SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File Nos.: C9/00-01(IB) & C36/00-01(IB)

Starred Decision No: 68/01

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Mr Damien Abbott,
Office of the Social Security and Child Support Commissioners,
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Decision No: C9/00-01(IB) &
C36/00-01(IB)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCAPACITY BENEFIT

Application for leave to appeal and Appeal
to a Social Security Commissioner
on a question of law from Tribunals' decisions
dated 9 September 1999 and 7 March 2000 respectively

DECISION OF THE SOCIAL SECURITY COMMISSIONER

INTRODUCTION

1. These linked decisions involve two appeals by the claimant. The first is against a decision dated 9th September 1999 of an Appeal Tribunal sitting at Dungannon (the first Tribunal decision). That Tribunal had disallowed the claimant's appeal in relation to Incapacity Benefit and had affirmed an Adjudication Officer's decision that the claimant was to be treated as capable of work from and including 19th July 1998 because he had worked and the work did not fall within an exempt category. The decision upheld was dated 26th October 1998 and was made on foot of a claim dated 6th May 1998.

2. The second appeal is against a Tribunal decision dated 7th March 2000 (the second Tribunal decision) to the effect that the claimant was to be treated as capable of work from 13th May 1999 because he had worked and that work did not fall within an exempt category. The Tribunal confirmed an Adjudication Officer's decision made on foot of a claim dated 16th June 1999 for the period from 13th May 1999.

3. There is also a third Tribunal decision which was not appealed but which I mention for completeness sake. This is a decision dated 12th May 1999 to the effect that the claimant had failed the All Work Test for the period 13th October 1997 to 5th May 1998 and was accordingly not entitled to Incapacity Benefit for the period 13th October 1997 to 5th May 1998. This confirmed an earlier Adjudication Officers decision dated 13th October 1997 which in its turn reviewed earlier decisions on foot of which the claimant had been paid Incapacity Benefit. The reason why this decision took so long in being finalised by a Tribunal was that an earlier Tribunal decision had been set aside by a Commissioner's decision and

the matter had been remitted for rehearing. As I mentioned above that decision was not under appeal to me. Consequently the claimant was not considered incapable of work for the period 13th October 1997 to 5th May 1998.

FACTUAL BACKGROUND

4. I set out the factual background to the case as it may help to clarify certain parts of my decision. The claimant became unfit for work on 23rd December 1991 initially by reason of back pain and headaches. He claimed Sickness Benefit from then followed by Invalidity Benefit from 6th July 1992. By reason of legislative changes the award of Invalidity Benefit was in 1995 translated into an award of Incapacity Benefit. Incapacity Benefit had replaced Invalidity Benefit. The claimant was medically examined on 15th September 1997 and on 13th October 1997 an Adjudication Officer reviewed the previous entitlement decision on the basis that the claimant had failed the All Work Test and was no longer entitled to Incapacity Benefit. On 12th May 1999 an Appeal Tribunal confirmed the above Adjudication Officer's decision.

5. In the meantime the claimant, on 6th May 1998, had reclaimed benefit. On 9th May 1998 he was treated as incapable of work pending assessment and awarded Incapacity Benefit. On 21st July 1998 he notified the Department that he had started work which he claimed as being of therapeutic value. On 26th October 1998 he was disallowed Incapacity Benefit from 19th July 1998 because he was working and the work was not in an exempt category. On 11th December 1998 he appealed against this disallowance decision. On 9th September 1999 this appeal was disallowed.

6. In the meantime on 16th June 1999 the claimant had reclaimed Incapacity Benefit from 13th May 1999. He was disallowed this benefit on the basis that he was treated as capable of work because he had worked and the work was not in an exempt category. On 7th March 2000 an Appeal Tribunal disallowed his appeal. I am uncertain as to whether the claimant stopped work at all between July 1998 and the reclaim on 16th June 1999. Certainly the Tribunal on 7th March 2000 refers to evidence from the employer that he had been working for approximately one year.

7. I held a hearing of the appeal against the first decision and the application for leave to appeal against the second decision. I grant leave to appeal the second decision and with the consent of both representatives I treat the application as an appeal and proceed to determine any questions arising thereon as though they arose on appeal. The claimant was represented at hearing by Mr Stockman of the Law Centre (NI) and the Department was represented by Mr Toner of the Decision Makings and Appeals Unit. I am obliged to both representatives for their assistance.

8. In the first Tribunal's decision the statement of reasons includes a statement that the evidence "did not satisfy the criteria laid down by legislation". Nowhere in the reasons is it indicated that any consideration was given to whether or not the work was undertaken on the advice of a doctor. The bulk of the reasons relate to whether or not the work done would assist or prevent or delay deterioration in the claimant's health and evidence on whether or not he had a psychiatric illness.

There is no express finding of fact on the question of whether or not work was undertaken on the advice of a doctor.

9. In the second decision the Tribunal makes the comment "The medical evidence does not suggest the work was undertaken on the advice of a doctor". It also deals at some length with whether or not the work would improve or prevent delay on deterioration in the claimant's condition. It again deals with whether or not any disease or bodily or mental disablement was present.

10. The grounds of appeal were set out in a letter dated 4th December 2000 and were amplified by letter of 23rd January 2001. The Department made observations on the appeal by letters dated 28th June 2000, 8th January 2001 and 2nd February 2001. These representations were amplified at hearing.

GROUNDS OF APPEALING THE FIRST TRIBUNAL DECISION

11. With regard to the first decision (that of 9th September 1999) the grounds for appeal in general terms were that:-

1. The Tribunal had erred in relying on the evidence of (the claimant's GP) who did not address any element of the All Work Test.

2. That there was a breach of natural justice on the Tribunal's part in considering whether or not the claimant had a mental disablement. This appeared to have been done on the basis of the GP's evidence. The claimant not having been aware that such a question was to be considered, this was a breach of natural justice in that he was taken by surprise.

3. That the Tribunal's decision was based on insufficient evidence in that there was not proper investigation of the circumstances surrounding the claimant's undertaking of the work in question and of the effect it would have on his condition. This ground was linked with ground two above.

4. That there was an error of law on the face of the record since the correct legal test was not applied. The statute raised two questions:-

   (a) was work undertaken on advice of a doctor and
   (b) would it improve, prevent or delay deterioration in the mental disablement which caused the incapacity for work.

12. Mr Stockman submitted that "advice" should be equated with approval in these circumstances and the claimant's doctor did approve of his working. The fact that his doctor saw a therapeutic benefit in his working was enough to satisfy regulation 17(1)(a) of the Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995. The statutory test was met. The Tribunal either failed to apply the correct test or reached an irrational decision on the evidence because that test was met.

13. Mr Toner submitted that the Tribunal did not err in looking at [claimant's GP's] evidence. The Tribunal was not querying whether or not there was a specific

mental illness or disablement. It appeared to have accepted this and to have moved on to regulation 17(1)(a)(i) and to be considering whether the work would help to improve or prevent or delay deterioration in the disease or bodily or mental disablement which was the cause of the incapacity for work. In Mr Toner's submission there was therefore no breach of the rules of natural justice.

14. Mr Toner submitted that the Tribunal had clearly concluded that the work in question would not improve or prevent or delay deterioration in the claimant's condition and in his view the Tribunal was entitled to so conclude on the evidence. The General Practitioner had avoided answering the question posed by the adjournment decision of 25th June 1999 and it was hard to understand how the Tribunal could have come to any other decision than that which it did.

15. Both parties, at my request, addressed me on certain questions raised by regulation 28(1) of the above Regulations and I will deal with that matter later in this decision.

DECISION 1 AND REASONS

16. I begin by setting out the Adjudication Officer's decision which was under appeal in this case. The decision was dated 26th October 1998 and was as follows:-

> "This decision is given in respect of [the claimant's] claim for Incapacity Benefit. He is treated as capable of work from and including 19 July 1998. This is because he has worked and that work does not fall in an exempt category.
>
> As a result I have reviewed the decision dated 24 June 1998 of the Adjudication Officer awarding Incapacity Benefit from and including 9 May 1998.
>
> There has been a relevant change of circumstances since the decision was given. This is that [the claimant] started work on 20 July 1998.
>
> My revised decision for the period from and including 19 July 1998 is as follows:
>
> [The claimant] is not entitled to Incapacity Benefit from and including 19 July 1998.
> Social Security (Incapacity for Work) (General) Regulations, (Northern Ireland) 1995 regulations 16, 17, 19 and 20.
> Social Security Contributions and Benefits (Northern Ireland) Act 1992, Section 30A."

17. The original decision treating the claimant as incapable of work and awarding him Incapacity Benefit was therefore being reviewed on the basis that the claimant had started work on 20th July 1998. That was obviously based on the claimant's letter informing the Department that he had so done and his so doing certainly was a relevant change of circumstances. In any review decision the onus of proving grounds for review or revision rests on the person seeking the review, in this case

the Adjudication Officer. Mr Stockman has queried whether or not the claimant had ever stopped work between this and earlier claims but that matter was not raised to the Tribunal and there was no error in relation in its not exploring the matter. Starting work being a relevant change of circumstances, grounds for review were established. Whether the original decision should be revised depended on whether or not the work fell in an exempt category. If it did the entitlement could continue. It could only fall within such a category if it complied with regulation 17 of the said Regulations. Regulation 17 sets out the categories of exempt work. It is common case that only regulation 17(1)(a) is applicable. That provision sets out the relevant category of exempt work as follows:-

> "(a) work undertaken on the advice of a doctor which –
>
> (i) helps to improve, or to prevent or delay deterioration in, the disease or bodily or mental disablement which causes that person's incapacity for work;"

18. It will therefore be seen that the work must fulfil two conditions. Firstly it must be undertaken on the advice of a doctor. Secondly it must be work which helps to improve or to prevent or delay deterioration in the disease or bodily or mental disablement which causes that person's incapacity for work. It is worthy of note that the phrase "therapeutic work" is not used in the provision. There is no concept in the Regulations of work being generally therapeutic. It must fulfil the conditions in regulation 17(1) to be exempt.

19. As the Adjudication Officer's decision was to the effect that the work did not fall within an exempt category the Tribunal had to consider whether or not the work fell within the two conditions of regulation 17(1)(a)(i). It was only if it satisfied both that the work could be considered as exempt work. It appears to me in this case that the Tribunal did not have adequate evidence for the assumption, which I do consider it made, that the work was undertaken on the advice of a doctor. The letters from [claimant's GP] dated 7th September 1998 in which he did not answer the specific question as to whether he had advised the claimant to undertake work as a cleaner for medical reasons and the subsequent letter from [claimant's GP] dated 23rd June 1999 both raise and fail to answer the question of whether or not the work was undertaken on the advice of a doctor. The Tribunal made no finding of fact on this point and indeed, I am in agreement with Mr Toner, that it did not appear to specifically consider the point. I think it should have done so. [Claimant's GP's] evidence at least raised the question. I set the decision aside for that and for other reasons.

20. I pause here to note that the Adjudication Officer's submission on this matter was somewhat vague. It would be helpful in future cases if submissions would indicate the decision makers views on satisfaction or otherwise of each of the statutory conditions. The Tribunal would not of course be bound by any such views but the issues might be more clearly highlighted. However this is a matter for the Department.

21. My other reason for setting the first Tribunal decision aside is that it seems to me that the Tribunal was not sufficiently specific in its findings as regards the second condition in regulation 17(1)(a)(i) in that it did appear to stray into whether or not the causes of incapacity certified by the claimant's doctor were in fact incapacities at all.

I can understand why the Tribunal may have done this in the light of [claimant's GP's] letter of 7th September 1998 which states:-

> "He has no real mental health problem. He has low self-esteem and is a loner. He does not mix with others well. (socially isolated)."

22. This was in response to a request by the Department to "please state your patients diagnosis".

23. Obviously the Tribunal could not ignore the evidence of the GP but it does not appear to me that it was entitled to approach the matter in the way that it did.

24. It seems to me that the Tribunal was reasoning that because the claimant did not have a specific bodily or mental disease or disablement he could not fulfil the condition in regulation 17(1)(a)(i). I do not say that the Tribunal was wrong in that reasoning bearing in mind the provisions of regulation 17(1)(a)(i).

25. The claimant had been treated as incapable of work pending assessment on the basis of regulation 28(1) and (2)(a) of the said Regulations. These provisions entitle a claimant to be treated as satisfying the All Work Test until assessment on condition that he provides "evidence of his incapacity for work in accordance with the Social Security (Medical Evidence) Regulations (Northern Ireland) 1976." I can see no dispute and I proceed on the assumption that the doctor's certificates in this case appeared to comply with the Medical Evidence Regulations and therefore the Adjudication Officer at the time appears to have been obliged to treat the All Work Test as satisfied.

26. It appears to me that implicit in so doing was the acceptance that the causes of incapacity for work were as set out in the doctor's statement. That statement is dated 21st April 1998 and advises the claimant to refrain from work for 26 weeks on the basis that he is suffering from:-

> "anxiety and low self-esteem."

While it may be doubted that these are actually disabilities of themselves nonetheless the Adjudication Officer appears to have accepted them as the cause of incapacity pending assessment. Therefore in this case when regulation 17 fell to be considered by the Tribunal if it doubted, as it appears to have done that there was any disease or bodily or mental disablement, causing incapacity for work, this matter should have been raised with the parties. It may have been, because of the provisions of regulation 28(1) and 2(a) that the claimant would still have had to be treated as incapable of work. However regulation 17(1)(a)(i) requires the relevant work undertaken to improve, prevent or delay deterioration in "the disease or bodily or mental disablement" which caused the incapacity, before it can be considered "exempt" work. If there was no such disease or disablement the work could not be classed under regulation 17(1)(a)(i). However, the claimant should have been given an opportunity to make submissions on the issue. There was a breach in the rules of natural justice in his not being given the chance to do so and I agree with Mr Stockman in that respect.

27. It does appear to me, despite Mr Toner's submissions, that the Tribunal was querying this. Its reasons for decision refer at length to this matter and it appears to me from reading them that it must have been considering that the claimant did not have a disease or bodily or mental disablement, which could be assisted. I set the Tribunals decision aside for the reason that there was a breach of the rules of natural justice.

REGULATION 28(1) AND (2)

28. Certain further issues which arose during the course of the appeal remain to be dealt with. These issues relate to the claim which was the subject of the Tribunal's decision on 9th September 1999. That claim was the claim for Incapacity Benefit from and including 13th May 1999. When the claimant made the claim from 13th May 1999 he was treated as capable of work pending assessment under regulation 28(1) and (2). He could only be so treated if he satisfied the conditions in regulation 28(2). Those conditions were as follows:-

> "(a) that the person provides evidence of his incapacity for work in accordance with the Medical Evidence Regulations; and
>
> (b) that it has not within the preceding 6 months been determined, in relation to his entitlement to any benefit, allowance or advantage which is dependent on him being incapable of work, that the person is capable of work, or is to be treated as capable of work under regulation 7 or 8, unless –
>
> (i) he is suffering from some specific disease or bodily or mental disablement which he was not suffering from at the time of that determination;
>
> (ii) a disease or bodily or mental disablement which he was suffering from at the time of that determination has significantly worsened, or
>
> (iii) in the case of a person who was treated as capable of work under regulation 7, he has since provided the information requested by the Department under that regulation."

29. It has nowhere been contested that the claimant fell within (i), (ii) or (iii). An issue arose as to whether there had been a determination within the preceding six months that the claimant was capable of work.

30. The facts relevant to the matter were that pursuant to an Adjudication Officer's decision of 13th October 1997 the claimant was determined to be capable of work from and including that date. That decision was appealed to a Tribunal which upheld the Adjudication Officer's decision. The Tribunal's decision was dated 15th December 1997 and (under the legislation then in force) would have had effect down to the date of that decision. That Tribunal's decision was subsequently set aside by the Chief Commissioner in decision *C55/97(IB)*. The matter was remitted to a differently constituted Tribunal which on 12th May 1999 disallowed the claimant's appeal against the Adjudication Officer's decision of 13th October 1997.

31. In the meantime the claimant had reclaimed benefit on 6th May 1998, had been treated, by a decision dated 9th May 1998 as incapable pending assessment and awarded benefit, had on 21st July 1998 notified the Department that he had restarted work claimed as being exempt work and had been disallowed Incapacity Benefit from 19th July 1998 because the Department considered that the work was not in an exempt category. The claimant appealed against this decision on the 11th September 1998 and the decision of 9th September 1999 (which I have just set aside) disallowed his appeal.

32. I consider that, though the mechanism by which it was reached may not have been completely correct, the fact that the decision of the Tribunal of 15th December 1997 was subsequently set aside meant that the Adjudication Officer on 9th May 1998 correctly treated the claimant as incapable of work pending assessment on the basis that he fell within the said regulation 28(1).

33. However, when the claimant reclaimed benefit on 16th June 1999 (he was reclaiming with effect from 13th May 1999) there was in existence a Tribunal decision dated 12th May 1999 which determined that the claimant was capable of work. In essence this Tribunal was upholding the decision of the Adjudication Officer of 13th October 1997. I am in agreement with both representatives that that Tribunal decision of 12th May 1999 covered only the period from 13th October 1997 to 5th May 1998 (the day before the claimant reclaimed benefit). However I have to construe regulation 28(2)(b) and ascertain whether that determination (i.e. the Tribunal decision of 12th May 1999) was the one which was to be considered or whether it was the earlier determination of the Adjudication Officer on 13th October 1997 which was the relevant determination.

34. It was settled law under the former legislation when a Tribunal decision had effect down to the date of hearing that that Tribunal's decision was the relevant determination. It was current down to its own date. That is not, however, the situation under the amended legislation and that is well illustrated by the situation which arose here when the Tribunal in May 1999 was deciding whether a claimant was capable of work for the period 13th October 1997 to 5th May 1998. In the present case the only decision which was current up to the date of making was that of 13th October 1997. That decision alone made a determination as to current capacity at the time of making. One of the purposes of Regulation 28 would seem to have been to avoid as far as possible repeated claims within a short period of time where there has not been a change in the cause of incapacity.

35. The condition in Regulation 28(2)(b) is that it must not have been determined that the person "is capable" of work. The determination must therefore relate to <u>current</u> capacity for work. The Tribunal of 12th May 1999 was making a determination in respect of a past period. It was not therefore caught by Regulation 28(2)(b).

36. The Tribunal which dealt with the matter on 12th May 1999 was a Tribunal not affected by the amendments in the Social Security (Northern Ireland) Order 1998. It would have had the power to deal with the matter down to the date of its decision had it been dealing with a decision for an indefinite period. However, the period before it was shortened to end on 5th May 1998 because of the subsequent claim and the adjudication in respect of that claim from 6th May 1998. The decision of the Tribunal

of 12th May 1999 therefore not being as to current capacity at the date it was made it was not a determination within regulation 28(2)(b).

37. I do not therefore consider that there was any determination within the provisions of regulation 28(2)(b) which meant that the claimant could not be treated as incapable of work from 13th May 1999. I therefore consider that the decision to treat him as incapable pending assessment from 13th May 1999 was made in accordance with Regulation 28 and was not in error in that respect.

DIRECTIONS

38. I do not consider that this is a case where I can give the decision, which the first Tribunal should have given, and I therefore remit the matter to a differently constituted Appeal Tribunal.

39. I direct that the new Tribunal bear in mind the above views and make findings as to:-

1. The work which the claimant did and when the claimant started it.

2. Whether or not he obtained the advice of a doctor before starting this work.

3. Whether or not he relied on that advice in deciding to undertake the work.

If the answer to 2 or 3 is "No" the work cannot be categorised as "exempt" work.
If the answer to 2 and 3 is "Yes" then the following question must be answered.

4. Has the work undertaken helped to improve or to prevent or delay deterioration the disease or bodily or mental disablement which caused the incapacity for work?

GUIDANCE

40. In order to assist the new Tribunal in making those findings I give below some guidance as to the application and interpretation of regulation 17(1)(a)(i) and its linkage with regulation 28(1) and (2)(a).

41. The Tribunal will need to ascertain when the relevant work commenced and whether it ever ceased. In the course of the hearing before me Mr Stockman mentioned that the claimant might never have stopped work. If that was so the date of any review decision might have an effect from the effective date of claim. It could also have an effect on decisions relating to other benefits but that matter is not before me. I do consider, however, that the question of whether or not work is exempt work within regulation 17(1)(a)(i) is one which has to be answered afresh for each claim to Incapacity Benefit. I have reached this view because it is possible that the cause of incapacity could change or indeed the effect of the same incapacity may have changed. Therefore work which might assist the claimant's health at the time he first undertook the work might not always so assist. Because therefore circumstances can change I think it has to be re-determined in connection with each claim for the said benefit whether or not the work in question is within a category of exempt work.

42. I am strengthened in this view by the provisions of Article 17 of the Social Security (Northern Ireland) Order 1998 which relates to the finality of decisions. Article 17(1) provides for the finality of decisions and Article 17(2) provides that "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 is to be conclusive for purposes of further such decisions. I am unable to trace any regulatory provision that findings of fact or determinations embodied in one decision are to be conclusive for the purposes of further such decisions as to whether or not a person is entitled to Incapacity Benefit. By reason of Article 9(2) of the said Order once a claim for benefit is decided the claim is not to be regarded as subsisting after that time so that a new claim will provoke a new decision.

43. As regards the effectiveness of the earlier decision it would cease to have effect at least from the time when the new decision on the new claim had effect.

44. That does not mean that each time benefit is reclaimed a claimant must necessarily again seek his doctor's advice if he has continued without interruption at the same work. If the work was undertaken on the doctor's advice and the claimant continues in that work without interruption the work will still have been undertaken on the doctor's advice even though the claimant ceases to claim benefit and then re-claims it. Whether or not the provisions of Regulation 17(1)(a)(i) are satisfied will have to be determined.

45. As regards the meaning of work undertaken on the advice of the doctor, I am in agreement with Mr Toner that this means that the doctor must have been consulted before the work was started. The legislature did not say work continued on the advice of the doctor but work undertaken on the advice of a doctor. It appears to me that this means that the claimant must have obtained the doctors advice before he started work. I am in agreement with Mr Commissioner Walker in Great Britain in decision *CIB/1749/1997* where he states at paragraph 3:-

> "The contention before the tribunal and now before me is that "on the advice of a doctor" can be advice given retrospectively – or strictly speaking ex post facto which is to say after the work has been done. On that short point I am satisfied that the normal use of English would require the words in question to be construed as meaning that the undertaking of the work must follow in time sequence the advice of the doctor. That aside, reference is made, in support of the argument for the claimant, to decisions R(S) 4/93 and CSS/5/1987. It is contended that in these decisions the Commissioners considered the meaning of "on the advice of a doctor" in law and held that both encouragement and retrospective approval were sufficient. Those words were not, in fact, considered in either case since they did not exist in the form of the regulations applicable thereto which ante-dated the 1995 Incapacity for Work Regulations. The then applicable regulations were the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975. Regulation 3(3) thereof contained the exemption, putting it briefly, for those whose work was "undertaken under medical supervision as part of treatment in a hospital" or for which the claimant had "good cause for doing". And it was the "good cause" part of the regulation that was held to apply where there was ex post facto advice from a doctor that the work undertaken had been a good idea – that was

the "retrospective" advice. These authorities therefore do not help in the present case."

46. Like Mr Commissioner Walker I consider that authorities on what constitute good cause are not authorities on whether or not work is undertaken on the advice of a doctor. Mr Stockman referred to *R(S)4/79*. That was a decision on whether or not a claimant had "good cause" for working. It was under the 1975 legislative provisions, now repealed. If is of no assistance in determining what is meant by "work undertaken on the advice of a doctor" in the present context.

47. I come then to the question of what is meant by "advice". This is an ordinary English word and I do not, of course, attempt to substitute any wording of my own for the statutory wording. It does, however, appear that "advice" must include some sort of recommendation as to the undertaking of the work whether this is said explicitly or it is obvious from the conversation that the doctor's judgment is that the work be undertaken. Advice and approval are not the same words though at times they may overlap. In the context of this legislation there is a distinction. The claimant here must rely on the doctor's advice before undertaking work. If the claimant has already decided to start it he could not be said to be undertaking the work "on the advice of a doctor" even though the doctor approved of him starting it. There must be reliance on the doctor's advice in deciding to undertake the work otherwise it would not be undertaken <u>on</u> the advice of a doctor. Approval is less strong than advice. The most salient factor is, however, likely to be the time sequence and the fact that reliance must be placed on the advice when the work is undertaken.

48. Mere acquiescence by the doctor in the proposed course of action is not sufficient to constitute advice. Something stronger is required. No particular form of words is necessary but the doctor would have to make clear in some manner his view that the claimant should undertake work.

49. It is necessary that the claimant places some reliance on the doctor's advice when he undertakes the work otherwise the work would not be undertaken "on" the doctor's advice. This means that the doctor's advice must contribute to the claimant undertaking the work i.e. to his starting it.

50. As regards whether the advice in question must be related specifically to the actual job undertaken the matter has not been argued before me so my views are not concluded. It does, however, appear to me that the advice must be so closely related to the work that is undertaken that it is able to be relied upon in the undertaking of that work though the advice may not have to be that a specific job should be undertaken.

51. The second limb of regulation 17(1)(a)(i) is that the work must help to improve or to prevent or delay deterioration in the disease or bodily or mental disablement which causes the relevant persons incapacity for work. I note that the present tense is used and that this is not a question of work which is likely to help etc but of work which actually does help etc. This presumably is linked to Regulation 16. Regulation 16(1) provides that in general a person is treated as capable of work on each day in the week during which he works but regulation 16(3) applies to the first and final weeks of a claim and provides for a person to be treated as capable of work only on the days he works. The decision makers and Tribunals in dealing with this matter may have

available various evidential sources and the assessment of the evidence from those sources is for them. It may for example be possible to ask the claimant if his health has improved or ceased to deteriorate as regards the causes of incapacity. Similarly it may be possible to obtain evidence from the claimant's doctor and possibly from an independent medical source. This list is not exhaustive. The point is that it is the effect of the work already done which must be looked at. There may of course be several causes of incapacity and it would be necessary to ascertain whether or not any of those causes are either improved or deterioration prevented or delayed by the relevant work. For work to help to prevent or delay deterioration it must have an effect on deterioration which would otherwise take place. Otherwise it could not be said that the work prevented or delayed deterioration. The work would have to improve or stabilise the relevant cause or causes of incapacity or delay deterioration in it or them. Essentially these are conclusions of fact for the new Tribunal to reach and provided the conclusions are reasonable they should not be upset as in error of law.

52. The new Tribunal should bear in mind the views set out above.

DECISION 2

GROUNDS OF APPEALING THE SECOND TRIBUNAL DECISION

1. The grounds of appeal and submissions put forward in this case on the claimant's behalf were substantially the same as those in the first decision with two additional grounds. The first was that the Tribunal had had before it a medical officer's report of 15th September 1997 and had ignored it in apparently determining that no mental disablement had been identified.

2. The second was that the Tribunal had erred in placing weight on the fact that the claimant "seems to have had his job for some time prior to the present claim and continued with this work". Mr Stockman contended that if the job was therapeutic work for the purposes of earlier claims, then this was not a proper matter to take into consideration when deciding the appeal and submitted that it amounted to an irrelevant matter being taken into account or else a finding based on insufficient evidence.

3. Mr Stockman further contended that a successful outcome of the first appeal would have relevance to the second appeal to the extent that the further claim would not have been necessary.

DECISION AND REASONS

4. The Tribunal's reasons for decision in this case referred again to the certified cause of incapacity as "anxiety and low self-esteem". The reasoning also referred to the General Practitioner not identifying any mental illness and speaking of "social isolation". Unlike the earlier case this Tribunal made a specific finding that "The medical evidence does not suggest that the work was undertaken on the advice of a doctor". I am in agreement with the Tribunal to the extent that the medical evidence does not establish that the work was undertaken on the advice of a doctor. However, in considering the medical evidence the Tribunal does seem to have entered again into the question of whether or not the claimant suffered from any mental disease or disablement. For the reasons which are indicated in the earlier decision I consider that the claimant should have been afforded an opportunity to deal with this issue. There was a breach of the rules of natural justice in that he was not.

5. I set the Tribunals decision aside as in error of law for that reason. Again I do not consider that this is a case where I can give the decision which the Tribunal should have given and I therefore remit this case also for rehearing by the same Tribunal which hears the remitted appeal in decision 1. I direct that in dealing with this appeal also the views expressed in that decision be borne in mind by the new Tribunal.

6. I do not consider that the second Tribunal was bound by the medical officer's report in relation to any earlier claim though it may consider it. It is quite possible for a person to have an illness or a disability which clears up or improves and the matter has to be looked at afresh in connection with each claim. It would be quite possible (and indeed would be the hoped for outcome) that treatment or indeed exempt work would have improved the claimant's condition by the time of the claim under consideration.

7. Mr Stockman submits that a successful outcome on the first appeal would have had relevance to the second appeal to the extent that the further claim would not then have been necessary. I make no comment on this save to say that it is a matter for the new Tribunal to determine the situation initially on the claim dated 6th May 1998 and to bear that decision in mind when considering the situation from 13 May 1999.

(Signed):

MOYA F BROWN
COMMISSIONER

(Dated): **1 MAY 2001**

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