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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

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Starred Decision No: 50/01

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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 as follows. It is given under section 14(8)(b) of the Social Security Act 1998.

1.1 The decision of the Liverpool appeal tribunal held on 28th February 2000 is erroneous in point of law.

1.2 Accordingly, I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal to the tribunal, I refer the case to a differently constituted tribunal for determination.

1.3 I direct the tribunal that rehears this case to conduct a complete rehearing. In particular, the tribunal must determine whether the claimant was capable of work from and including 3rd December 1999 on the circumstances obtaining at that date in accordance with section 12(8)(b) of the Social Security Act 1998 and my decision in CDLA/4734/1999, paragraphs 54 to 68. The burden is on the Secretary of State to show that there were grounds for supersession.

The issue

2. The issue that arises in this case is the proper forms of adjudication in what are usually known as credits only capacity for work cases.

3. The issue arises in this way. The key date is 3rd December 1999. Before this date, the claimant was not entitled to incapacity benefit, but was receiving income support on the basis of incapacity for work. He had been accepted as incapable of work since 1990. In 1999, his capacity for work was assessed. In accordance with the standard procedure, he completed a self-assessment questionnaire and was interviewed and examined by a doctor who prepared a report on the claimant's capacity for work. On receipt of that report, the case was referred to a 'decision-maker', which is the new jargon term for the officer of the Secretary of State authorised to make decisions under the Social Security Act 1998. That officer's decision is at page 6A of the papers. The version set out on page 1B of the papers is incomplete and inaccurate. The appeal tribunal confirmed the decision.

The appeal to the Commissioner

4. The issue arises on an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with my leave.

5. I directed an oral hearing of the claimant's application for leave. It was held before me in London on 11th October 2000. The claimant did not attend and was not represented at the hearing. The Secretary of State was represented by Mr J Heath of the Office of the Solicitor to the Departments of Health and Social Security. Following the oral hearing, I granted leave to appeal. As the claimant's representative had not attended, I set out in some detail the issues that appeared to me to arise on the appeal.

6. I also directed an oral hearing of the appeal itself. Both parties made written submissions in advance of that hearing. The hearing was held before me in London on 24th

January 2001. The claimant did not attend and was not represented. The Secretary of State was represented by Mr J Heath. At the end of the hearing, I allowed Mr Heath time to make further written submissions, essentially dealing with the form of decisions made by the Secretary of State.

7. At the oral hearing of the appeal, Mr Heath submitted that the tribunal's decision was wrong in law for failing to deal with the issues that arose. I accept that submission in the context of this case. There was confusion over the decision that was before the tribunal and the tribunal could not exercise its jurisdiction until it had properly identified the decision under appeal and the basis on which it was made. I emphasise two points. First, it is not essential for tribunals to deal with the complexities raised by this decision in every case. Second, I do not criticise the tribunal for not dealing with these complex issues.

8. Mr Heath also submitted that, as the claimant did not attend the oral hearing before me, the proper decision for me to give was to direct a rehearing. I also accept that submission.

9. I particularly wish to thank Mr Heath for his arguments both at the oral hearings and in writing. They were invaluable in identifying the issues and the relevant arguments in this complex area of law.

Adjudication before the Social Security Act 1998

10. The adjudication arrangements in respect of a claimant's capacity for work before the Social Security Act 1998 were clear.

11. The question whether a claimant was, or was to be treated as, capable or incapable of work was for an adjudication officer: see regulation 20 of the Social Security (Incapacity for Work) (General) Regulations 1995. It was a question submitted to an adjudication officer under section 21 of the Social Security Administration Act 1992.

12. An appeal lay to a social security appeal tribunal against the decision of the adjudication officer: see section 22 of the 1992 Act.

13. A claimant's capacity for work might come before a tribunal in one of two ways.

14. It might form an integral part of another decision and come before the tribunal as a part of the composite decision on entitlement to benefit. If the claimant had previously been entitled to incapacity benefit, the decision under appeal would be the review of the last operative decision and the revision by termination of the award of benefit.

15. However, the decision could also come before a tribunal as a free-standing one. This was most likely to occur if a claimant was receiving income support on the ground of incapacity for work. Often only the incapacity decision was put before the tribunal. If the appeal was allowed, the impact on the income support decision was put into effect by a review. Any issue relating to credits was irrelevant, because credits were within the sole jurisdiction of the Secretary of State and, therefore, outside the jurisdiction of the adjudication officer and the social security appeal tribunal: see the combined effect of sections 17(1)(b) and 20(2) of the Social Security Administration Act 1992.

16. Although these decisions could come before a tribunal as free-standing ones, they were in practice only made for the purposes of determining entitlement to a benefit or a credit. This was obscured by the limited jurisdiction of the social security appeal tribunal. But it was recognised in regulation 19 of the Social Security (Incapacity for Work) (General) Regulations 1995:

> 'A determination whether a person is, or is to be treated as, capable or incapable of work, which is made for the purposes of determining his entitlement to any benefit, allowance or advantage, shall be treated as conclusive for the purposes of his entitlement to any other benefit, allowance or advantage in respect of any day or any period to which that determination relates.'

17. Once made, the decision could only be altered on review or appeal: see section 60(1) of the Social Security Administration Act 1992. Before an adjudication officer could make a decision that the claimant was no longer incapable of work, grounds both to review and revise the earlier decision had to be shown. The usual ground of review was that there had been a relevant change of circumstances under section 25(1)(b) of the Social Security Administration Act 1992.

18. Review had been a feature of modern social security adjudication from its inception in 1948. The decisions of the Commissioners in the 1950s suggest that it was a simple concept that involved considering afresh the earlier decision. By 1998, the concept had been much refined. In capacity for work cases, the concept required some fine distinctions to be drawn. The complexities could not be escaped, because the adjudication officer's conclusion that the claimant was incapable of work was made in a decision and, as a decision, could only be changed on a review.

Adjudication under the Social Security Act 1998

Decisions and determinations

19. The Social Security Act 1998 and the regulations made under it draw a distinction between decisions and determinations. The distinction is not always immediately obvious, because 'determine' and 'determination' are used both (a) to distinguish a determination from a decision and (b) to refer to the process by which a conclusion (whether a decision or a determination) is reached.

20. Only three of the decisions under the 1998 Act are relevant to this case. They concern the Secretary of State's responsibility:

> "to decide any claim for a relevant benefit": section 8(1)(a) - the relevant benefits are defined by section 8(3) and include incapacity benefit, severe disablement allowance and income support;
>
> "to make any decision that falls to be made under or by virtue of a relevant enactment": section 8(1)(c) – the relevant enactments are defined by section 8(4) and include the Social Security Contributions and Benefits Act 1992, which governs the crediting of earnings (section 22(5)) and capacity for work (Part XIIA);

for "making a decision" that revises or supersedes an earlier decision: sections 9 and 10.

21. There is no definition of 'determination' in the legislation. The best indication of the nature of a determination is given by section 17(2) of the Social Security Act 1998:

> '(2) If and to the extent that regulations so provide, any finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based, shall be conclusive for the purposes of-
>
> (a) further such decisions'.

22. Without attempting a definition, the nature of a determination is that it is a building block of a decision. Take as an example an award of income support. The findings of fact on which the award is based are all determinations. So are the conclusions on the individual components of the calculation that lead to an award, like the amount of the eligible housing costs and the premiums that are included in the applicable amount. The decision - that the claimant is entitled to income support of a specific amount from and including a particular date - is the result of combining those determinations. (There are also determinations that are conclusions on procedural matters, but they are not relevant to this case.)

23. The distinction between a determination and a decision is relevant, because an appeal lies to an appeal tribunal only against a decision. This is made clear by section 12 of the Social Security Act 1998. This reflects the new emphasis on outcome decisions.

Outcome decisions

24. Standing back from the details of the Social Security Act 1998 and the regulations made under it, there is a clear theme uniting most of the decisions that are appealable. This is that they are, to use the new jargon, 'outcome decisions'. This is not a term of art. It is merely a useful expression to refer to decisions that have, in crude terms, an impact on a claimant's pocket. In other words, an outcome decision is one that directly affects the money that the claimant receives or might receive in the future.

25. The determinations that are the building blocks of outcome decisions also, of course, affect the money that the claimant receives or might receive in the future. But they do not have this effect directly. They have this effect only when incorporated in an outcome decision. The claimant is able to appeal against the outcome decision and is able to challenge, as an issue arising on that appeal, the underlying determination.

Is a conclusion by the Secretary of State on the claimant's capacity for work a decision or a determination?

26. Both the claimant and the Secretary of State submit on the appeal that a Secretary of State's conclusion that the claimant is not incapable of work is a determination. I accept that as correct. Although under the pre-1998 adjudication scheme a conclusion on capacity for work was an appealable decision by an adjudication officer, under the new scheme it has the nature of a determination and is consistently referred to as such.

Giving a replacement determination on capacity for work

27. As a Secretary of State's conclusion on a claimant's capacity for work is a determination and not a decision, it is not made under section 8, 9 or 10 of the Social Security Act 1998. Those sections deal with revision and supersession of decisions only. It follows that the supersession provisions in the Social Security and Child Support (Decisions and Appeals) Regulations 1999 do not apply either.

28. The result is that there are no procedural requirements that attend a Secretary of State's determination of a claimant's capacity for work other than those specified in the Social Security (Incapacity for Work) (General) Regulations 1995. This is true whether or not it is the first decision on a claimant's capacity for work.

29. This is why I have used the word 'replacement'. It is an accurate and convenient description of a new determination that is not made on revision or supersession and does not involve proving anything akin to the former grounds for review. What in practice is the significance of this?

30. I need only deal with the matter from the perspective of an appeal tribunal dealing with an appeal that raises the issue of capacity for work. The issue for the tribunal is whether the claimant was, at the effective date of the decision, incapable of work. In dealing with that issue, the tribunal must take account of all relevant evidence. It must not merely rubber stamp the views of the examining doctor, or of anyone else for that matter.

31. It will always be relevant to know that the claimant was previously accepted or assessed as incapable of work. But the extent to which the tribunal will need to take account of the details of the basis of the claimant's previous incapacity will depend on the circumstances of the case. Take these three possibilities as examples.

32. *First,* the details of the basis of the claimant's previous assessment may be an essential part of the tribunal's consideration. This will be the case if the grounds of appeal allege that the claimant's capacity and condition have not changed from the previous assessment. If that is alleged, the tribunal has to consider the details of the previous assessment. It has to do this, because the claimant's disabilities are asserted to be the same then as now, not because it has to be satisfied that there has been a change of circumstances since, or a mistake of fact in, the previous assessment.

33. *Second,* the details of the basis of the claimant's previous assessment may be relevant evidence of the claimant's overall capacity. This is most likely to be the case if the claimant has a variable condition. The clinical findings of a claimant who has asthma may vary from examination to examination. The findings on a particular day can only provide a snapshot of the claimant's condition at that time. A better view of the claimant's overall capacity for work is obtained by taking account of findings at different examinations. If the claimant's condition is variable, the tribunal has to consider the details of previous assessments, because those details are relevant to an assessment of the claimant's present capacity for work. The tribunal is not concerned with whether there has been a change or circumstances since those assessments were made or whether there was a mistake of fact in them. (This assumes, of course, that there has not been an overall change in the claimant's capacity for work.)

34. *Third,* the details of the basis of the claimant's previous assessment may be of no relevance. This will be the case if there is evidence that the claimant's condition has changed in a way that renders the details of the earlier assessment irrelevant. One example would be if the previous assessment had taken place shortly after a surgical operation. Another would be if there had been a change in the condition identified as relevant to capacity for work, say from depression to heart disease. In circumstances like these, the only relevance of the basis of the previous assessment is that it shows that the evidence from that assessment is irrelevant to the claimant's present incapacity. It is not relevant as showing a change of circumstances since, or a mistake of fact in, the previous assessment.

35. I emphasise that the issue for the tribunal is whether the claimant was capable of work at the effective date of the determination. In reaching its conclusion, the tribunal, like the Secretary of State, is free from any technicalities. The grounds for revision or supersession of decisions do not apply. The statutory adjudication framework only begins to apply at the point when a decision is made. Before that point, the appeal tribunal is required only to act judicially and to reach its conclusion on a rational evaluation of the relevant evidence. The tribunal does not have to identify any change of circumstances since, or mistake of fact in, the previous assessment. It is not concerned with the fine distinctions that had to be drawn under the Commissioners' interpretation of review powers. It does not as a matter of law have to undertake in every case a comparison with the basis of the previous assessment, although that assessment may be relevant to a greater or lesser extent as evidence.

36. This does not leave claimants exposed to the whim of arbitrary determinations by the Secretary of State or appeal tribunals. In practice, there are three reasons that led to a different assessment under the pre-1998 adjudication scheme: (a) the wrong conclusion was reached on the evidence available at the time of the earlier assessment; (b) there is different evidence now available; (c) there has been a change in the nature or extent of the claimant's disabilities. Those reasons will still exist under the new scheme. They will underlie determinations. What has changed is that it is no longer necessary for the Secretary of State or tribunals to deal with them as an essential legal requirement in determining capacity for work.

37. Claimants are adequately protected. Determinations by the Secretary of State must be based on relevant evidence and have to be justified on scrutiny by a tribunal on an appeal. Determinations of tribunals have to be made judicially and on a rational evaluation of relevant evidence. They are subject to scrutiny for mistake of law by a Commissioner.

The outcome decision

38. Once a determination of a claimant's capacity for work has been made, it is embodied in an outcome decision. It is that decision that is appealable under section 12 of the 1998 Act. I am only concerned with cases where that outcome decision supersedes an earlier decision. I deal first with cases where the superseded decision was made under the 1998 Act. Then I deal with cases where the superseded decision was made under the pre-1998 adjudication scheme.

Credits decisions

39. I am concerned with cases in which the claimant is not entitled to incapacity benefit. In a typical case, two outcome decisions will have been made when the claimant was accepted

or assessed as incapable of work. One decision concerned entitlement to income support. The other concerned entitlement to credits.

40. It is necessary to distinguish between two different forms of decisions on credits.

41. *A decision on entitlement to credits* A claimant may be credited with earnings for each week of incapacity for work: see regulations 8B and 9 of the Social Security (Credits) Regulations 1975. But earnings can only be credited if the claimant was incapable of work: see regulation 8B(2). As I understand the practice of the Secretary of State, it is this. The Secretary of State gives decisions on entitlement to credits during the year as the claimant's capacity for work changes. If a claimant is assessed as incapable of work, a decision is given that the claimant is entitled to credits. If the claimant is assessed as no longer incapable of work, a decision is given that the claimant is no longer entitled to credits. These decisions are worded as decisions on entitlement to credits. They do not actually credit or refuse to credit earnings. A decision that a claimant is entitled to credits means this: from the effective date of the decision, each week of incapacity will be available for earnings to be credited, if (a) that is necessary and (b) the other conditions are satisfied. A decision that a claimant is not entitled to credits means this: from the effective date of the decision, weeks will not be available for earnings to be credited until the claimant again becomes incapable of work.

42. *A decision to credit or not to credit earnings for the year* Regulation 3 of the 1975 Regulations imposes a limitation on the extent to which an 'entitlement to credits' decision is put into effect. Earnings are only actually credited in so far as it is necessary to bring the claimant's earnings up to the relevant earnings factor for the year. So, a decision to credit or not to credit earnings can only be made once and at the end of the year in question. Appeal tribunals will seldom, if ever, be concerned with these decisions.

43. It is the Secretary of State's practice to treat decisions on entitlement to credits as decisions rather than determinations. On my reading of the 1975 Regulations, that practice is correct. Those Regulations do two things. They confer entitlement to credits if they are needed. And they credit earnings if necessary. Those are separate decisions and each is more appropriately categorised as a decision than a determination.

What is the proper ground for supersession?

44. When a replacement determination is made that the claimant is no longer incapable of work, both the income support outcome decision and the entitlement to credits outcome decision have to be superseded. But on what ground?

45. The relevant regulation is regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. As originally enacted, that regulation contained no provision that in terms referred to capacity for work cases. That made sense. A determination that the claimant was no longer incapable of work was 'a relevant change of circumstances' that allowed supersession under regulation 6(2)(a)(i). In the context of the supersession of an outcome decision, a change of circumstances is only 'relevant' if it requires a different outcome from that contained in the earlier decision. The subtleties based on the Saker decision, under which a change might be relevant without necessarily justifying a different outcome, have no place in the scheme of adjudication under the 1998 Act. They

were (perhaps) justified while a distinction was drawn between review and revision, but that distinction has now gone.

46. However, before the Regulations came into force, an express reference to capacity for work cases was inserted in regulation 6(2)(g). It provides for supersession of:

> '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'.

'Incapacity benefit decision' was defined in regulation 7A(1) as 'a decision to award a relevant benefit'. The definition was then amended, with effect from 19th June 2000, to include 'a decision to award ... a relevant credit. 'Incapacity determination' was also defined in regulation 7A(1). Neither of these definitions is entirely satisfactory. The reference to an award of a relevant credit is ambiguous; it may be more appropriate to refer to the actual crediting of earnings than to entitlement to credits. Also, the definition of determination is limited; it does not include determinations under regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995.

47. These amendments to the original form of the supersession provisions are unnecessary. In any case to which they apply, a supersession can always be made under the authority of regulation 6(2)(a) – 'relevant change of circumstances'.

48. They are also misconceived, because they reintroduce some of the complexities of review into the supersession process. Regulation 6(2)(g) covers every case where fresh medical evidence is received, regardless of the contents of that evidence and of whether or not the decision-maker relies on it. Regulation 6 only provides that a decision 'may' be superseded if one of the grounds is satisfied. That could be read as conferring a discretion on the Secretary of State to supersede or not to supersede according to whether the evidence justified a different outcome decision. However, that would effectively reintroduce the two stage procedure of review and revision, along with the subtleties and refinements that attended it. It was one of the purposes of the 1998 Act to simplify the adjudication scheme, not to retain those cumbersome features.

49. So, these amendments are in practice irrelevant, as supersession can always be based on a relevant change of circumstances. It follows that it is also irrelevant that there was no reference to credits decisions in regulation 7A until 19th June 2000.

Which outcome decision should be appealed?

50. In a typical credits case, there will be two outcome decisions, one on income support and the other on credits. A claimant who wants to challenge the capacity for work determination must appeal the first of those decisions to be made. In practice, this will be the credits decision, because the income support decision will probably be made by a different decision-maker, possibly based in a different office.

51. The reason for appealing the first decision to be made lies in section 17(2) of the 1998 Act and regulation 10 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. The combined effect of those provisions is this. Once a claimant's capacity for work has been determined and embodied in a decision, the determination is conclusive for the purposes of other decisions relating to the same period. So, once the credits decision-maker has determined that the claimant is no longer incapable of work and embodied that in a decision, the income support decision-maker has no choice but to follow the determination. If the claimant appeals against the income support decision, it will not be possible to challenge successfully the capacity for work determination on which it is based. That can only be challenged through the entitlement to credits decision.

52. It follows that if the claimant also wants to raise an income support issue, that decision must be appealed as well as the entitlement to credits decision.

Transition to the 1998 Act scheme

53. How does this analysis apply if the earlier decision was made under the former adjudication scheme?

54. Decisions made under the pre-1998 scheme are rebased by the transitional provisions for the introduction of the 1998 Act. They are treated as if they were made under section 8 of the 1998 Act, so that the supersession provisions can apply to them. Decisions made for the purposes of determining entitlement to income support are rebased by paragraph 3(1) of Schedule 22 to the Social Security Act 1998 (Commencement No 12 and Consequential and Transitional Provisions) Order 1999. Decisions made for the purposes of entitlement to credits are rebased by paragraph 4(1) of Schedule 16 to the Social Security Act 1998 (Commencement No 11, and Savings and Consequential and Transitional Provisions) Order 1999: see my interpretation of that provision in CIB/2161/2000, paragraphs 13 to 16.

Signed on original

Edward Jacobs
Commissioner
27th March 2001