SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/3179/00

Starred Decision No: 136/01

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

Ms Kimberli Jones,
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 6th March 2002

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal given on 27 March 2000 is erroneous in point of law. I set aside the decision of the tribunal and, since I cannot give the decision which the tribunal ought to have given without making fresh or further findings of fact and I do not consider it expedient to make such findings, I refer the case for determination by a differently constituted tribunal.

2. This is an appeal against the tribunal's decision dismissing an appeal against a decision terminating an award of incapacity benefit, brought by a claimant who suffers from back pain. He became incapable of work on 19 April 1993, from which date he was in receipt of invalidity benefit, followed by incapacity benefit. He was found to satisfy the all work test of entitlement in March 1996 and again in November 1997, and on 11 October 1999 he submitted an incapacity for work questionnaire in Form IB50 claiming impairment of the activities of sitting, rising from sitting, bending and kneeling, standing, walking up and down stairs, lifting and carrying, and hearing. However, on 14 December 1999 the examining medical examiner assessed him as scoring only 3 points, in respect of climbing and up and down stairs, and on the basis of that assessment the decision maker issued a decision terminating benefit from 13 January 2000.

3. In the appeal to the tribunal, the claimant's representative asked whether the previous all work test assessments had been taken into account in making the supersession decision, and requested that copies of the medical report used to reach that decision and the medical reports and incapacity for work questionnaires used in connection with the earlier all work test assessments be sent to the representative. Unfortunately, the claimant's representative was unable to attend the hearing of the appeal, although the claimant clearly expected him to be there, and the hearing proceeded in the representative's absence. In their statement of reasons, the tribunal, having set out the examining medical officer's clinical findings, gave the following reasons for dismissing the appeal:

> **"The tribunal agreed that the appellant had no problem with sitting, rising from sitting, bending, or kneeling, with standing, with walking, with manual dexterity, with reaching, with lifting or carrying, with vision, with speech nor with hearing. There is no evidence of a problem with consciousness and no problem with continence. The tribunal accepts the Benefits Agency doctor's opinion on these activities, based as it is on detailed, clinical findings in preference to the appellant's oral evidence which is not supported by any medical evidence. The tribunal accepts the Benefits Agency doctor's medical opinion that the appellant can only walk up and down a flight of 12 stairs if he goes sideways or one step at a time."**

It is against that decision that the claimant, with my leave, now appeals.

4. The Secretary of State's original submission opposed the appeal but did not say why, and on 20 November 2000 the Chief Social Security Commissioner directed a full submission on each of the grounds of appeal. Because the grounds of appeal and the Secretary of State's submission in response to the Chief Commissioner's direction raised issues regarding the relevance of previous all work test assessments, a legal officer directed that further proceedings in this appeal be deferred pending the decision in CIB/1972/2000, in which those issues were to be considered. On 8 May 2001 I directed that the decision in that case and in joined appeal CIB/3667/2000 be added to the case papers, and directed a further submission on behalf of the Secretary of State in the light of those decisions. In

his submission in response to that direction, dated 14 June 2001, the Secretary of State's representative maintained his opposition to the appeal.

5. The actual decision terminating benefit has not been included in the case papers, but the authority for it which is asserted in the submission to the tribunal is regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. That regulation empowers supersession under section 10 of the Social Security Act 1998 on the basis that the decision to be superseded:

   "is 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"

6. Although the matter is dealt with fully in the Secretary of State's submission, I understand the claimant's representative to accept in paragraph (1) of the grounds of appeal that it was not necessary for the decision maker to identify a change of circumstances in order to supersede the decision awarding benefit. I consider that concession to be correct. In *CIB/2338/2000* Mr Commissioner Jacobs expressed the view that regulation 6(2)(g) was unnecessary, because a finding as to a claimant's capacity for work is a "determination" rather than a "decision", and a changed determination constitutes a change of circumstances enabling supersession to take place under regulation 6(2)(a). In the Common Appendix to *CIB/1972/2000 and CIB/3667/2000* Miss Commissioner Fellner disagreed, expressing the view that the purpose of regulation 6(2)(g) was to remove the effect of decisions such as *CIB/3899/1997*, under which the absence of an earlier all work test report had frequently been held to be fatal to entitlement to review.

7. For my part, I agree with the Secretary of State's representative that a new determination as to whether a claimant is capable of work cannot, in itself, constitute a relevant change of circumstances. That would have the effect that a decision under section 10 took effect from the date when the decision was made, and the provisions in regulation 7(2) of the Decisions and Appeals Regulations, requiring the effective date of the section 10 decision to be based on the date when the relevant change of circumstances actually took place, would be nugatory. Any overpayments found to have taken place as a result of the supersession decision could therefore not be recovered for any period earlier than the date when the decision was made. I agree with the Secretary of State's representative that supersession is a composite process, embracing both the "review" and the "revision" decisions of the old regime, and that a new determination as to whether a claimant is capable of work does not exist separately from any outcome decision resulting from that determination.

8. What is clear, however, is that the obtaining of a new medical opinion in accordance with regulation 8 of the Incapacity for Work Regulations is by itself sufficient to allow supersession to take place, irrespective of any change of circumstances or any other of the former grounds for review. In my view, the need for the tribunal to consider previous favourable assessments in such cases depends entirely on the relevance of the earlier assessments to the determination of the claimant's incapacity for work at the date of the supersession decision. In *R(S) 1/55* a claim for sickness benefit had been disallowed by the insurance officer, but the decision did not specify the date on which the period of

disallowance ended. A Tribunal of Commissioners held that the decision ought to have specified the end date of the period. The Tribunal also held that a local tribunal could consider only the period of the claim and any other periods referred to them, but added:

> **"...evidence as to the claimant's state of health at any date not covered by these claims is only relevant in so far as it justifies an inference as to the state of his health during the period so covered."**

If evidence of incapacity for work relating to other claim periods could be taken into account by a tribunal considering claims for sickness benefit, it seems to me that assessments used to base earlier entitlement decisions on incapacity benefit, but which were not used in reaching the supersession decision under appeal, may also be relevant in deciding whether a claimant was incapable of work at the date of that decision.

9. In paragraph 5 of the Common Appendix to *CIB/1972/2000 and CIB/3667/2000* the Commissioner drew attention to section 10(2) of the Social Security Act 1998, which provides that in making a supersession decision:

> **"...the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative".**

However, I agree with the Secretary of State's representative that section 10(2) is concerned with issues, and not with evidence, and therefore does not provide any basis for excluding evidence of earlier assessments which is relevant to a claimant's incapacity for work at the time of the supersession decision. In *R(S) 1/53* the Commissioner held that a tribunal must have regard to all the relevant evidence in deciding whether a claimant is incapable of work. I therefore consider that if an earlier assessment is relied on by a claimant before a tribunal, and that assessment is relevant to the determination of incapacity at the date of the supersession decision, the tribunal must take the earlier assessment into account.

10. The weight to be attached to earlier assessments is entirely a question of fact for the tribunal. However, as Mr Commissioner Williams pointed out in paragraph 12 of *CIB/378/2000*, assessments will normally be based partly on clinically observed facts, and partly on opinions and reported facts, and a tribunal will often be entitled to place greater weight on clinical findings in earlier assessments than on expressions of opinion and disputed statements of fact. The fact that a tribunal does not have available the medical reports on which an earlier assessment was based, for example, because they have been destroyed, will not prevent the assessment from being considered by a tribunal and, as the Commissioner showed in *CIB/378/2000*, in some cases it may make it more difficult for the supersession decision to be upheld.

11. The claimant's representative raised the issue of the earlier favourable assessments in the appeal to the tribunal, but there is no reference to those assessments in the reasons for the tribunal's decision. The appeal to the Commissioner is on the basis that the tribunal did not deal with the earlier assessments, but the Secretary of State nevertheless resists the appeal on the ground that it was unnecessary for the tribunal to do so. The Secretary of State's representative submits that:

> **"In the instant case, the claimant's letter of appeal had asked whether previous medical assessments had been considered by the adjudication officer and requested that copies of those assessments be supplied to the claimant's representative. In my submission, the terms of he**

letter of appeal did not raise any substantive point of comparison with the earlier evidence that rendered it incumbent on the tribunal to call for and consider the previous assessments. Instead, the appeal simply indicates that the claimant is considering making such a comparison. If the claimant did indeed wish to rely on such a comparison, it was reasonable to expect the claimant's representative to do so explicitly at or before the tribunal. As the representative did not make any written submissions to that effect in advance and, without explanation, failed to appear at the tribunal, the tribunal were entitled to proceed on the assumption that no comparative argument was being advanced. Furthermore, as the earlier assessments evidently dated from two years before the date in respect of which the tribunal was considering the claimant's incapacity there was no compelling *a priori* reason for the tribunal to believe that they were relevant to the tribunal's deliberations. In my submission, the tribunal was entitled to focus merely on the evidence it did; namely the medical certificate submitted by the claimant, the claimant's own evidence as to his condition, and the contemporaneous expert medical assessment obtained by the Secretary of State. No case had been made as to why assessments of the claimant's incapacity two years before shed any light as to whether and how the claimant was incapacitated now. The tribunal was entitled to ignore that evidence in the same way as it would be entitled to ignore any other irrelevant evidence not specifically adduced by the parties. No express explanation was required."

12. I do not agree that the tribunal were entitled to disregard the earlier favourable all work test assessments because no issues of comparison between those assessments and the most recent personal capability assessment were raised at the hearing. Under the former review provisions, it was necessary for a tribunal to compare its findings of fact with the findings (actual or assumed) on which the previous decision was based, in order to decide whether a ground for review had been established. No such comparison is required on supersessions under regulation 6(2)(g), and, for the reasons I have given, the earlier assessments are relevant only in so far as they cast light on the claimant's condition at the time of the supersession decision.

13. I cannot agree with the Secretary of State's representative that assessments made approximately two years and three years previously were irrelevant because they shed no light on the question of whether the claimant was incapable of work at the time of the supersession decision. The claimant was medically retired from his job as a bus driver following an assault in 1993 and was certified by his general practitioner as suffering from low back pain on 28 February 1994. On his incapacity for work questionnaire he stated that he had arthritis of the lumbar spine and pain in the middle of his back. The examining medical officer found on clinical examination that the claimant had 90 degree straight leg raising on both sides, and normal power, tone, co-ordination, sensation, reflexes and hearing. He gave a diagnosis of "spondylosis-low back", and advised that he did not expect any significant change in the claimant's condition.

14. I regard it as apparent from those facts that, on any view, the claimant's condition was essentially stable. Although he did not specifically assert that there had been no improvement in his condition since the earlier assessments, his representative raised the issue of the earlier assessments in the appeal. Whilst the assessments might have been regarded as of little significance if they had resulted in points scores similar to that awarded on the most recent assessment, a difference of what must have been at least 12 points between each of the earlier assessments and the most recent assessment could not be explained away on the basis of legitimate differences in clinical judgement. The earlier reports were themselves based on clinical findings which, in the circumstances of this case, were almost certainly relevant in considering the correctness of the report which the claimant challenged, and on which the supersession decision was based. I have therefore come to the conclusion that the earlier assessments were relevant to the issues

which the tribunal had to consider, and that the tribunal therefore erred in law by failing to consider whether to adjourn or postpone the hearing of the appeal to enable copies of the medical reports leading to those earlier assessments to be obtained and by failing to have regard to the earlier assessments in reaching their decision.

15. Having reached that conclusion, I consider it unnecessary to deal with the other contentions of procedural unfairness made by the claimant's representative. I therefore allow the appeal and set aside the decision of the tribunal. Since I cannot give the decision which the tribunal ought to have given without making fresh or further findings of fact and I do not consider it expedient to make such findings, I refer the case for determination by a differently constituted tribunal. Because I regard the earlier assessments as relevant for the reasons I have given, I direct the Secretary of State to obtain and to add to the case papers the incapacity for work questionnaires and medical reports on which those assessments were based.

(Signed)

E A L Bano
Commissioner

28 November 2001