

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Stratford appeal tribunal dated 20 February 2003 and I substitute my own decision, which is that the claimant was incapable of work from 18 September 2002 to 13 March 2003 and is entitled to credits accordingly.

REASONS

2. The claimant became incapable of work on 1 December 1998 but, following a medical examination, it was decided by the Secretary of State on 21 March 2002 that he was no longer incapable of work from that date because he scored only 6 points in respect of physical descriptors on a personal capability assessment. An appeal against that decision was dismissed on 29 August 2002 because, although the tribunal awarded a total of 13 points, that was still two short of the 15 required if the claimant was to be accepted as being incapable of work under the personal capability assessment (see regulation 25 of the Social Security (Incapacity for Work) (General) Regulations 1995).

3. On 1 October 2002, the claimant made a new claim for incapacity "credits" from 18 September 2002. It is not entirely clear why the claimant chose that date but, in any event, on 11 October 2002, the Secretary of State disallowed the claim from that date on the ground that the personal capability assessment could not be treated as satisfied because there had been a determination within the preceding six months that the claimant had been capable of work, the claimant was not suffering from any new condition and his disablement had not significantly worsened. The claimant appealed, but, on 20 February 2003, his appeal was dismissed by a tribunal consisting only of a legally qualified panel member. The tribunal suggested that the claimant make a new claim, which he did, being found to be incapable of work from 14 March 2003. It is against the decision of 20 February 2003 that the claimant now appeals with the leave of a tribunal chairman. His appeal is supported by the Secretary of State.

4. Section 171C(1) of the Social Security Contributions and Benefits Act 1992 provides:

"Where the own occupation test is not applicable or has ceased to apply, in the case of a person, the question whether the person is capable or incapable of work shall be determined in accordance with a personal capability assessment."

Regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995 provides:

(1) Where the question of whether a person is capable or incapable of work falls to be determined in accordance with the personal capability assessment that person shall, if the conditions set out in paragraph (2) are met, be treated as incapable of work in accordance with the personal capability assessment until such time as he has been assessed or he falls to be treated as capable of work in accordance with regulation 7 or 8.

(2) The conditions are –

- (a) that the person provides evidence of his incapacity for work in accordance with the Social Security (Medical Evidence) Regulations 1976 (which prescribe the form of doctor's statement or other evidence required in each case); and
- (b) that it has not within the preceding 6 months been determined, in relation to his entitlement to any benefit, allowance or advantage which is dependent on him being incapable of work, that the person is capable of work, or is to be treated as capable of work under regulation 7 or 8, unless –
 - (i) he is suffering from some specific disease or bodily or mental disablement which he was not suffering from at the time of the determination; or
 - (ii) a disease or bodily or mental disablement which he was suffering from at the time of that determination has significantly worsened; or
 - (iii) in the case of a person who was treated as capable of work under regulation 7 (failure to provide information), he has since provided the information requested by the Secretary of State under that regulation.”

5. The Secretary of State concedes that both his original decision and that of the tribunal were erroneous in point of law. The six-month period mentioned in regulation 28(2)(b) ran from 21 March 2002, notwithstanding the unsuccessful appeal which resulted in the decision of the tribunal dated 29 August 2002. An unsuccessful appeal can not start the period from running again because a tribunal is prohibited by section 12(8)(b) of the Social Security Act 1998 from having regard to any circumstances after the date of the decision of the Secretary of State that is under appeal. Therefore, by 21 September 2002, the six-month period had expired in the present case. As that change of circumstances occurred before the Secretary of State made his decision on 11 October 2002, effect should have been given to it by treating the claimant as incapable of work in accordance with the personal capability assessment from 21 September 2002 until such time as he was actually assessed. The tribunal erred in suggesting that it was necessary for the claimant to make a new claim in order to obtain the benefit of regulation 28.

6. Secondly, in any case where a claim is made on the ground of incapacity for work and it is decided by the Secretary of State that the claimant cannot be treated under regulation 28 as incapable of work pending the assessment, the Secretary of State must still arrange a personal capability assessment in order to determine whether the claimant is *actually* incapable of work in accordance with the assessment. If it found that the claimant was incapable of work from the date of claim in accordance with the assessment, arrears of benefit will be payable from the date of claim. The point of regulation 28 is merely that it enables benefit to be paid before the assessment and irrespective of the eventual result of the assessment. This I explained in R(IB) 1/01 and R(IB) 2/01. Consequently, the claim for credits in the present case could not finally be determined until the assessment had been carried out.

7. The tribunal was not properly constituted if it was required to carry out such an assessment. Regulation 36(2)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 provides that a tribunal shall consist of both a legally qualified panel member and a medically qualified panel member in any case where –

“the issue, or one of the issues, raised on the appeal is whether the personal capability assessment is satisfied”.

I do not consider that the question whether a person is to be “treated as incapable of work in accordance with the personal capability assessment” falls within the scope of regulation 36(2)(a)(i), but it seems to me that the appeal before the tribunal necessarily raised the question whether the personal capability assessment was actually satisfied. That is because the claimant had asserted that he was incapable of work and the Secretary of State had decided that regulation 28 of the 1995 Regulations did not apply without giving any indication that an assessment was to be carried out on his behalf and that the question of entitlement to credits had not finally been determined. If the tribunal was not satisfied that the claimant fell within the scope of regulation 28, he did not himself have the power to assess the claimant and should have adjourned the case to another, properly constituted, tribunal. No doubt, had he done so, he would also have asked the Secretary of State to arrange a medical examination. If, in the light of the evidence obtained through that examination, the Secretary of State had been minded to accept that the claimant was incapable of work, he could have revised the decision under appeal so that the appeal lapsed (see regulation 3(4A) of the 1999 Regulations and section 9(6) of the Social Security Act 1998). If he had not been minded to accept that the claimant was incapable of work, the case would have come before the new tribunal in the same way as most incapacity cases.

8. I can substitute for the tribunal’s decision a decision that the claimant is to be treated under regulation 28 as incapable of work in accordance with the personal capability assessment from 21 September 2002. As the Secretary of State failed to arrange an assessment, my decision is effective until the day before the claimant was eventually awarded incapacity benefit on a new claim. I also find that the claimant was incapable of work for the three days from 18 to 20 September 2002. On any view he was chronically disabled and I do not consider it necessary to obtain further evidence as to the extent of his disablement in respect of such a short period after such a long time. Accordingly, I give the decision set out in paragraph 1 above.

(Signed) **MARK ROWLAND**
Commissioner
28 January 2004