WRB — ns – SSA 98 transitional rules –
credits – trans. rules apply ?
& credits cases – supersessions possible

(63)

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/2161/2000

Starred Decision No: 47/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr Damien Abbott,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 17th July 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Decision:

1. My decision is that the decision of the Hull appeal tribunal held on 21st January 2000 is not erroneous in point of law.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of Mr Commissioner Pacey. The Secretary of State supports the appeal.

The history of the case

3. The claimant was accepted as incapable of work from and including 2nd September 1997. Her GP certified the cause of her incapacity as migraine. She was not entitled to incapacity benefit, but she was entitled to credits from that date.

4. The claimant was not assessed under the all work test until 1999. In her self-assessment questionnaire, she asserted difficulties with bending and kneeling, standing, walking, negotiating stairs, reaching, lifting and carrying, and vision. She also referred to intermittent problems with sitting and manual dexterity. The cause of these difficulties is not always clear. They seem to be based on aches and pains in various limbs and joints. She listed her medications, which were for migraine and eczema.

5. When the claimant was interviewed and examined for the purposes of her assessment, the examining doctor did not identify any significant clinical abnormality. The doctor identified difficulties only with walking, although the suggested descriptor did not carry any points under the all work test. The reason for the doctor's opinion on walking is not apparent from the report.

6. The decision-maker accepted the examining doctor's report, except for negotiating stairs. For that activity the decision-maker awarded 3 points. So, the claimant failed the all work test. The decision-maker superseded the decision that the claimant was entitled to credits from and including 28th October 1999.

7. The claimant appealed against that decision to an appeal tribunal. She did not attend the hearing of her appeal. So, the tribunal had to deal with the appeal on the documents. The claimant's case was set out briefly in her letter of appeal. It was that the report of the examining doctor was not reliable, because the interview had been hurried and she could not understand the doctor's questions on account of his accent. She emphasised that she was not prejudiced. She listed her medication, which now included inhalers for asthma.

8. The appeal tribunal confirmed the decision under appeal.

The Secretary of State's support for the appeal

9. The ground on which the Secretary of State supports the appeal refers to the transitional arrangements for the introduction of the new adjudication scheme under the Social Security Act 1998.

10. The decision under appeal was given as a decision on supersession. The power to supersede is governed by section 10 of the 1998 Act and regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

11. As they stand, the supersession provisions do not apply to decisions made under the pre-1998 Act scheme, because they only apply to decisions made under sections 8 to 10 of the 1998 Act: see section 10(1). The approach taken in the transitional provisions governing the introduction of the 1998 Act is to rebase decisions made under the pre-1998 Act scheme (to use Mr Commissioner Williams' useful expression). In other words, those decisions are treated as if they were made under section 8 of the 1998 Act, so that the supersession provisions can apply.

12. The Secretary of State identifies a doubt about the rebasing of a decision, made by an adjudication officer under the pre-1998 Act scheme, that a claimant was incapable of work. The Secretary of State argues that there is a gap in the transitional provisions, because those decisions are not rebased, and that it is necessary to apply section 16(1) of the Interpretation Act 1978.

13. I disagree with that argument. The key to understanding the rebasing of capacity for work decisions lies in the pre-1998 Act scheme. Under that scheme, an adjudication officer's decision on capacity for work was free-standing, but it was always made for the purpose of determining entitlement to a benefit or credit. The transitional rebasing provisions always refer to decisions 'made under or by virtue of' Part II of the Social Security Administration Act 1992 'in relation to a relevant benefit'. The adjudication of capacity for work was governed by section 61A of the 1992 Act, which was in Part II. So, that form of expression is broad enough to include capacity for work decisions made for the purposes of determining entitlement to a particular benefit.

14. So, decisions made for the purposes of determining entitlement to incapacity benefit are caught by paragraph 4(1) of Schedule 14 to the Social Security Act 1998 (Commencement No 9, and Savings and Consequential and Transitional Provisions) Order 1999. And decisions made for the purposes of determining entitlement to income support are caught by paragraph 3(1) of Schedule 22 to the Social Security Act 1998 (Commencement No 12 and Consequential and Transitional Provisions) Order 1999.

15. However, there is a problem with the Social Security Act 1998 (Commencement No 11, and Savings and Consequential and Transitional Provisions) Order 1999. Schedule 18 to that Order provides for decisions outstanding under the pre-1998 Act scheme to be made under the 1998 Act. (The word 'now' in Schedule 18 must be read as 'not'.) But the rebasing provision does not in its terms cover decisions relating to entitlement to credits. The rebasing provision is paragraph 4(1) of Schedule 16:

> 'A decision (other than a decision of a social security appeal tribunal, disability appeal tribunal, a medical appeal tribunal or a Commissioner) made before 18th October 1999-
>
> (a) on a claim for; or
>
> (b) under or by virtue of Part II of the Administration Act in relation to,

a relevant benefit, shall be treated on or after that date as a decision of the Secretary of State under paragraph (a) or, as the case may be, paragraph (c) of section 8(1).'

16. 'Relevant benefit' is defined in article 1(2)(c) by reference to article 2(c)(i) and (ii). The definition does not cover entitlement to credits, which are mentioned in article 2(c)(iv). If that definition applies, there is a gap in the rebasing provisions for which there can be no rational explanation. However, the definitions in article 1(2) only apply 'unless the context otherwise requires'. In the context of the overall scheme for the introduction of the 1998 Act, a different meaning is required. The only sensible interpretation of paragraph 4(1) is to read 'relevant benefit' as including entitlement to credits.

17. So, I reject the Secretary of State's support for the appeal

The claimant's grounds of appeal

18. On appeal to the Commissioner, the claimant has set out her case in greater detail. That detailed account was not before the appeal tribunal and I cannot take it into account in deciding whether the tribunal's decision was erroneous in law. She had the opportunity to attend the tribunal and put her case in more detail. She cannot now complain because she did not avail herself of that opportunity.

19. The claimant has repeated her allegations about the inaccuracies in the examining doctor's report. She attributes this to language problems. I accept that it can take a little time to become attuned to an unfamiliar accent. In a relatively short examination, this can lead to some misunderstanding. But what it cannot do is to affect the doctor's competence at conducting a clinical examination. That examination revealed no significant abnormality. It certainly did not provide the basis for an award of any further points than those given by the decision-maker. The appeal tribunal relied on the results of that examination and its decision was, therefore, soundly based.

20. The claimant also states that, although she is not prejudiced, she believes that a claimant should be examined by a doctor of the same colour. That remark merely merits comment. It is sufficient to say that her belief is entirely irrelevant to whether the tribunal's decision was erroneous in law.

Summary

21. I reject the Secretary of State's support for the appeal and the claimant's grounds of appeal. No other error or law appears from the papers before me or from the circumstances of the case. I dismiss the appeal.

Signed on original

Edward Jacobs
Commissioner
27th March 2001