CIB/2949/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(a)(i) of the Social Security Act 1998. It is:

I SET ASIDE the decision of the Cardiff appeal tribunal, held on 24 June 2005 under reference U/03/188/2005/01722, 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 to dismiss the claimant's appeal against the Secretary of State's decision and to confirm that she was entitled to incapacity benefit on and from 6 January 2005 at the lower of the short term rates.

The issues

2. The issue that concerns the claimant in this case is her entitlement to incapacity benefit from 26 October 2004 to 5 January 2005 and the rate of her entitlement thereafter. The case also raises an issue on the interpretation and application of section 13(3) of the Social Security Act 1998. It is convenient to deal with the section 13(3) issue first, because it determines whether I have any jurisdiction to deal with the incapacity benefit issue.

The procedural background

3. The Secretary of State decided that the claimant was not entitled to incapacity benefit from 26 October 2004, because she did not satisfy the contribution conditions. She did, though, receive credits. The claimant was awarded incapacity benefit from 6 January 2005, but was only paid at the lower of the short term rates. She exercised her right of appeal, arguing that she was entitled to incapacity benefit from 26 October 2004 and that she was anyway entitled to be paid at the long term rate. Her appeal came before a tribunal on 3 May 2005. The tribunal adjourned that hearing with directions. The hearing was resumed before a different chairman on 24 June 2005. He allowed the appeal in part. The tribunal decided that the three waiting days did not apply to the claimant and that she became entitled to the incapacity benefit at the higher of the short term rates from the day she satisfied the contribution conditions. Otherwise the claimant's appeal failed.

4. The tribunal's decision left both the claimant and the Secretary of State dissatisfied. The claimant acted promptly by applying for leave from the tribunal, but this was refused equally promptly. She then applied for leave to appeal from the Commissioner. The Secretary of State's representative was not quite as quick. The application for leave from the tribunal was signed on the same day that the claimant's application arrived at the Commissioners' office. The chairman gave the Secretary of State leave to appeal the following week.

5. The case came before Mr Commissioner Angus as an appeal by the Secretary of State and an application for leave by the claimant. Mr Angus directed observations from the parties on whether he had jurisdiction to deal with the case; I explain later why he was concerned. Having received those observations, he directed an oral hearing. The hearing took place before

me in Cardiff on 21 March 2006. The claimant attended, accompanied by her husband. The Secretary of State was represented by Mr Huw James. The claimant commented that she had not had access to the full legislation that was available to Mr James. I agreed to issue a detailed direction setting out the issues and to provide her with copies of the relevant legislation. I wrote that direction on 5 April 2006 and the claimant has now responded. After reading her comments, I decided that I did not need further observations from the Secretary of State.

Section 13 of the Social Security Act 1998

The legislation

6. Section 13 provides:

> **Redetermination etc. of appeals by tribunal**
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> **13.**-(1) This section applies where an application is made to a person under section 14(10)(a) below for leave to appeal from a decision of an appeal tribunal.
>
> (2) If the person considers that the decision was erroneous in point of law, he may set aside the decision and refer the case either for redetermination by the tribunal or for determination by a differently constituted tribunal.
>
> (3) If each of the principal parties to the case expresses the view that the decision was erroneous in point of law, the person shall set aside the decision and refer the case for determination by a differently constituted tribunal.
>
> (4) In this section and section 14 below "the principal parties" means-
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> (a) the persons mentioned in subsection (3)(a) and (b) of that section , and
>
> (b) where applicable, the person mentioned in subsection 3(d) and such a person as is first mentioned in subsection (4) of that section.

The issue

7. I can now explain the issue that concerned Mr Angus. When the claimant applied to the tribunal for leave, the district chairman had power, but not a duty, under section 13(2) to set aside the decision. When the Secretary of State applied to the tribunal for leave, the district chairman again had power, but not a duty, under section 13(2) to set aside the decision. But what about section 13(3)? When the Secretary of State applied for leave, the claimant had already applied for leave. In other words, both the parties had expressed the view that the decision was wrong in law. They had done so on different grounds, but that is not relevant. Section 13(3), unlike section 13(2), confers a duty, not a power. If it applied, the district chairman had to set aside the tribunal's decision and direct a rehearing. He had no power to give leave to appeal to a Commissioner. That is why Mr Angus was concerned. If section 13(3) applied, he had no jurisdiction to deal with the case. So did section 13(3) apply?

8. Section 13(3) does not contain an express time limit on its operation. But it must be subject to some limit. If it did not, it would conflict with the legislation that governs the powers of the Commissioners. Assume that a claimant applies for leave to appeal, which is refused by the district chairman but granted by the Commissioner. The Secretary of State then supports the appeal before the Commissioner. Section 14 of the Social Security Act 1998 deals with the powers of the Commissioner. Section 14(7) provides:

> 'If each of the principal parties to the appeal expresses the view that the decision appealed against was erroneous in point of law, the Commissioner may set aside the decision and refer the case to a tribunal with directions for its determination.'

And section 14(8) authorises the Commissioner to give directions for a rehearing or to substitute a decision for that of the tribunal without the need for a rehearing. But note that both the parties have now expressed the view that the decision was erroneous in point of law. If section 13(3) were read as it stands, that would mean that the district chairman was now under a duty to set aside the decision and direct a rehearing. That would deprive the Commissioner of further jurisdiction to decide whether the tribunal's decision was wrong in law and, if it was, whether to direct a rehearing and, if so, to give appropriate directions.

9. On the face of it, sections 13(3) and 14(7) and (8) are in conflict. The issue for me is the time frame within which each operates. This is not the first time that this issue has been considered by Commissioners. I begin by looking at those decisions.

Previous Commissioners' decisions

10. In *CF/6923/1999*, the claimant had applied for leave to appeal. The chairman refused leave to appeal, but the clerk asked the Secretary of State to comment on the application before notifying the claimant of that decision. In the event, the Secretary of State did not agree that the tribunal's decision was erroneous in law and the clerk notified the claimant that the application was refused. Mr Commissioner Rowland wrote:

> '6. ... As Mr Cooper [who represented the Secretary of State] readily accepted, while a decision of a tribunal may be set aside under section 13 in lieu of it being decided to grant or refuse leave to appeal, a decision may not be set aside once the application for leave to appeal has been determined. That is because the person to whom the application for leave to appeal is made ceases to be seised of the matter once the application is determined and the applicant then becomes entitled to bring the matter before a Commissioner by way of a renewed application or an appeal as the case may be. The Secretary of State is not entitled to override a chairman's grant or refusal of leave by purporting to support an application, with a view to bring section 13(3) into play, after the application had been determined'

11. In *CIB/4427/2002*, the claimant had applied for leave to appeal to the Commissioner, which had been granted by a chairman. Before leave was granted, the officer presenting the case for the Secretary of State at the hearing stated in writing that the tribunal's decision was wrong in law. Mr Levenson decided that that officer was authorised to act for the Secretary of State and that, in those circumstances, section 13(3) applied. Mr Commissioner Levenson wrote:

> '16. ... the chairman who dealt with the application was in breach of his duty to set aside the decision and refer the matter to a new tribunal.
>
> '17. However, it is clear that in the present case I can supply no separate remedy in respect of that breach, because I am taking the action that should in any event [have] been taken by the chairman. Nevertheless, there might be cases where the Commissioner is not of the opinion that an error of law had been made but where the Commissioner would be obliged to refer the matter back to the tribunal, or direct that a chairman should do so, so that the claimant's rights under section 13(3) are preserved.'

12. Both decisions were considered by the Chief Commissioner for Northern Ireland in *R1/04(DLA)*, but his decision not add further to their reasoning in so far as it is relevant to this case.

Analysis

13. With respect to Mr Rowland, there are difficulties with his case as an authority on section 13(3). To begin with, the passage I have quoted dealt with an issue that did not arise. The Secretary of State had not expressed the view that the tribunal's decision was erroneous in law, so section 13(3) did not apply. As the issue did not arise, I am not bound to follow his reasoning. Furthermore, that reasoning assumes that leave had been refused when the Secretary of State was asked to comment. While it is correct that the chairman had so decided, the decision had not been notified to the claimant. It was, therefore, not yet effective, because decisions only become effect once promulgated. Finally, Mr Rowland was only considering a case in which an application was made and refused. That allowed him to say that the tribunal was no longer seised of 'the matter'. He was not considering a case in which a further application was made to the tribunal by the other party. When that happened, the tribunal was seised of that application. This is the sequence of events in the case before me.

14. The application of section 13(3) did arise before Mr Levenson and I am bound by his decision. His approach was consistent with Mr Rowland's reasoning, although it does not appear that his decision was cited to Mr Levenson. Unlike Mr Rowland, he did not define the point at which the expressions of view had to be made. No doubt, that was because it was not necessary on the facts of the case. The case was still clearly within the tribunal's control when the coinciding views were expressed by the parties and does not deal with the sequence of events in the case before me.

15. With respect to my colleagues, I do not find either of their cases helpful in dealing with the sequence of events in this case. The complicating factor here is that there were two applications. One had been dealt with and refused before the other arrived. There must be a point of demarcation between sections 13 and 14, albeit that there may be some overlap. That point must be identified as a matter of principle and statutory interpretation against the general back of the nature of an appeal and the competing jurisdictions. I disclaim any attempt to formulate a test of general application. It seems to me that there are various combinations of events that may occur. Attempting to formulate in one context a test of general application without having in mind the full range of possibilities is unlikely to be successful. I, therefore, limit myself to the facts of this particular case.

16. On the sequence of events, the claimant's application reached the Commissioners' office on 7 September 2005 and was registered on the computer system. The Secretary of State's application to the tribunal for leave was signed on that same day. The date of receipt is not recorded, but it does not appear that it was faxed. That means that it was not received by the tribunal until the claimant's application had been received and registered by the Commissioners' office. At that time, the claimant's application came within the control of the Commissioner. In Mr Rowland's more formal language, the Commissioner became seised of the application. I consider that at that point, the control of the ultimate disposal of the case was a matter for the Commissioner, not the tribunal and the chairman's duty under section 13(3) no longer applied.

17. I emphasise that the claimant's application was properly before the Commissioner. That is to say, she had applied for leave from the tribunal and this had been refused. It may be that it would be different if her application had not been properly made, because she had not yet applied to the tribunal.

18. I also emphasise that I am not saying that the chairman no longer had power to grant leave to appeal to the Commissioner once the case was within the Commissioners' control. That may be subject to different considerations. I do not need to decide that issue and have dealt with the case as coming before me on the leave granted by the district chairman. That does not prejudice the claimant. If the chairman's grant of leave was made without jurisdiction, I would regularise the position by granting leave to appeal to either party or to both parties.

19. Finally, I do not need to deal with the application of section 13(2) once the claimant's application was received by the Commissioners' office. That issue does not arise. It may or may not be subject to different considerations from section 13(3).

20. At the oral hearing, the claimant was more concerned with her entitlement to incapacity benefit than with the procedural issues that bring such joy to the hearts of the Commissioners. However, she did make a suggestion. She noted that the parties had one month in which to apply for leave and suggested that the duty under section 13(3) should operate until the one month allowed for applying for leave had expired. That is a sensible suggestion that has the advantage of providing a bright line of demarcation between the functions of the tribunal and the Commissioners. However, it does have the difficulty that the one month can be extended for a period up to 13 months.

The substantive issues

21. I come at last to the issues that concern the claimant. As I have said, after the oral hearing, I set out the issues in a detailed direction and provided the claimant with a copy of the relevant legislation. As she has that material, I am not going to make this decision longer by quoting the relevant provisions. I shall merely refer to them.

22. To recap, the claimant became incapable of work on 10 March 2004. She received statutory sick pay from 10 March 2004 to 25 October 2004. From 26 October 2004, she was given credits for her incapacity for work, but did not receive incapacity benefit because the contribution conditions were not met. However, she was advised that she could claim incapacity benefit from 3 January 2005, because the contribution conditions would then be

satisfied. She claimed incapacity benefit in January 2005 and it was awarded from 6 January 2005, paid at the lower of the short term rates.

23. At the oral hearing, I discussed with the claimant whether she may have been entitled to income support from 26 October 2004. She accepted she had been given a form on which to claim that benefit, but did not complete it. In her comments on my direction, she has formed the impression that her claim might have been continuous if she had claimed income support. That is not correct. Income support is a different benefit from incapacity benefit. The only reason I discussed this with her is that I was concerned that she might not have been given the chance to claim income support. That is a social security benefit that does not depend on contribution payments. Whether or not she would have been entitled would have depended on her family's financial and other circumstances. I do not know whether she would have qualified. I was merely concerned that she may not have been given the opportunity to make a claim.

24. I deal with the claimant's arguments in the order she made them at the oral hearing. (As a preliminary point, the benefit year is not the same as the calendar year. It runs from the first Sunday in January.)

The terms of the claim in January 2005

25. First, some background. The reason why the claimant was advised to wait until January 2005 to make a claim is what is known as the second qualifying condition. This is one of two contribution conditions that have to be met in order to show entitlement to incapacity benefit. In simple English, this condition is that the claimant must have paid the necessary contributions for the two full tax years immediately before the benefit year to which her claim relates. In my direction, the preceding sentence read:

> 'In simple English, this condition is that the claimant must have paid the necessary contributions for the two full tax years immediately before the benefit year *in which she claimed incapacity benefit*.'

The words I have italicised were misleading, because I did not bear in mind the backdating point that I deal with below.

26. For the claim in 2004, the relevant tax years were 2001-2003, but for 2005 they were 2002-2004. The claimant told me that there was a gap of some 7 months in her employment in 2002, which must have affected your contribution record.

27. The claimant's first argument was that her January 2005 claim form was completed on her behalf and was completed incorrectly. It was completed to claim from 3 January rather than from 1 January. In response to my direction she has told me that in January 2005 she was prevented by her state of health from acting so strongly to protect her own interests. I accept that. But even so, the fact is that she signed the form in the terms that it was completed. She also says that the backdating rules should apply. However, once again the fact is that she did not ask for backdating and signed the form as completed for her.

The waiting days

28. Second, the claimant said that the three waiting days should not have been imposed in January 2005. The tribunal accepted this argument, which is what led the Secretary of State to apply for leave to appeal. The claimant said that she had already served the three waiting days at the start of the period of statutory sick pay and should not now have to serve them again.

29. The basic rule about the waiting days is in section 30A(3) of the Social Security Contributions and Benefits Act 1992. The interrelationship between statutory sick pay and incapacity benefit is governed by Schedule 12 to that Act. Mr James relied on paragraph 4. He argued that the effect of this is that the three waiting days do not apply *for the 57 days following the ending of the statutory sick pay*. There were more than 57 days between 26 October 2004 and the beginning of January 2005. So, he argued, the waiting days applied again.

30. In response to my direction, the claimant has argued that the statutory language refers to periods of incapacity, not to periods of entitlement to incapacity benefit. She is right about the words used, but she has not taken account of the context. Paragraph 4 of Schedule 12 deals precisely with the position of a claimant who is entitled to statutory sick pay but does not immediately qualify for incapacity benefit. Paragraph 4 bypasses basic rule that three waiting days must apply, but it does so only for a period of 57 days. After that, they apply again. I must accept Mr James' argument, as it is the only one that the provisions can bear.

31. This is perhaps an appropriate point to deal with the fundamental flaw in the claimant's argument. They are intelligently structured and logically argued. However, they make the mistake of assuming that there is in law a unity about incapacity for work or about entitlement to benefits in respect of that incapacity. That is not so. The law distinguishes between benefits and entitlements for different periods. The claimant has emphasised certain words in the legislation, but has not taken sufficient account of their context in provisions dealing with particular benefits.

The rate of entitlement

32. Third, the claimant said that the award should not have been made at the lower rate. The rate at which incapacity benefit is paid is governed by section 30B(2) of the 1992 Act. This refers to a period of entitlement. Mr James argued that this meant period of entitlement to incapacity benefit. The claimant argued that she was continuously sick (and certified as such) and in a single period of entitlement to a benefit, albeit different benefits. What the claimant says is correct, but section 30B clearly deals only with incapacity benefit. It does not deal with any other benefit. The reference to entitlement can only mean entitlement to incapacity benefit.

33. Mr James also referred to section 30D(4). That must have been a mistake on his part. But the claimant, who was sharing a copy of the legislation with Mr James, spotted section 30D(3) and said that that applied to her. Section 30D(3) is an enabling provision. The relevant regulation made under it is regulation 7 of the Social Security (Incapacity Benefit) Regulations 1995. Mr James argued that, as with Schedule 12, this only applies within 57 days following the ending of statutory sick pay. I accept that argument. As with his argument on Schedule 12, it is the only interpretation that the provisions can bear.

34. The claimant has relied on the decision of the Commissioner in *R(S) 1/56*. I can understand why she has done so. It certainly appears on the face of it to support her argument. However, it deals with different legislation that was drafted in different terms. Admittedly that legislation used some of the same terms as the legislation that I have to interpret and apply. But language always has to be interpreted in its context. I cannot use that case on different legislation to interpret similar language in a different context.

Backdating

35. Fourth, the claimant said that she was entitled to incapacity benefit from October 2004 on the basis of backdating. She told me that this was suggested to her by chairman at the first hearing of her appeal.

36. Strictly speaking, the reference to backdating is wrong and can lead to a false impression of how the law works. It is common for tribunals and Commissioners to refer to backdating. But that is not a correct description of how the legislation is drafted. The law allows a specified time to make a claim for a social security benefit. The time varies from benefit to benefit. See regulation 19 of and Schedule 4 to the Social Security (Claims and Payments) Regulations 1987. The way the law works is by extending the time within which a claim can be made rather than by backdating a claim once it is made.

37. Mr James argued that these provisions only related to the making of a valid claim. They did not affect the other conditions of entitlement, which have to be met at the time for which benefit is claimed. He referred to section 1 of the Social Security Administration Act 1992 to show that making a claim was but an *additional* condition of entitlement.

38. I accept Mr James' argument. Section 1 of the Social Security Administration Act 1992 provides that it is a condition of entitlement for most benefits (incapacity benefit is one of them) that there be a valid claim. The effect of the so-called backdating rules is to ensure that there is a valid claim for a period before the date when it was actually submitted, thereby satisfying the condition that there must be a claim. But claim and entitlement are different. It is not enough to make a claim. The claim can only succeed if the other conditions of entitlement are satisfied. For incapacity benefit, one of those conditions is the second contribution condition. That condition depends on the benefit year to which to which the claim relates. To put it another away, although the claim was actually made in January 2005, it related to the position from 26 October 2004 and had to be decided as if it had been made at that time. And to put it a third way, the fact that a claim is made late cannot operate to a claimant's advantage.

Disposal

39. I allow the Secretary of State's appeal and set aside the tribunal's decision. The tribunal was wrong to apply the three waiting days and they must be restored. The tribunal did not go wrong in any other respect. A rehearing is not necessary in order to rectify the tribunal's mistake. I can and do substitute the decision that it should have given, which was to dismiss the claimant's appeal and confirm the decision of the Secretary of State.

Signed on original
on 11 May 2006

Edward Jacobs
Commissioner