

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8(4) and (5)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. It is:

I SET ASIDE the decision of the Boston appeal tribunal, held on 9 February 2004 under reference U/42/030/2003/00505, because it is erroneous in point of law.

I give the decision that the appeal tribunal should have given, without making fresh or further findings of fact.

My DECISION is that the decision-making process by the local authority is not complete. I direct the local authority to refer the issue of the claimant's capacity for work to the Secretary of State and to decide her claim in accordance with the Secretary of State's determination.

The issues

2. The principal issue on which this case turns is whether the claimant was incapable of work for the purposes of the original version of regulation 11(3)(b) of the Housing Benefit (General) Regulations 1987. A new version of regulation 11 was substituted with effect from 2 January 1996 by the Housing Benefit (General) Amendment Regulations 1995. Regulation 10 of the 1995 Regulations contained a savings provision, which preserved regulation 11 for certain cases. This is one of those cases, because the claimant's accommodation is 'exempt accommodation' in that the landlord is a registered charity which provides care, support or supervision in addition to accommodation.

3. Regulation 11 imposed restrictions on the amount of the claimant's eligible rent. However, this did not apply in certain circumstances. One of those is governed by regulation 11(3)(b). This applies if the claimant

'is incapable of work for the purposes of one or more of the provisions of the Social Security Act, or Part I of the Social Security and Housing Benefit Act 1982 or Part II of the Act'.

Regulation 2(1) defined 'Social Security Act' as meaning the Social Security Act 1975 and 'the Act' as meaning the Social Security Act 1986. The 1975 Act dealt with sickness and invalidity benefits, the 1982 Act with statutory sick pay and the 1986 Act with incapacity in relation to income support and housing benefit.

4. Two questions arise on that provision. First, is incapacity for work to be determined under the present law on incapacity for work or by the law in force when the regulation was enacted? Second, in either case who decides whether the claimant is incapable of work, the housing benefit decision-maker or the Secretary of State?

5. Before the tribunal there was also an issue whether there was other suitable accommodation for the claimant in the area. The tribunal decided that there was not. The local

authority has challenged that conclusion. However, it was a finding of fact based on evidence given at the hearing. As the tribunal noted, the local authority did not send a presenting officer to the hearing nor did the papers include any evidence to show that there was other suitable accommodation or the level of rent for that accommodation. I need say no more about this issue than that the tribunal was entitled to make the finding that it did.

History

6. The local authority decided that the claimant was not incapable of work, because she had claimed and was receiving a jobseeker's allowance. The tribunal decided that this was not decisive and found her incapable of work under the test that applied in January 1996. The local authority appealed to a Commissioner with the leave of the tribunal's chairman. In due course the Secretary of State joined as a party to the proceedings. Mr Commissioner Howell directed a series of submissions from the parties. They are now complete and the case has been transferred to me for decision.

7. I do not refer to the submissions of the parties, because they did not deal with the provisions that are the key to this appeal. The Commissioners have an inquisitorial jurisdiction and have, if necessary, to undertake their own research into the issues that they have to determine. In this case, Mr Howell commissioned one of the legal officers to the Commissioners to undertake the necessary legal and historical research. I am indebted to Mr Marcus Revell for identifying the relevant provisions on which this decision is based.

8. At one stage the claimant's representative asked for an oral hearing. I refuse that request. The reasoning on which I have based my decision may appear somewhat convoluted, but once unravelled its application is clear. I can see no advantage to an oral hearing to discuss the inevitable.

Question 1

9. Is incapacity for work under regulation 11(3)(b) to be determined under the present law on incapacity for work or by the law in force when the regulation was enacted?

10. The relevant provisions of the 1975, 1982 and 1986 Acts mentioned in regulation 11(3)(b) were repealed and re-enacted in the Social Security Contributions and Benefits Act 1992. Section 2(4) of the Social Security (Consequential Provisions) Act 1992 provided:

'(4) Any reference, whether express or implied, in any enactment, instrument or document to a provision of the repealed enactments shall be construed, so far as is required for continuing its effect, as including a reference to the corresponding provision of the consolidating Acts.'

If that was not clear enough, section 17(2)(a) of the Interpretation Act 1978 also provided:

'(2) Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears-

(a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted'.

This applies to subordinate legislation (Regulations) as it does to statutes (Acts).

11. The result of these provisions is that, from 1992, regulation 11(3)(b) had to be read as referring to the 1992 Act rather than to the 1975, 1982 and 1986 Acts. But that did not affect the substance of the law on incapacity for work, which remained the same.

12. However, in 1995 the law on incapacity for work was fundamentally reformed. Incapacity benefit was introduced by the Social Security (Incapacity for Work) Act 1994. That Act largely took effect by way of amendments to the 1992 Act. Section 13 contained a savings provision:

‘(1) The amendments to the Social Security Contributions and Benefits Act 1992 made by this Act shall be treated as repealing and re-enacting with modifications the provisions of that Act relating to incapacity for work, so that, subject to any amendment, repeal or revocation-

(a) any reference in any enactment to any such provision shall be construed as a reference to the corresponding new provision or, as the case may be, to the provision as amended by this Act’.

The provision that the amendments were to be treated as repealing and re-enacting the relevant provisions of the 1992 Act had the effect that section 17(2)(a) of the Interpretation Act 1978 applied. So, once again there are two provisions ensuring that references to the former law took effect as if they were references to the new law. This time, though, the changes affected the substance of the law.

13. Sometimes a change in the law is not allowed to act to the detriment of someone affected by it. Section 16(1)(c) of the Interpretation Act 1978 contains a general provision to this effect:

‘(1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears-

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment’.

That provision might benefit some claimants, but it cannot apply to the claimant in this case. She was only 9 years old when the change to incapacity benefit came into force and as such had no right or privilege for the purposes of section 16(1)(c).

14. Regulation 11(3)(b) was not specifically amended on the introduction of incapacity benefit. However, on my analysis, that was not necessary. The effect of the provisions I have set out was sufficient for that provision to refer as to the future to the new incapacity for work regime. There was a new provision inserted to deal with persons who were treated as capable of work (regulation 11(3)(bb)). But that was a new concept which justified a special mention. The absence of any other amendment to regulation 11(3) confirms my view that no amendment was necessary. Otherwise it would surely have been made when subparagraph (bb) was inserted.

15. My answer to the first question is that the claimant's incapacity for work had to be determined by reference to the new law and not by reference to the law as it was before the 1995 reforms. It follows that the tribunal went wrong in law by applying the invalidity benefit test for incapacity for work. It should have applied the incapacity benefit test.

Question 2

16. Who decides whether the claimant is incapable of work, the housing benefit decision-maker or the Secretary of State?

17. This is answered by regulation 11 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999:

'Where, in relation to a determination for any purpose to which Part XIIA of the Contributions and Benefits Act applies, an issue arises as to-

- (a) whether a person is, or is to be treated as, capable or incapable of work in respect of any period; or
- (b) whether a person is terminally ill,

that issue shall be determined by the Secretary of State, notwithstanding that other matters fall to be determined by another authority.'

Part XIIA of the Social Security Contributions and Benefits Act 1992 deals with incapacity for work. It governs determinations of capacity for work under regulation 11 of the Housing Benefit Regulations; regulation 11 of the Decisions and Appeals Regulations governs the procedure by which the determinations are made.

18. (Regulation 10 of the Decisions and Appeals Regulations provides for decisions on capacity for work determinations in one decision to apply to any other decision. However, that applies only to decisions under Chapter II of Part I of the Social Security Act 1998, which largely deals with decisions by the Secretary of State. That chapter does contain some provisions relevant to housing benefit (sections 34 and 35), but they do not deal with most of the decisions that are made on housing benefit claims and awards. Accordingly, regulation 10 will seldom, if ever, apply to housing benefit decisions. However, if the Secretary of State has already made a determination on capacity for work, the determination in respect of the housing benefit will no doubt follow that.)

19. My answer to the second question is that the claimant's incapacity for work had to be determined by the Secretary of State.

Challenging the Secretary of State's determination

20. If a claimant is dissatisfied with the Secretary of State's determination, there will be a right of appeal. The claimant will be able to appeal against it as a determination embodied in the housing benefit decision. Alternatively, the determination may also have been made in the context of a claim for incapacity benefit, income support or credits. There is a right of appeal against those decisions also. Whether the appeal is against the housing benefit decision or

against a social security decision, the tribunal must be constituted, if appropriate, in accordance with regulation 36(2)(a)(i) of the Decisions and Appeals Regulations.

Disposal

21. I allow the appeal and set the tribunal's decision aside. As the local authority has not yet completed the proper adjudication of the claimant's claim, it is appropriate to refer the case back to the local authority for this to be completed. It will have to refer the issue of the claimant's capacity for work to the Secretary of State. I have set out the claimant's rights of appeal if she is dissatisfied with the ultimate outcome.

**Signed on original
on 1 February 2006**

**Edward Jacobs
Commissioner**