(162) Therapeutic work – calculation of hours – school ancillary workers. 7

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/1723/2000

Starred Decision No: 16/00

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Commissioners file: CIB/1723/2000

SOCIAL SECURITY ACTS 1992 TO 1998

APPEAL FROM A UNIFIED APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a supported appeal from a decision of the Newcastle upon Tyne unified appeal tribunal given on 26 January 2000 dismissing the appeal of the claimant from a decision of the secretary of state issued on 19 August 1999 that
   a. As a result of a review decision dated 16 July 1999 an overpayment of incapacity benefit had been made from 17 January 1998 to 3 July 1999 (both dates included) amounting to £5,578.26.
   b. On 12 March 1998 the claimant misrepresented the material fact that her hours of work exceeded the limit for exempt work.
   c. As a consequence incapacity benefit amounting to £5,578.26 from 17 January 1998 to 3 July 1999 had been paid which would not have been paid but for the misrepresentation and
   d. Accordingly that amount was recoverable from the claimant.

2. For the reasons set out below, this appeal is allowed, the decision of the tribunal is set aside and the case is remitted to a new tribunal to determine in accordance with the directions given below.

3. The claimant suffered from arthritis, complicated by fibromyalgia and also has acute anxiety attacks complicated by a personality disorder (file, p.10). She had been in receipt of invalidity benefit from 1993 to 1995, and from that time had been in receipt of incapacity benefit. On 7 January 1998, she had begun work as an escort on school buses. She does not seem to have disclosed this immediately to the benefits office, but did so by a statement dated 11 February 1998, where she stated that she was working 16 hours a week for a wage of £40.10, and claimed that the work was

therapeutic. She described the work as sitting with children on the bus morning and evening and writing out a short report about their behaviour (p.1G). The work appears to have been accepted as therapeutic, but there is a note dated 12 March 1998 that the claimant was advised that the hours must be less than 16 hours (p.2).

4. According to a letter dated 12 July 1999 from her employer, the claimant had in fact worked 17.5 hours a week since her employment began, at a wage initially of £2.29 per hour, rising first to £2.38 per hour, and then to £3.60 per hour from 1 April 1999. On 1 July 1999, the claimant had been interviewed by a special investigation unit which was unaware that her work had been treated as exempt. In a written statement of that date, the claimant had confirmed the wages information then shown to her as correct, and had stated that she only got paid when she worked and not during the school holidays. She also confirmed that she was aware that she should only earn £58 per week and would check if there was a mistake with her wages. I observe that if she was working 16 hours a week, then at £3.60 per week she would earn £57.60 per week, or just below that limit.

5. She appears to have checked her earnings, and to have discovered that her wages had gone up to £63 per week. As a result, she had reduced her hours so that she would only work 3 days a week, earning £37 per week. She sent in her wages slips and a statement of her hours.

6. In the light of the information supplied, it appears that a review must have taken place of the claimant's entitlement to incapacity benefit, resulting in her being treated as capable of work from 7 January 1998, but she was re-awarded incapacity benefit from 4 July 1999, the date from which her hours were reduced. There is no copy of the review decision dated 16 July 1999 with the file, nor is there any information as to the actual wages paid in the file. The review decision ought to be added to the file for the new tribunal, which should also have such evidence as is available as to the actual hours worked by the claimant each week. I would expect that this would appear from wages slips, but insofar as it does not, it can no doubt be obtained from her employer.

7. I would add that if the review decision was that the claimant was not entitled to any incapacity benefit from the time she started work, then for the reasons given below, it was wrong in law, as the claimant was clearly entitled to incapacity benefit for many of the weeks in question, since regulation 16(1) of the Social Security (Incapacity for Work)(General) Regulations only operates in respect of periods during which the claimant is doing relevant work, and does not by itself end entitlement to any relevant benefit (CIB/4090/1999, *28/00, para.5; and see also CIB/5170/1999, para.15).

8. There is no doubt that if the claimant in fact worked 17.5 hours per week, but told the benefits office that she was only employed to work 16 hours each week, then she misrepresented the number of hours she was employed to work. The real question for the purposes of s.71(1) of the Social Security Administration Act 1992 is what payments the secretary of state would not have made but for the misrepresentation. It seems to me that to answer this question it is necessary to determine what payments

the claimant was legally entitled to in the light of the true facts. She was entitled to continue to receive incapacity benefit for so long as she was not treated as capable of work as a result of the work she in fact did.

9. I note that it cannot strictly be correct to state that payments made prior to 12 March 1998 would not have been made but for the misrepresentation made on that date on which the adjudication officer relied, but it is equally clear that there was an earlier misrepresentation in February and non-disclosure from early January, so that if any point was taken on the date of the misrepresentation, then further determinations could now be made by the secretary of state to cover the earlier misrepresentation and non-disclosure.

10. The relevant provisions are to be found in regulations 16 and 17 of the Social Security (Incapacity for Work)(General) Regulations 1995. Regulation 16(1) provides that, subject to certain exceptions which have no relevance here,

> "a person shall be treated as capable of work on each day of any week commencing on Sunday during which he does work to which this regulation applies ... unless that work –
>
> (a) falls into any of the categories of exempt work set out in regulation 17(1); and
> (b) is done within the limits set out in regulation 17(2)."

11. Regulation 17(1) sets out certain categories of therapeutic work, it being common ground that the claimant's work falls into the category mentioned in regulation 17(1)(a). Regulation 17(2) and (3) provide, so far as material, that

> "(2) The weekly limits in relation to exempt work are –
>
> (a) that earnings from work referred to in paragraph (1)(a) do not exceed [an amount which has gradually increased over the years];
> (b) that, subject to paragraph (3), the combined total of the number of hours spent doing work referred to in paragraphs (1)(a)(i) or (b) is less than 16.
>
> (3) A person shall not be treated as capable of work because he has exceeded the limit referred to in paragraph (2)(b) in any week, if he has worked or would be expected to work, as the case may be an average of less than 16 hours a week –
>
> (a) in a case where a recognisable cycle in respect of that person's work has been established, in the period of that cycle in which the week in question falls; or
> (b) in any other case, in the period which comprises that week and the four weeks preceding it."

12. These provisions are in some respects similar to, and in some respects differ from, the provisions in regulation 5 of the Income Support (General) Regulations 1987. It is

first necessary to note that under regulation 16(1) a person who does work is only ever treated as capable of work during weeks in which that person actually does work which is not exempt (CIB/4090/1999, *28/00, para.5). Half terms and holiday periods during which the claimant did not work fall outside regulation 16(1), so that the claimant was incapable of work during those periods. The tribunal ought therefore to have found in respect of the weeks where the claimant did no work that she could not be treated as capable of work under regulation 16.

13. The next question which should have been addressed by the tribunal is as to the extent to which the work done fell within the weekly limits. Regulation 17(2)(b) refers to the number of hours spent doing the exempt work, not to the number of hours for which the claimant was employed to do it. It is not therefore enough to look at the contractual hours of work if the claimant did not in fact work those hours. This is similar to the position under regulation 5 of the Income Support (General) Regulations 1987, where the crucial issue is the number of hours for which the claimant is engaged in the work, an expression which has been held to exclude, for example, a paid lunch break (CIS/3/1989 – there was subsequently an amendment to the regulation reversing the effect of this decision). It appears to me that if a claimant is off sick, or for any other reason, the same principle would apply, so that it is only the hours actually worked which count. This appears all the more the case on the wording of this regulation and in the context of claimants who have health problems which lead to their being treated as incapable of work.

14. The tribunal ought therefore to have had before it evidence of hours actually worked each week, insofar as these differed from the contractual 17.5 hours. In any week in which the hours worked were in fact below 16 hours, the work was exempt and the claimant was not to be treated as capable of work. This may be the case, for example if she was off sick, or if, because of a holiday she only worked a reduced number of days. It may be, as I have said, that the necessary information appears from the claimant's pay slips if she was paid only for the hours actually worked.

15. It is only in relation to those weeks where she worked 16 hours or more that it is necessary for the tribunal to look at regulation 17(3). The first question under that regulation is whether, and if so when, a recognisable cycle of work has been established in respect of the claimant's work. Here the tribunal concluded that the claimant's position was analogous to a school ancillary worker. I agree with this. It went on to say that her recognised cycle of work was limited to term time plus the normal holidays etc. I disagree. Once the cycle is established, in the case of a school ancillary worker, it was held in R(IS)15/94 and in R(IS)7/96 that the appropriate cycle is one year at least where the claimant's contract continues throughout the year.

16. There is no evidence here as to whether the claimant had one contract or a separate contract for each term. If there is a contract which continues throughout the year, even though the claimant does not work or get paid for part of that year, then the cycle would normally seem to be established from the start. If there was a

probationary period of, for example, a term, then it may only have been at a later time that a yearly cycle would be established.

17. However, the point is probably academic, because, unlike regulation 5 of the Income Support (General) Regulations, which requires one to look at the average hours over the entire cycle, regulation 17(3)(a) requires one to look at the average in the period of the cycle in which the week in question falls. In my view, in the present case, in the absence of special facts, the period of the cycle for this purpose would be the term in which the week falls.

18. The question here is whether the claimant would have received incapacity benefit from week to week had she made proper disclosure. The tribunal must therefore notionally put itself in the position of the adjudication officer from week to week and ask itself from that view point when, on all the facts, a recognisable cycle in respect of the claimant's work would have been established. Until it was established, it could not apply regulation 17(3)(a) but in respect of each week where 16 hours or more of work was done, the tribunal would have to average the hours worked that week and in the four previous weeks under regulation 17(3)(b). The practical effect of that would be that in many weeks where the claimant did 17.5 hours work the five weeks average would be below 16 hours and the claimant would not be treated as capable of work. On the other hand, except insofar as there was a trial period of some sort at the beginning, I would be surprised to find that there was no recognisable cycle of work from the beginning in the present case.

19. The averaging procedure over a term would involve taking the total number of weeks all or part of which fell in that term and averaging the number of hours which the claimant would be expected to work in that term. By way of example, it is stated at p.33 (a document not before the tribunal) that the claimant worked from (Sunday) 3 January 1999 to (Saturday) 3 April 1999, apart from one week in the middle, which was presumably half-term. If she worked 17.5 hours for each of the other 12 weeks, then her total for the term would be 210 hours, or a little over 16 hours a week for the 13 week term. There are, however, various reasons why the claimant may not have been expected to work or have worked 17.5 hours each week. Term may not have begun on the Monday of the first week, or may not have ended on the Friday of the last week. In either case the claimant would probably have worked less than a full week on those occasions. In addition, an employee may reasonably be expected not to work all of her contractual hours because, for example, of sickness. If, instead of working 210 hours over 13 weeks, the claimant worked only 207.5 hours, she would have been averaging less than 16 hours per week over the weeks in question.

20. While I do not agree that the health of the claimant can be taken into account in determining the recognisable cycle in respect of her work, it does appear to me that her health can be taken into account in determining the number of hours which she can be expected to work during any period of that cycle. If she was off ill, she could not be expected to work any hours until such time as she could reasonably be expected to have recovered sufficiently to return to work. If she can be anticipated on

the balance of probabilities to be off work in the course of 13 weeks, then the adjudication officer ought to take that into account in assessing the average number of hours she could be expected to work in that term. In putting itself as far as possible in the position of the adjudication officer after the event, in the absence of special circumstances, the tribunal would be entitled to form an overall view of the likely absences of the claimant over a term by looking to see what actually happened.

21. To sum up, therefore, the new tribunal should approach the matter as follows:

(a) The tribunal should identify weeks where the claimant did not in fact work, and weeks where the claimant worked less than 16 hours, the number of hours referred to being those actually worked by her, not her contractual hours. In all of those weeks, the claimant is not to be treated as capable of work by virtue of regulations 16 and 17, provided, in the case of weeks where she worked, that her income did not exceed the maximum permitted at that time. Unless she was treated as capable of work for some other reason, she was incapable of work in those weeks and her entitlement should be calculated on that basis. Where periods of incapacity are separated by periods of less than 8 weeks they are treated as a single period by s.30C of the Social Security Contributions and Benefits Act 1992.

(b) In relation to the remaining weeks, the tribunal should first determine how many hours were worked each week, and whether on any occasion the claimant earned more than the permitted maximum income at the time. In the case of those weeks where the permitted maximum income was exceeded, which it would seem could only be after her hourly rate was raised to £3.60 in April 1999, and then only where she worked the full 17.5 hours, the claimant is to be treated as capable of work and she is liable to refund any incapacity benefit paid to her for any such week.

(c) In relation to the weeks where the permitted maximum income was not exceeded, the tribunal should determine when a recognisable cycle in respect of the claimant's work was first established, and what that cycle was. The contract of employment will be relevant for this purpose, as will any initial probationary period of employment.

(d) In relation to any weeks before the recognisable cycle was established, the tribunal should then apply the averaging provisions of regulation 17(3)(b).

(e) In relation to any week after that cycle was established, the tribunal should determine what constitutes a period of that cycle for the purpose of regulation 17(3)(a), and average the claimant's weekly earnings over that period. For the reasons given above, it appears to me likely that the period in question will be the term in which the week falls, but that is a question of fact for the tribunal. Separate calculations will need to be carried out for each period.

(f) If the average hours worked over that period is 16 or more, then in the weeks when the claimant worked 16 hours or more, she is to be treated as capable of work. Otherwise in respect of those weeks, the work done is within the limits of regulation 17 by virtue of regulation 17(3)(a) and the claimant is not to be treated as capable of work by virtue of regulation 16(1).

(g) The tribunal must then determine how much less the claimant would have received but for the misrepresentation by deducting from the sum actually paid to her the amount which she was in fact entitled to receive. The difference is repayable by her.

22. For the reasons given above, the appeal is allowed and the case is remitted to a new tribunal to determine in accordance with the directions given above.

(signed) Michael Mark
Deputy Commissioner

1 February 2001