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Failure to return questionnaire
 - Tribunal entitled to find questionnaire
 - Failure on part of sufficient evidence for it
 - Failure on part of treatment of capacity of work even in
 transitional cases

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *37/99

(Commissioner's File No.: CSIB/611/98)

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DECISION OF SOCIAL SECURITY COMMISSIONER

1. This appeal fails. The decision of the social security appeal tribunal dated 23 June 1998 is not erroneous in law.
2. This is an appeal by the claimant with leave on a question of law against the above-mentioned tribunal decision. The appeal was dealt with at an oral hearing held before me on 30 March 1999 at which the claimant, who attended in person, was represented by Ms Sheila Alexander and the adjudication officer was represented by Mr J Brodie, Advocate instructed by Mrs S Sutherland acting as Solicitor in Scotland for the Department of Social Security.
3. The claimant in the present case was born on 24 December 1967. He became incapable of work through chronic lumbago. He had insufficient contributions to entitle him to sickness benefit but was awarded credits of contributions on the ground of his unfitness for work in January 1995. He remained unfit for work and continuing to submit medical statements after the introduction of incapacity benefit in April 1995. He remained in receipt of credits as a person who had been determined to be incapable of work by virtue of the provisions of regulation 31 of the Social Security (Incapacity) (Transitional) Regulations 1995. According to the facts found by the adjudication officer the claimant was issued on 23 May 1997 with a questionnaire (form IB 50) to complete with regards to his own assessment of his functional abilities. On 26 June 1997 he was issued with a reminder to return the questionnaire within the allotted timescale with a warning that he might otherwise incur a loss of "benefit" (sic). The claimant did not return the questionnaire by the relevant date of 4 July 1997. Thereafter the adjudication officer by a decision dated 16 July 1997 applied regulation 7 of the Social Security (Incapacity for Work) (General) Regulations 1995 in a decision which treated the claimant as capable of work from and including 5 July 1997. That decision was intimated on 25 July 1997 and on 30 July 1997 the claimant appealed, maintaining that he had never received any questionnaire.
4. Included among information listed in regulation 6 of the Social Security (Incapacity for Work) (General) Regulations 1995 which may be required for the purposes of determining whether a person is capable or incapable of work is:-

“..such information as the Secretary of State may request in the form of a questionnaire relating to a person's ability to perform the activities referred to in the Schedule”. (Regulation 6(1)(b).)

Regulation 7 of the same regulations provides as follows:-

“7.-(1) Where a person fails without good cause to comply with a request of the Secretary of State to provide the information referred to in regulation 6(1)(b) (All Work Test questionnaire) he shall, subject to paragraph (2), be treated as capable of work.

(2) A person shall not be treated as capable of work under paragraph (1) unless -

(a) at least 6 weeks have elapsed since the Secretary of State sent that person the first request for that information: and

(b) the Secretary of State has sent that person a further request at least 4 weeks after the first, and at least 2 weeks have elapsed since that further request was sent.”

Having regard to the dates upon which the Department claimed to have taken action, the time requirements of the above regulation were fulfilled. Regulation 9 of the same regulations provides for certain matters to be taken into account in determining whether a person has good cause for failing to provide information under regulation 7 or to attend a medical examination under regulation 8. None of the specified matters had any bearing in the present case.

5. As is too often the case in such appeals, no presenting officer attended the tribunal hearing of the claimant's appeal. The tribunal had written evidence of the sending of the relevant documents and decision. The claimant gave evidence that he did not “get the mail” although he had received the letter on what was described as the stoppage of benefit. His representative mistakenly referred to the situation as being one in which the claimant had not received any “letters to go for medical”.

6. The tribunal unanimously refused the claimant's appeal. They held that the relevant questionnaire and reminder had been sent to and delivered to the claimant. They did not accept the claimant's evidence about his non-receipt of these communications. That being in effect the only “good cause” ground suggested, the tribunal held that good cause for his failure to comply was not established for the purposes of regulation 7 above.

7. In this appeal it was maintained before me on the claimant's behalf that there was insufficient evidence to support the tribunal's decision. It was also submitted that it was a breach of natural justice for the tribunal to presume that delivery of the relevant mail was effected and to disbelieve the claimant. The claimant's representative made reference to certain factual matters regarding the claimant's local mail delivery at the material time. These however had not been put before the tribunal.

8. Mr Brodie for the adjudication officer submitted that there was adequate evidence before the tribunal to warrant their decision and that they had dealt adequately with the issue of good cause. He submitted in the alternative that if I were not satisfied regarding the second of those matters I should substitute my fuller decision to the same effect. Mr Brodie also offered an interpretation of the significance of entries on document 10 in the appeal papers headed “screen print..”. He also produced specimens of the letters which normally accompany form IB 50 and the reminder. He accepted that in the absence of any presenting officer the screen print interpretation had not been put to the tribunal and also accepted that the specimen letters had not been put before the tribunal either. I indicated and he accepted that none of this additional material could be taken into account unless the tribunal decision were set aside and the appeal required to be reconsidered.

9. Mr Brodie referred to section 7 of the Interpretation Act 1978 which contains a rebuttable presumption of the delivery of documents duly served under statutory authority. Although the specific requirements in the section for the deeming of effective service had not all been the subject of proof in the present case, he submitted that the provisions of the

section at least represented a statutory exclusion of any argument that it would be contrary to natural justice to infer that delivery had been effected. He pointed out that there was written evidence of the issuing of form IB 50 on 23 May 1997 and of the reminder on 20 June 1997 in the record on page 10E of the papers upon which the tribunal was entitled to rely. There was also evidence that the claimant had lived at the same address for several years and he admitted receipt of the letter terminating his entitlement. Accordingly the tribunal were entitled to hold, contrary to the claimant's evidence, that delivery of the relevant documents had been effected. The tribunal had negated the only basis of "good cause" which was in issue. It was unfortunate that the tribunal had repeated the claimant's representative's reference to letters to attend a medical, but the tribunal's decision notice made it clear that the tribunal were well aware that the case related to a claimed failure to return questionnaire form IB 50. Their decision should not be held to be erroneous for that reason. At this stage Mr Brodie also revealed that subsequent to the claimant's appeal on 30 July 1997, or possibly on the same occasion he was supplied with a fresh form IB 50. This was evidently completed to the satisfaction of the Department and his entitlement to credits of contributions was apparently restored with effect from 17 May 1997.

10. I am satisfied that the tribunal in the present case were entitled to hold that the questionnaire and reminder were duly sent to and received by the claimant in accordance with the requirements of regulation 7 of the Incapacity Benefit (General) Regulations and to hold that good cause was not established for the claimant's failure to respond timeously. There was written evidence to support the tribunal's finding that these documents were sent to the claimant on the dates claimed. In this connection of course regulation 1(3) of the Social Security (Adjudication) Regulations 1995 deems such documents to have been given or sent on the day of posting. There was also evidence sufficient to warrant a tribunal holding that the documents were delivered, contrary to the claimant's evidence. That was a factual matter for the tribunal to decide and they had the opportunity of hearing the claimant's evidence. The tribunal did not have any evidence of local mail being unreliable such as was offered to me. Nor of course did they have the benefit of the additional interpretation of the screen print and specimen letters tendered to me by the adjudication officer. The tribunal's decision must be looked at in the light of the evidence which was put before them and in my judgment that evidence was sufficient. I agree with Mr Brodie that the tribunal dealt adequately with the issue of good cause and that their inadvertent reference to the request as being to attend a medical did not in the circumstances render their decision erroneous in law.

11. In the course of the hearing before me I raised a question regarding the operation of regulation 7 founded upon by the adjudication officer as against the claimant's existing rights under regulation 31(1) of the Social Security (Incapacity Benefit) (Transitional) Regulations 1995. The claimant's representative did not feel able to assist but appreciated that I was raising a matter potentially in the claimant's interest. Mr Brodie responded on the point and I was ultimately satisfied regarding it. As it is a matter of possible general interest I have referred to it in the appendix to this decision.

12. In view of my conclusion upon the appeal including the matter just mentioned the decision of the tribunal is not erroneous in law and this appeal must be refused.

(Signed)
J G MITCHELL QC
Commissioner
Date: 21 April 1999

APPENDIX

1. The Appendix to Commissioner's decisions CIB/16092/96, CIB/90/97 and CIB/2073/97 (★45/98) was produced by the adjudication officer as part of the appeal papers in the present case. Much of that Appendix was concerned with the form in which, once a claimant has been held incapable of work for credits purposes, any subsequent decision altering that situation should be made. Two of the decisions required the Commissioner to consider the position where a claimant had, as in the present case, been held incapable of work prior to 13 April 1995 (the appointed day for the introduction of incapacity benefit). In paragraphs 20 and 21 of that Appendix the Commissioner began consideration of the transition to the incapacity benefit regime in such cases in the following way:

"20. It is necessary briefly to consider the provisions which operate where a claimant's incapacity for work began before 13 April 1995, under the sickness/invalidity benefit regime, and continues after that date. The Social Security (Incapacity Benefit) (Transitional) Regulations 1995 (the Transitional Regulations), despite their name, contain provisions dealing with the general transition from the old test to the new tests of incapacity. Regulation 30 provides:

"30. A person's continued enjoyment on or after the appointed day [13 April 1995] of severe disablement allowance or any other advantage under any provision for the purposes of which Part XIIA of the 1992 Act [the Contributions and Benefits Act] applies shall, except as provided in regulation 31, be subject to satisfying the tests of incapacity under that Part of the 1992 Act."

Being entitled to have earnings credited or being accepted as incapable of work for the purposes of such entitlement is an advantage to which regulation 30 applies. So, in my judgment, is an entitlement to income support without being required to be available for employment or with the allowance of the disability premium on grounds of incapacity for work.

21. Regulation 31(1), as in force prior to 6 January 1997, provides:

"(1) Where it has been determined that a person is incapable of work for any purpose of the 1992 Act immediately before the appointed day and on or after the appointed day the all work test applies to him, he shall not be required to satisfy or be treated as having satisfied the condition of entitlement that he is incapable of work in accordance with that test until he has been assessed as to incapacity for work in accordance with regulations made under section 171C of the 1992 Act (the all work test) or until it is determined that he falls within one of the cases mentioned in paragraph (5), so long as he satisfies the condition in paragraph (2)."

The condition in regulation 31(2) is of providing evidence of incapacity in respect of each day under the Social Security (Medical Evidence) Regulations 1976. Anyone who comes within one of the categories set out in regulation 31(5) is deemed to be

incapable of work under the all work test, in some cases without having to provide medical evidence. None of those categories is relevant in the present case.”

2. In paragraph 32 of his Appendix the Commissioner went on to include the following statement:-

“[Regulation 31(1)] .. provides that a person is not required to satisfy the condition of entitlement of being incapable of work until the all work assessment is actually carried out, so long as evidence of incapacity is provided and the person is not [otherwise] deemed to be incapable of work. The effect is that, although regulation 30 requires satisfaction of the test of incapacity for work, regulation 31(1) removes that requirement until the assessment is carried out ...”

3. The Commissioner's statement therefore implies that regulation 31(1) will always protect the position of a claimant who complies with the condition in paragraph (2) until the all work test assessment is actually carried out (or the claimant is treated as having satisfied it under one of the cases in paragraph (5)). On the other hand of course the present claimant was treated as capable of work under regulation 7 of the Incapacity for Work (General) Regulations and thus ceased to have the protection of regulation 31(1) before any all work test assessment was carried out.

4. The framework of the legislation is important in considering the question thus raised in the present case. The Transitional Regulations are made under the powers in sections 4, 7 and 12 of the Social Security (Incapacity for Work) Act 1994 and regulations 30 and 31 in particular are derived from section 7(3)(b) of that Act. The wording of the first part of regulation 31(1) was amended by SI 1996 No 3207 with effect from 6 January 1997, so that the provisions material for the purposes of this case now read, with the altered wording underlined as follows:-

“31.-(1) Where it has been determined that a person is incapable of work for any purpose of the 1992 Act immediately before the appointed day and he continues to be incapable of work on or after the appointed day, the all work test shall apply to him, but he shall not be required to satisfy or be treated as having satisfied the condition of entitlement that he is incapable of work in accordance with that test until he has been assessed as to incapacity for work in accordance with regulations made under section 171C of the 1992 Act (the all work test), so long as he satisfies the condition in paragraph (2).”

The amendment makes it more clear that the all work test applies in such a case after the appointed day despite continuing incapacity as vouched under the old regime. The provision that the claimant “shall not .. be treated as having satisfied” the test points to the difference between a transitional case and one coming under the General Regulations where the issue of incapacity first arises after the appointed day. However it is noteworthy that regulation 28 of the General Regulations which treats the all work test as satisfied until assessment makes express reference to the alternative possibility of the person being treated as capable of work under regulations 7 or 8.

5. The regulation making power referred to in regulation 31(1) which is contained in section 171C of the 1992 Act (part of sections 171A to E introduced into that Act by the Incapacity for Work Act 1994) is expressed in the following terms:-

“(3) Regulations may provide that where the all work test applies the test shall, if prescribed conditions are met, be treated as satisfied until the person has been assessed or he falls to be treated as capable of work in accordance with regulations under section 171A(2) or (3) above...” (my emphasis)

Section 171A(1) to (3) of the 1992 Act provides as follows:-

“(1) For the purposes of this Act, save as otherwise expressly provided, whether a person is capable or incapable of work shall be determined in accordance with the provisions of this Part of this Act.

(2) Regulations may make provision as to -

- (a) the information or evidence required for the purpose of determining whether a person is capable or incapable of work, and
- (b) the manner in which that information or evidence is to be provided,

and may provide that if a person without good cause fails to provide that information or evidence, or to do so in the manner required, he shall be treated as capable of work.

(3) Regulations may provide that in any case where a question arises as to whether a person is capable of work -

- (a) he may be called to attend for such medical examination as may be required in accordance with regulations, and
- (b) if he fails without good cause to attend for or submit himself to such examination, he shall be treated as capable of work.”

6. Regulations 7 and 8 of the Incapacity for Work (General) Regulations directly reflect the empowering provisions of section 171A(2) and (3) and are accordingly of general and on-going effect, unlike the transitional provisions of regulations 30 and 31. Regulations 7 and 8 enable a claimant to be treated as capable of work, on a default, without good cause, in providing the information or medical evidence required to enable an assessment under the all work test to be made, where the default obstructs the carrying out of the assessment.

7. It is not in dispute that the test of actual incapacity applicable to the claimant in the present case under sections 171A(1) and 171C was the all work test. Its applicability in a transitional case under regulation 31(1) is of course expressly stated in paragraph (1) as amended from 6 January 1997. Regulation 30 of the Transitional Regulations renders the continued enjoyment of the “advantage” of credits conditional on satisfaction of the all work test except where exemption is provided by regulation 31. The problem, in so far as there is one, lies in the provision in regulation 31(1) which bears to remove the requirement of such

satisfaction "until he has been assessed as to incapacity for work in accordance with regulations made under section 171C of the 1992 Act (the All Work Test)....." without any express reference to the possible intervention of an adverse treating decision under regulations 7 or 8. Regulation 171C however, as noted in paragraph 5 above, not only deals with treating the all work test as satisfied until a person is assessed but includes the alternative possibility of a claimant being treated as capable of work under the powers in section 171A(2) (or(3)) applicable where the carrying out of the test is obstructed by a default of the claimant.

8. In these circumstances my conclusions regarding the operation of regulation 7(or 8) of the General Regulations in a case when the claimant has been covered by the transitional provisions of regulations 30 and 31 are as follows:-

"(1) the condition under regulation 30 for the continued enjoyment of the advantage of credits is not satisfied;

(2) the specific applicability of the all work test to such a claimant opens the way to enable the operation of regulation 7 (or 8) of the General Regulations in a transitional case, notwithstanding the omission of any direct reference to their possible operation in the latter part of regulation 31(1) as a further possible limitation of the exemption in that paragraph; and accordingly

(3) a decision after the appointed day treating a claimant as capable of work under regulation 7 can competently be made to interrupt the exemption under regulation 31(1) at least for the period in which that decision has effect.

9. It follows that the Commissioner's statement in paragraph 32 of the Appendix to ★45/98 as to the effect of regulation 31(1) must be read as subject to the qualification that the period during which regulation 31(1) removes the requirement of satisfaction of the test of incapacity stipulated in regulation 30 may be terminated before the assessment is carried out where the default of a claimant obstructs the carrying out of the assessment and leads to the operation of regulation 7(or 8) of the General Regulations.