be doubt at a particular date whether there is blanching *episodically throughout the year,* as there appears to have been in this case in 1991. It might be argued that it cannot be finally decided that someone has the prescribed disease until at least a year of episodic blanching to the minimum physical extent has occurred, so that in one sense you can only prescribe the disease some months after the date of onset. In my view, the law does not require this because it is looking to certainty rather than probability. PD A11 is well known to be a disease that does not improve. Onset should be judged on the balance of probabilities without waiting a year. The "date of onset" is the date that the disease probably first reaches the relevant levels and causes disablement. This part of the test for PD A11 is to be stated as "this probably will be episodic throughout the year". It is not a test that "this definitely has been episodic throughout the past year". But once it is clear that the proper test is applied, determining the date of onset is a question of fact, not of law, and is not for appeal to a Commissioner. It is of the nature of probability decisions that some will be shown by later events to be wrong. There are mechanisms for dealing with that elsewhere in social security legislation.

Determining date of onset on a second claim

14 What happens, as in this case, where there has been a determination that there is no PD A11 present on a claim, and on a later claim it is decided that the determination on the first claim was factually wrong, and that there was PD A11 present before the date on which the first claim was decided? This was an issue on which the parties did not agree and on which several arguments were presented. I have put my unavoidably lengthy analysis of those arguments in the appendix to this decision. The conclusion of that analysis is that:

(1) The refusal of a claim for disablement benefit for PD A11 by a proper authority on the grounds that the claimant does not have PD A11 at the date of decision prevents a later authority deciding a date of onset of that disease before that date for any later claim for that benefit;

(2) (1) also applies to any two claims for REA because of PD A11;

(3) But a previous determination for disablement benefit purposes that a claimant does not have PD A11 is to be treated as a question of fact by a decision maker deciding a later claim for REA, and is not binding on that later authority.

15 Applying the conclusion to this case requires further matters to be established. If the 1991 claim was a claim for disablement benefit, and (as I was told at the hearing) the 1998 claim is for REA, then the determination in 1991 is not binding on any future tribunal determining the 1998 claim. It is to be treated as a question of fact. Were the

new tribunal to reach the same conclusions on the facts as the 1998 tribunal, then it should find that the appellant had made good that part of his claim for REA, and it should determine the date of onset accordingly.

Directions to the new tribunal

16 The new tribunal is to consider again the issues put before the tribunal in 1998. It must first establish whether it is considering the claim that the appellant has PD A11 for the purposes of a second disablement benefit claim or for the purposes of a first or subsequent REA claim. If the claim is for disablement benefit, then the tribunal is to regard the determination that the appellant did not have PD A11 in 1991 as final. If the claim is for REA (and there has been no previous claim for REA) then it is to regard the decision in 1991 as a question of fact. Subject to those limits, the new tribunal is to consider if the appellant has or had PD A11, or any sequela, at any relevant time, and if it is satisfied that PD A11 or any sequela is present it is to consider the date of onset and the level or levels of disablement. In determining the date of onset, it should apply the definition of "date of onset" set out at paragraphs 12 and 13 above, namely the date on which the disease first became prescribable, resolving any doubt on the basis of probability.

17 The Secretary of State is directed to advise the new tribunal about all previous claims made by the appellant for disablement benefit and REA.

David Williams
Commissioner

22 November 2001

APPENDIX to CI 6027 1999: DATE OF ONSET AND SECOND CLAIMS FOR PD A11

A1 Does a determination that a claimant does not have PD A11 on a first claim preclude the claimant claiming, in a second claim, that the date of onset was before the date of decision of the first claim?

Arguments of the parties

A2 Ms Haywood submitted for the Secretary of State that a second decision maker could not go behind an earlier decision that PD A11 was not present. Under the Social Security Administration Act 1992 and previous Acts, this depends on whether the "date of onset" was or was not a medical question. She submitted that it was a diagnosis question and was therefore to be determined by the medical authorities. This was confirmed by CI 189 1994. It cannot be decided that someone is suffering from a prescribed disease unless there is a date of onset. The decision that a claimant does not have the disease is also a decision that there was no date of onset. Once determined by the relevant authorities, that decision is final (subject only to appeal or set aside). This follows from the principle of finality in section 60 of the Social Security Administration Act 1992 as applied by a Tribunal of Commissioners in R (I) 9/63. In that case, the Tribunal of Commissioners held:

> " ... it is not possible to have two decisions by different boards or tribunals on an identical question relating to the same period, which conflict with each other. Nor indeed is it convenient to have two decisions even to the same effect, since if one were reviewed there would be a conflict." (Paragraph 19).

She also drew my attention to Schedule 6 paragraph 7 to the Social Security Contributions and Benefits Act 1992. This required that an assessment of disablement benefit shall specify the period of disablement "for the purpose of determining ... reduced earnings allowance (whether or not a claim has been made)."

A3 Mr Seddon, for the appellants, did not agree. It was open to a second medical authority or tribunal to find PD A11 although the first decision maker had not. If it found the disease, then it should reach its own decision about the date of onset. That was a question of fact, and section 60(2) expressly provided that it could be reconsidered. The date of onset is not part of the diagnosis question. The disease can be present without a date of onset until a loss of faculty is identified. Onset is a separate and subsequent question to the date when a claimant first suffered from the disease itself. Section 45 of the Social Security Administration Act 1992 provides that loss of faculty is a disablement question. CI 189 1994, on a proper reading, did not disagree with this. If section 60 had the effect for which the Secretary of State argued, then regulation 6(1) of the Social Security (Industrial Injuries)(Prescribed Diseases) Regulations 1985 was not necessary. As it was there, it should be assumed to have content. Applying regulation 6(1) to these cases, the regulation applied only when the prescribed disease was first diagnosed. Only then could there be a date of onset. "That date" in regulation 6 could only refer to a specific date of onset, not a finding that there was no date. But that did not alter the meaning of section 60. Section 60(2) applies to dates of onset, not section 60(1). Each decision maker could reconsider it. R (I) 9/63 was not relevant here because there was no "identical question" about date of onset between the first and second decisions.

A4 Mr Seddon supported that submission by arguing that I was under a duty to come to a view that assisted his clients by reason of section 3 of the Human Rights Act 1998 and article 6 of the European Convention on Human Rights. He did not argue that the previous tribunals had erred in law for that reason. But he did argue that once the decision of those tribunals had to be set aside, my duty under section 3 of that Act became relevant for any future decision. Ms Haywood did not agree. But I do not need to go into this as I reach a decision in his client's favour without direct reliance on section 3, and I do not consider that his client could gain more, as the case was presented to me, on any alternative basis. I therefore record these arguments in case they should arise on any appeal but without deciding them.

CI 1120 2001 and CI 189 1994

A5 In CI 1120 2001, decided shortly before these cases, a Commissioner decided "with considerable reluctance" and without an oral hearing that the effect of section 60(1) of the Social Security Administration Act 1992 was to apply issue estoppel to decisions about PD A11. That decision caused the Commissioner concern with what he felt was its apparent unfairness. It was made without oral argument. In particular, no argument was heard about the Human Rights Act 1998. I accept that I should consider carefully in the light of the full argument before me whether I follow the reasoning of this "reluctant" and "totally unreal" decision.

A6 The main arguments for the parties were rested on what each claimed to be the true nature of the implicit decision that there had been no date of onset where the prescribed disease was not present. For the Secretary of State it was argued that the question of the date of onset is an inherent part of the diagnosis decision. There is no disease, so there is no date of onset. This was the approach accepted in CI 1120 2001. For the claimants, it was argued that the date of onset is part of a disablement question that arises separately from, and after, diagnosis. Both parties sought to strengthen their arguments by reference to CI 189 1994. Having heard the two parties argue diametrically opposed views about what that decision does and does not decide, both basing themselves on the text of the decision, I consider with respect that it does not deal with the matter unambiguously. It could be said that both parties are right. I must therefore consider the matter afresh.

Reduced earnings allowance (REA)

A7 Mr Seddon expressly argued his points to establish a date for REA claims, not to obtain backdating of disablement benefit. To claim REA, his clients must show that each 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"
> [Schedule 7, paragraph 11(1)(a) to the Social Security Contributions and Benefits Act 1992.]

REA is a separate benefit to disablement benefit, although linked by this provision to it. Is the nature of the link one of fact or of law? As explained below, it is in my view a mixture of both.

The legislation

A8 Section 60 of the Social Security Administration Act 1992 provides:

> (1) Subject to the provisions of this Part of this Act, the decision of any claim or question in accordance with the foregoing provisions of this Part of this Act shall be final; and subject to the provisions of any regulations under section 58 above, the decision of any claim or question in accordance with those regulations shall be final.
>
> (2) 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 purposes of any further decision.

[The subsequent subsections are not relevant to these appeals.] Section 60 was repealed and replaced by section 17 of the Social Security Act 1998 with effect from 5 July 1999.

A9 Section 17 of the Social Security Act 1998 provides:

> (1) Subject to the provisions of this Chapter, any decision made in accordance with the foregoing provisions of this Chapter shall be final; and subject to the provisions of any regulations under section 11 above, any decision made in accordance with those regulations shall be final.
>
> (2) If and to the extent that regulations so provide, any finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based, shall be conclusive for the purposes of –
> (a) further such decisions;
> (b) decisions made under the Child Support Act; and
> (c) decisions made under the Vaccine Damage Payments Act."

[There are no relevant regulations applying to disablement benefit cases, save as noted below.]

Regulation 6(1) of the PD Regulations 1985

A10 The relevant part of regulation 6 is set out in the main decision. Does it apply to a decision that there is no PD A11? I agree with the Commissioner in CI 1120 2001 that it applies only when there has been a specific determination of the "date of onset" of a prescribed disease on a claim. If there is no specific date, then the reference to "that date" in regulation 6(1)(a) cannot apply to a later claim.

Section 60 of the 1992 Act and section 17 of the 1998 Act

A11 I agree with the Commissioner in CI 1120 2001 that the argument that issue estoppel applies to these cases rests on section 60 (or section 17), together with relevant decisions. The operative words of section 60(1) are "the decision of any claim or question in accordance with the foregoing provisions ... shall be final." Those in section 17(1) are "any decision made in accordance with the foregoing provisions ... shall be final". Section 60(1) must be read with and subject to section 60(2). This provides that subsection (1) "shall not make any finding of fact ... conclusive for the purpose of any further decision." Section 17(2), as noted, takes a different approach. Conclusiveness applies to a finding of fact only where a regulation specifically provides it, but not otherwise. Regulation 6(1) may provide such finality, but it does not apply here. Nor does any other regulation. Nor do I consider that Schedule 6 paragraph 7 to the Contributions and Benefits Act 1992 advances the argument. It imposes a duty on the first decision maker, and makes the decision available to later decision makers, but has no other prospective effect. The crucial question under both sections is therefore whether the implied non-existence of a "date of onset" where no PD A11 is found is a decision or a finding of fact for the purposes of a later claim.

Is a date of onset law or fact?

A12 Mr Seddon is right in his submission that a decision on a claim for prescribed disease A11 that the claimant does not have prescribed disease A11 is not a decision inherently involving an irreversible decision of law about the date of onset for all subsequent purposes. It is essentially a question of fact, not of law. In particular, it does not decide a claim. But I do not fully accept his analysis of why that is so, or indeed that of the Secretary of State. To my mind, the answer lies not in the distinction (now gone under the Social Security Act 1998) between diagnosis questions and disablement questions, but in the distinction between consideration of a second claim for the same benefit and consideration of a second claim for some other benefit. If the claimant is arguing expressly on two separate occasions that he or she is entitled to disablement benefit, then the operative decision on both occasions is not either a diagnosis question or a disablement question but a question of entitlement to benefit – in current terminology the "outcome" question. If the claimant in this case has claimed disablement benefit in 1991, and a decision was taken that he did not have it, and there is no appeal or review, then that non-entitlement decision falls within section 60(1) or 17(1) and is final for any later claim to the same benefit. The long established authority of R (I) 9/63 applies directly. There cannot be both a refusal and a grant of disablement benefit for the same disease for the same period.

A13 The situation is different if the first claim is for disablement benefit and the second claim is for REA. Perhaps customary procedure has obscured the substantive point. Disablement benefit and REA are separate benefits: Social Security Contributions and Benefits Act 1992 section 94(2). Entitlement to REA was originally linked entirely to receipt of disablement benefit, but not now: Social Security Contributions and Benefits Act 1992 Schedule 7, paragraph 11. A claimant is entitled to claim REA without first obtaining disablement benefit, or even claiming it.

A14 For the purposes of a new REA claim, a decision about the date of onset (or its absence) on an earlier disablement benefit claim may be either a question of law or a

question of fact under Schedule 7, paragraph 11, depending on how the issue arises. If an individual is entitled to disablement benefit, then as a matter of law he or she also has entitlement to REA under paragraph 11(1)(a) from the date of onset decided for benefit purposes, subject to regulation 6 of the PD Regulations. If the individual is not entitled to disablement benefit, then the question whether there is a relevant level of disablement from PD A11 is a question of fact. There are four possible situations where an earlier decision about onset for disablement benefit purposes might fall to be considered for REA purposes:

(a) the claimant has previously been awarded disablement benefit for PD A11 and a date of onset decided;

(b) the claimant has previously been diagnosed as having PD A11 with disablement of between 1% and 14%, and a date of onset decided but no benefit is payable;

(c) the claimant has previously been diagnosed as having PD A11, but with no date of onset;

(d) the claimant has previously been diagnosed as not having PD A11.

Situations (a) and (b) pose no problem on a later REA claim; any question about the date of onset can be reconsidered under regulation 6(1) of the PD Regulations (or the general provisions for reconsideration). Situation (c) is also covered by regulation 6(1) of the PD Regulations so the absence of a date of onset can be reconsidered, and general provisions may also apply. Situation (d) is not covered by regulation 6(1). Nor is it covered by section 17(1), as it is a question of fact within section 17(2). It may also be covered by general provisions.

A15 To these alternatives must be added the situation where there are two or more claims for REA. A decision that the claimant does not meet the conditions for REA on a first claim for that allowance will have a binding effect on a subsequent claim for that allowance.

Section 17 and section 60 compared

A16 This analysis is entirely consistent with section 17 of the Social Security Act 1998. Under the 1998 Act it is only decisions by the Secretary of State, or "outcome decisions", that are within the scope of section 17(1). Advice about the absence of PD A11, or its presence at a low level of disablement, is not an "outcome decision". And a decision that a claimant is not entitled to disablement benefit does not of itself decide if PD A11 was present or not, only that it did not exceed 14%. On either basis a "no PD A11" decision on a disablement benefit claim is within section 17(2) not section 17(1) for the purposes of a later REA claim.

A17 How does this analysis apply to decisions taken under the framework of the 1992 Acts? Section 60 of the Social Security Administration Act 1992 gave finality to "the decision of any claim or question". Section 45 of that Act states that the level of disablement is a disablement question for industrial injuries benefit (including REA: Social Security Contributions and Benefits Act 1992, section 94). This gave finality under section 60(1) for a medical decision on a diagnosis question. The immediate problem in this case is, however, whether that finality still operates. Has section 60 now been replaced by section 17, and if it is replaced, does section 17 (1) apply or

section 17(2)? In my view, there are several reasons that together compellingly argue that section 60 has no continuing effect. Section 17 should now apply for all purposes. Further, the effect of a decision about PD A11 made before 5 July 1999 is within section 17(2) for REA purposes, not sec 17(1). Accordingly, the analysis set out above now applies to pre-1999 medical opinions about the onset of PD A11 in the same way as to post 1999 medical opinions. Nor do I see anything unfair about that. Finality clauses such as these are traditionally construed against public authorities. And it must be assumed that the narrowing of the scope of section 17 from section 60 was intentional.

A18 Section 60 could have been given direct continuing effect under the 1998 Act (or transitional regulations) but was not. It was repealed by section 39(3) of the 1998 Act, as section 39(3) was brought into effect for specific kinds of decision. Any continuing effect of section 60 in these cases therefore can only be derived indirectly from the transitional regulations. For disablement benefit and REA cases, the only relevant provision is Schedule 12 to the Social Security Act (Commencement No 8, and Savings and Consequential and Transitional Provisions) Order 1999. That Order activated section 39(3) of the 1998 Act for these cases with effect from 5 July 1999. Paragraph 4 of Schedule 12 provides that from that date decisions of adjudicating authorities made before 5 July 1999 are, from 5 July 1999, to be treated as decisions by the Secretary of State under section 8(1)(a) or, as the case may be, (c) of the 1998 Act. Paragraph 11 of Schedule 12 provides that decisions of appeal tribunals established under the 1992 legislation are to be treated as decisions of appeal tribunals established under the 1998 legislation. In other words, decisions taken before 5 July 1999 are from that date to be treated as if they were decisions taken under the 1998 legislation. The precise wording of the transitional provisions and the precise effect of their interaction with the primary legislation may be open to a number of interpretations, but in my view the narrowing of the finality provision, combined with the absence of any express continuation of section 60, means that there is no continuing operation of section 60 after the 1998 Act took effect.

A19 Are previous decisions of medical authorities about PD A11 within the scope of section 17(1) if taken before 5 July 1999? Are they, or are they to be treated as, decisions "made in accordance with the foregoing provisions of this Chapter"? Are decisions of medical appeal tribunals within the scope? This can only be so under the transitional regulations noted above. I do not think that paragraphs 4 and 11 have that effect. Decisions of medical authorities are not decisions of the Secretary of State under either section 8(1)(a) or (c) of the 1998 Act. Section 8(1)(a) is clearly not relevant. Section 8(1)(c) applies to the power "to make any decision that falls to be made" under a relevant enactment. I do not read that as applying to a past decision by a medical authority rather than the Secretary of State under a repealed provision on an issue that can no longer be a "decision that falls to be made" either under the repealed legislation or any replacement. A previous "no PD A11" decision associated with a "no benefit" decision for one benefit now comes within section 17(2), not section 17(1), for the purposes of any later claim for another benefit.