File

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSIB/1266/00

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Oral Hearing

Appellant: Mary Docherty

Respondent: Secretary of State

Tribunal: Glasgow

Tribunal Case No: U/05/098/2000/01160

DECISION OF SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal (the tribunal) of 3 May 2000 is in error of law, for the reasons given below and in a common appendix with CSIB/905/01. I set it aside and substitute my own decision under s.14(8)(a)(i) of the Social Security Act 1998:-

> **The decision of the Secretary of State is confirmed as a supersession, under regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations, of a tribunal decision in or around 1997.**

The issues

2. The main issue arising in this appeal and in CSIB/905/01 is whether the Secretary of State's decision was fundamentally flawed and invalid and whether the tribunal had any jurisdiction over the appeal. I deal with that issue in the appendix to this decision.

3. Also arising in this appeal is the extent of any obligation on the tribunal to look at all the prior evidence in the case when determining whether the claimant remains incapable of work during the later period in issue.

Background

4. The claimant was in receipt of invalidity benefit, which became incapacity benefit, from 1993. Continued entitlement depended on passing the All Work Test (AWT), now known as the personal capability assessment.

5. Following the claimant's completion of a questionnaire in September 1999, she was examined by a Medical Adviser (MA) on 12 October 1999. The MA's opinion was that the claimant satisfied no descriptors giving points under the Schedule to the Social Security (Incapacity for Work)(General) Regulations 1995. The file was passed to a decision-maker (DM) with no express reference to supersession. The DM completed a score sheet which followed the advice of the MA and on 25 January 2000 issued a decision in the following terms:-

> "[The claimant] is not entitled to incapacity benefit from and including 25.1.00. This is because she has been assessed under the All Work Test and has not attained the required number of points. The total points were nil. Therefore [the claimant] cannot be treated as incapable of work."

The claimant appealed to the tribunal saying that three years earlier she had passed the AWT and her back pain and arthritis had progressed rather than improved.

6. The claimant was represented at the hearing by a member of a local advice project (the representative). (What has caused such delay to the hearing of this appeal is that, through no fault of either the claimant or any of the representatives involved, representation has altered throughout the process of the case). The representative emphasised that in 1997, following an earlier adverse MA report, a tribunal allowed her appeal and held that she satisfied the AWT. The claimant gave evidence of her condition and difficulties. The

representative also made a submission, which the statement of reasons for the tribunal's decision records as follows:-

> "An initial procedural submission was made concerning the failure on the part of the Decision Maker to identify the decision which was being reviewed or superseded. It was further submitted that it was unclear whether the earlier award was being reviewed, revised or superseded and that the present decision was flawed as a result."

The tribunal decision

7. The tribunal dismissed the appeal although it found 9 points to be justified.

8. The tribunal rejected the "initial procedural submission":-

> "It was evident from the date of the decision that the appeal was to proceed in terms of regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This regulation permits supersession of an incapacity benefit decision where the Secretary of State has received medical evidence following an All Work Test examination. We were satisfied that this had taken place in the appellant's case, and the decision made on 25.1.00 was not flawed on procedural grounds."

9. The tribunal continued:-

> "Although attention was drawn to earlier BAMS assessments, no request for an adjournment was made on behalf of the appellant to enable previous papers to be obtained. We accepted that the appellant had previously been assessed and found incapable of work after a successful appeal. We did not, however, consider it in the interests of justice to adjourn for a previous medical report, which had not found the appellant to be incapable of work, and we accordingly proceeded to hear the substantive points of the appeal."

10. The tribunal then gave its findings and reasons with respect to the descriptors put in contention on the appellant's behalf.

Appeal to the Commissioner

11. The application for leave to appeal made to the chairman by the representative founded on inadequate findings of fact and reasons. That ground has not, in the event, been pursued. In my view that was the correct course of action. The facts and reasons are detailed.

12. The district chairman granted the application for leave to appeal "on basis of no sight of any previous assessments or decisions". The Secretary of State's written submission gave no support to that ground.

13. I then directed an oral hearing with argument addressed also to the point that the adverse decision under appeal to the tribunal was not phrased in the form of supersession.

The oral hearing

14. This case and CSIB/905/01 came before me for an oral hearing on 15 March 2002. The claimant was represented by Mr Christopher Keel. The Secretary of State was represented by Mr Bartos, Advocate, instructed by Miss Ritchie, Solicitor, of the Office of the Solicitor to the Advocate General. I am grateful to them for their submissions.

The arguments

15. The arguments with respect to the validity of the relevant decisions are set out in the common appendix.

16. So far as the argument had been put that the tribunal were required to see previous medical assessments, Mr Bartos did not accept that contention. The representative did not seek an adjournment and the exercise of its discretion by the tribunal to proceed was not unreasonable. Mr Keel accepted that no adjournment had been requested by the representative, despite the latter's submission at the hearing that prior medical evidence might be relevant.

My conclusion and reasons

Supersession

17. It is essential that a claimant's benefit is not altered or terminated without justification under the statutory grounds and without following the correct legal processes. The claimant was previously in receipt of incapacity benefit. Therefore, any decision changing that entitlement must identify the statutory grounds on which it does so and articulate the nature of the decision being made.

18. The DM's decision under appeal made no mention of supersession or of any statutory ground permitting supersession in the case. The tribunal accordingly erred in not stating that the DM's decision was flawed in those respects. Exercising its own power to perfect the supersession, it should have reformulated the decision in the necessary terms.

19. There is no dispute that the claimant was previously receiving incapacity benefit. The tribunal further accepted that the last decision determining that the claimant satisfied the AWT was made by a social security appeal tribunal in or around 1997. That was sufficient identification of the decision to be superseded. Relying on the facts as found by the tribunal, I am able to substitute my own decision to the same effect.

Previous medical assessments

20. Once it has been decided that a supersession ground applies, it is still necessary for an adjudicating authority to consider incapacity as part of its outcome decision. The burden of proof will lie on the one who suggests change to the previous decision, which is in this case the DM. The adjudicator will wish to look at all the relevant evidence with respect to

incapacity in the period in issue and that may include medical evidence referable to earlier periods.

21. It will depend upon the circumstances. Such evidence is likely to be relevant where the claimant says she has not improved or where the medical condition is a variable one. Whether, however, a tribunal errs by failing to call for such evidence if it is not already in the papers, must depend upon the particular situation before it. The tribunal errs only if no tribunal, acting judicially and properly instructing itself on the law, could have so acted.

22. That was not the case here. The immediately previous medical assessment was *unfavourable* to the claimant. The only information which could possibly be helpful related to the 1997 tribunal decision. The claimant had the opportunity at the appropriate time to request a copy of the record of proceedings and of the full statement of that earlier decision but presumably did not do so. The record of proceedings is almost certainly now destroyed. The decision notice, which would also be supplied to the claimant and of which it is to be assumed the local office keeps a copy, might give the pointage. Mr Keel argued that this could affect the tribunal's opinion of the claimant's credibility. I am unable to accept this. Leaving aside the medical evidence, at the end of the day all hinges on the claimant's contemporaneous evidence to the tribunal and the view it took of that evidence. The tribunal knew that a previous tribunal had accepted she satisfied the AWT, that her contention was that she had not improved, but it nevertheless dismissed the appeal. The decision notice of the previous tribunal could not have told the tribunal anything that it did not know already except for possibly the identification of those descriptors which the previous tribunal found satisfied. This would add nothing significant to the weight of the evidence.

23. Moreover, the representative sought no adjournment. Adjourning this claimant's case delays that of others waiting in the queue, as well as the evaluation of the claimant's own appeal. All these are competing matters for the tribunal's judgement. The tribunal made, and fully explained, a reasoned decision not to adjourn because the evidence sought could not materially assist. The tribunal displayed no error in this respect.

Summary

24. Although the appeal technically succeeds, this is without practical benefit to the claimant. My substituted decision is as set out in paragraph 1 above.

(signed)
L T PARKER
Commissioner
Date: 21 March 2002

25. Although differing in other respects these two appeals, which were heard at the same oral hearing, concern a point of law in common. This was the effect of the Secretary of State's decision overturning an incapacity determination, in terms which did not refer to setting aside an earlier awarding decision, nor the statutory grounds on which the Secretary of State acted, nor used the term supersession.

Statutory criteria

26. The term supersession was introduced by s.10 of the Social Security Act 1998, which reads as follows:-

> "10.-(1) Subject to subsection 3 …. , the following, namely –
>
> (a) any decision of the Secretary of State under section 8 above or this section, whether as originally made or as revised under section 9 above; and
>
> (b) any decision under this Chapter of an appeal tribunal or a Commissioner,
>
> may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.
>
> (3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section.
>
> ……
>
> (5) Subject to subsection (6) …. a decision under this section shall take effect as from the date on which it is made or, where applicable, the date on which the application was made.

(6) Regulations may provide that, in prescribed cases or circumstances, a decision under this section shall take effect as from such other date as may be prescribed."

27. Regulation 6(2)(g) of the Decisions and Appeals Regulations was made under the authority of section 10(3) above and reads:-

"(2) A decision under section 10 may be made on the Secretary of State's ..... own initiative or on an application made for the purpose on the basis that the decision to be superseded-

.....

(g) is an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision) and where, since the decision was made. the Secretary of State has received medical evidence following an examination in accordance with regulation 8 of the Social Security (Incapacity for Work)(General) Regulations 1995 from a doctor referred to in paragraph (1) of that regulation."

28. S.12 of the Social Security Act 1998 provides for appeals to a tribunal from decisions under the above s.10.

The arguments

29. Both Mr Keel and Mr Bartos urged me to follow the decision of Mr Commissioner May QC in CSIB/1268/00, find the decision of the decision-maker invalid and inept and remit the case to the Secretary of State to proceed in conformity with the law.

30. It is not in dispute that CSIB/1268/00 is on all fours with the decisions before me. Following an adverse medical report, the file there was put before the adjudication officer (AO) with the views of the claimant on a questionnaire, the report of the examining doctor and the AO's scoring sheet. The reference to the AO did not expressly state "supersession". The adverse decision under appeal then held the claimant not to be entitled because on assessment under the all work test the required number of points had not been reached.

31. The tribunal in CSIB/1268/00 recast the decision in terms of supersession under regulation 6(2)(g). The Commissioner accepted the submission made by Mr Bartos in that case that the tribunal erred in law in so doing. The case had not been referred to the decision-maker to supersede (as occurred in CSIB/51/01, an earlier decision of Commissioner May's) and the decision-maker did not purport to carry out such a supersession.

32. Mr Bartos adhered to that submission today. It was not open to the tribunal to carry out a supersession on their own behalf. The decision was defective in substance rather than defective in form. Only correction of the latter was permitted by the decision of the Tribunal of Commissioners in R(IS)2/97. Insofar as Commissioner Mesher in paragraph 31 of the

common appendix to CIB/16092/96, CIB/90/97 and CIB/2073/97 suggested that a tribunal had jurisdiction to conduct or perfect any review of a relevant decision, even if the defect in the review process was one of substance not one of form, he went too far. That approach was not justified by R(IS)2/97 where the AO had expressly purported to review, albeit relying on the wrong grounds.

33. Mr Bartos went further. He submitted that the tribunal had no jurisdiction to hear the appeal under s.12 of the Social Security Act 1998 because there was no decision under s.10 before them and it was not suggested that the decision fell under s.8, which constituted an alternative ground for appeal to a tribunal.

34. A tribunal cannot carry out supersession on its own initiative. It is an appellate body. It cannot itself change the nature of the decision under appeal to it. The tribunal can only rehear a purported supersession decision and that did not exist in the present cases. The awarding decision had not been set aside by the decision-maker and therefore still stood. The case should be remitted to the Secretary of State on that basis.

My conclusion and reasons

35. I am unable to accept the submissions made.

36. With respect to CSIB/1268/00, I prefer the analysis of the learned author of the supplement to volume 1: Non-Means Tested Benefits (Social Security Legislation 2001) at page 143, who comments as follows:-

> "In CSIB/1268/00, the Commissioner held that a tribunal could not cure a defect in a decision where the defect was one of substance rather than form. The Secretary of State had decided that the claimant was not entitled to incapacity benefit from October 20 1999 because he had scored only six points under the 'all work test'. However, the claimant had already been in receipt of incapacity benefit under the usual indefinite award. The tribunal recast the decision as a supersession under reg. 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. The Commissioner held that they were not entitled to do that because the case had not been referred to the decision-maker for a supersession decision. He distinguished his earlier decision in CSIB/51/01 in which he had held that a decision of the Secretary of State which failed to identify the decision being superseded was not defective but that, even if it was, the defect could be cured by the tribunal. He said that in the earlier decision the supersession was implicit by virtue of the reference made to the decision-maker. It is suggested that an alternative analysis would be that the substance of the decision in the later case was

that benefit was not payable and that, as matters taken into account by the Secretary of State amounted to clear grounds for supersession under reg.6(2)(g), the defect was really one only of form."

37. On that analysis of the facts in CSIB/1268/00 and in these appeals, with which I respectfully agree, the tribunal is merely perfecting the supersession process. That was an approach endorsed by the Tribunal of Commissioners in R(IS)2/97. It is somewhat bizarre if a tick in a box marked "supersession" is all that distinguishes a case where a tribunal can act itself to correct a defective decision from one where it cannot.

38. With the error in the Secretary of State's decision classified as a defect of form rather than substance, it also means that there is no dubiety about the tribunal's jurisdiction to hear the appeal under s.12. What is under appeal is in its nature a superseding decision, albeit not expressed as such. The evidence before the decision-maker (as is not in dispute) was that the claimant previously satisfied the all work test, there were then grounds to supersede because there had been a further medical examination and the remaining important issue in contention was whether the Secretary of State had shown that on supersession the claimant no longer satisfied the all work test (now personal capability assessment).

39. This is a more satisfactory result than under the approach taken by Mr Bartos. The logical outcome of his submission is that the only way of changing the Secretary of State's decision is by judicial review. If the tribunal has no jurisdiction under s.12, then all it can correctly do is say so, and with no power to make any remission or give any directions in the case. That would be unfortunate. As was said by the Commissioner at paragraph 16 of CIB/227/00:-

> "The purpose of an appeal before a tribunal is to determine whether or not a claimant is entitled to benefit. The tribunal should operate so as to fulfil this purpose and it is a waste of time and public money to do otherwise."

40. As "an appeal to a tribunal puts the matter as open as it was formerly before an AO" (see paragraph 14 of R(IS)2/96), the tribunal conducts a complete rehearing of the merits of the outcome decision on the circumstances as they were at the time the decision under appeal to it was made. If the evidence before the tribunal demonstrates that the circumstances before the decision-maker provided grounds to supersede, then the tribunal may perfect that supersession itself.

41. In both the cases before me, the tribunal considered the outcome decision carefully, viz. whether or not the claimant satisfied the AWT at the relevant date. However, in neither case did it reformulate the adverse decision properly as a supersession decision, standing the omission to do that by the decision-maker. In each case that constituted an error of law.