WRB—NS Capacity for work— need to consider previous assessments

(63)

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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/1972/2000 & CIB/3667/2000

Starred Decision No: 58/01

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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.

1. This appeal, brought with my leave, succeeds. The decision of the Appeal Tribunal on 25 2 00 was erroneous in point of law, as explained below. I therefore set it aside and remit the appeal to a completely differently-constituted tribunal for rehearing.

2. I held an oral hearing because a point of law involving regulation 6(2)(g) of the Decisions and Appeals Regulations 1999 was concerned. The appellant did not attend, but was most ably and sensibly represented by Mr Jim Strang of Welfare Rights and Employment Law Consultants. Mrs Ruth Aldred of the DSS Solicitor's Office represented the Benefits Agency. The case was heard with CIB/3667/00, and the representative in that case co-operated with Mr Strang in what were effectively joint submissions on the point of law, though of course individual submissions were made on the facts of each case. I am exceedingly grateful to all for their help. My conclusions on the point of law are contained in a common appendix to the two appeals.

3. The appellant in this case suffers from asthma and right radial tunnel syndrome (interpreted by the examining doctor as right arm pain, tennis elbow and muscle pains). She has been on invalidity/incapacity benefit since 1992, and passed an All Work Test (AWT) in 1996, but the results of this were not before the tribunal, despite Mr Strang's efforts to obtain them. I therefore have no idea what they were. On the present AWT the appellant, despite claiming points for walking, stairs, manual dexterity, reaching, lifting/carrying and seeing, scored no points, and was consequently found no longer entitled to incapacity benefit from 28 10 99.

4. She made a number of complaints about the conduct of the latest AWT, for which she received an apology from SEMA Medical Services, who are now responsible for conducting the AWT on behalf of the Benefits Agency. She also made a number of observations which I suppose could amount to a statement that she had not improved since her previous AWT, though these contained some misrepresentation of what her consultant Mr Stanley had said.

5. "Reconsideration" on receipt of the letter of appeal resulted in a most unsatisfactory document (page 56A) which refused to change the original decision on the ground that the decision maker had considered all the

available evidence when making the original decision. No doubt s/he had, but the point of reconsideration is to look at the issues raised in whatever is taken to be the application for revision, in this case the appeal letter (see appendix), and this was not done.

6. The tribunal took a detailed record of proceedings and reached a conclusion with which I would be most reluctant to quarrel (it is detailed and complete and fully explains its conclusions, including its reasons, based on comparing the IB50 claims with the oral evidence, for finding the appellant an unpersuasive witness), were it not that I have now reached a decision which suggests that the tribunal might usefully have called for the earlier AWT and made a comparison. I accordingly, and with regret, set its decision aside.

7. I have dealt with the representative's submissions in the appendix.

8. The rehearing tribunal will, I trust, be provided with the earlier AWT report, and the district chairman to whom this decision will be referred for directions will no doubt add his or her directions to my exhortation. If the 1996 AWT is no longer available, then the representative will be able to seek more detailed evidence from the GP's records.

9. The rehearing tribunal will consider both the asthma and the right arm conditions, and also the left arm in so far as it is relevant. It will make its own fresh investigation and its own findings of fact, though it will be entitled to rely on the previous tribunal's record of proceedings unless it is alleged that this was incorrect in any respect. It will also take account of the complaints about the latest AWT examination.

(signed) Christine Fellner
Commissioner

27 April 2001

1. This appeal, brought with leave of a district chairman, succeeds. The decision of the Appeal Tribunal on 12 6 00 was erroneous in point of law, as explained below. I therefore set it aside and remit the appeal to a completely differently-constituted tribunal for rehearing.

2. I held an oral hearing because a point of law involving regulation 6(2)(g) of the Decisions and Appeals Regulations 1999 was concerned. The appellant did not attend, but was most ably and sensibly represented by Mrs Mariame Saleh of the Mount Vernon Disablement Resource Unit. Mrs Ruth Aldred of the DSS Solicitor's Office represented the Benefits Agency. The case was heard with CIB/1972/00, and the representative in that case co-operated with Mrs Saleh in what were effectively joint submissions on the point of law, though of course individual submissions were made on the facts of each case. I am exceedingly grateful to all for their help. My conclusions on the point of law are contained in a common appendix to the two appeals.

3. The appellant in this case, who was born on 4 9 59 and was therefore 40 at the date of the latest All Work Test (AWT) suffers from right arm/hand injury and reactive depression. He became incapable of work on 4 7 97. He failed a most detailed AWT examination in 1998, but succeeded before a tribunal on the tribunal's view that the examining doctor had failed to appreciate the full effect of his disablement upon his ability to perform the AWT activities of reaching and manual dexterity, having regard to the reasonable regularity test. The IB85 and the tribunal decision were before the tribunal whose decision is under appeal On the present AWT the appellant, despite claiming points for sitting, rising, stairs, manual dexterity, reaching and lifting/carrying, scored only 12 points on manual dexterity and lifting/carrying, and was consequently found no longer entitled to incapacity benefit from 30 3 00. The doctor observed that he was able to straighten his right elbow and lift it above his head.

4. His letter of appeal at page 1B stated, among other things, that he had not improved since his earlier AWT, that he could not raise his right arm as if to put on a hat, and that the previous tribunal had agreed with him on stairs, sitting and rising.

5. "Reconsideration" on receipt of the letter of appeal resulted in a careful two-page decision in which, although not acknowledging any obligation to do so, the officer considered the earlier AWT which the appellant had failed, and the tribunal decision. The officer said, correctly, that the tribunal had not endorsed the appellant's claims on stairs, sitting or rising, but only on manual dexterity and reaching. In regard to the latter, the latest examination had found no functional impairment. The appellant had been awarded lowest rate disability living allowance care component for the cooking test based on a visiting doctor's report, but the officer doubted the relevance of this.

6. The tribunal took quite a detailed record of proceedings. It was told that the only extra descriptors in issue were stairs and reaching. It observed that there was no medical evidence to justify impairment of reaching ability, and that the appellant's only problem on stairs, for which he had never consulted his GP, was dizziness through lack of sleep. I would be reluctant to quarrel with this conclusion were it not that I have now reached a decision which suggests that the tribunal might usefully have compared the later AWT findings with the earlier tribunal's decision and the earlier clinical findings. The appellant failed both AWT medical examinations, and the earlier tribunal must have proceeded on the basis of accepting the appellant's evidence, which the later tribunal was not required to do. But some gesture should have been made towards the earlier results, and also towards the DLA award on the cooking test, though only the fact of this, and not the basis for it, was before the tribunal. Mrs Saleh observed at the hearing that although failing an AWT is often a ground for reviewing (or superseding) a DLA award, that had not been done in this case. I accordingly set the later tribunal's decision aside.

7. I have dealt with the representative's submissions in the appendix, but emphasise that the law on "review" is no longer relevant following the coming into effect of the Social Security Act 1998.

8. The rehearing tribunal will make any comparison with the previous award that it sees fit. The representative will be free, if she wishes, to obtain a copy of the visiting doctor's report on the DLA claim and produce this to the tribunal. It may be that it will suggest disablement in excess of that found by the current AWT examination, it may be that it will not. The tests are different, and although I see the attraction of the representative's

submission that DLA factual reports should be obtained by the Benefits Agency when considering incapacity benefit, I am not persuaded that I should give any indication that this should routinely be done.

9. The rehearing tribunal will consider the matter afresh and make its own findings of fact. It will be entitled to rely on the previous tribunal's record of proceedings unless it is alleged that this was incorrect in any respect.

(signed) Christine Fellner
Commissioner

27 April 2001

COMMON APPENDIX

CIB/1972/00 & CIB/3667/00

1. These two appeals, which were heard together, concerned the same point of law: the effect of subparagraph (g) of regulation 6(2) of the Decisions and Appeals Regulations 1999 (introduced by regulation 3 of the Decisions and Appeals Amendment (No 2) Regulations, SI 1999 No 1623) which provides that a decision under section 10 of the Social Security Act 1998 to supersede another decision may be made on the Secretary of State's own initiative on the basis that the decision to be superseded -

> (g) 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.

In more familiar terms, this means that a decision awarding incapacity benefit on an earlier All Work Test (AWT - now "personal capability assessment") may be superseded where the Secretary of State receives the results of another AWT examination. In practice this will occur where a claimant passed the earlier AWT but has failed the later one, and has his benefit stopped accordingly.

2. Supersession is a new concept introduced by s10 of the 1998 Act whereby the Secretary of State may supersede, on application or on his own initiative, one of his own decisions or a decision of an appeal tribunal or a Commissioner, and need not consider any issue not raised on the application or that did not cause him to act on his own initiative. Subsection (3) empowers the making of regulations to prescribe the cases and circumstances in which, and the procedure by which, a supersession decision might be made, and this is the power that was exercised in making regulation 6(2)(g).

3. Having been offered arguments to the effect that subparagraph (g) was "contrary to the spirit" of the 1998 Act, that it offended "natural

justice", that invalidity benefit (and indeed incapacity benefit before the 1998 Act) was an open-ended award that could only be revised on identifiable grounds (presumably those in s25 of the 1992 Administration Act), and even that the subparagraph contravened earlier Commissioners' decisions, I took the precaution of inquiring whether an *ultra vires* argument was sought to be made. But I was assured it was not, and I think this was wise. Subsection (3) of s10 seems to me to confer as wide a regulation-making power as a Secretary of State could wish, subsection (1) empowers him (in practice through an officer) to act on his own initiative, and subsection (2) makes clear that he is not required to consider any issue which did not cause him so to act. A fresh AWT is, under subparagraph (g), what causes him to act. As I understand the sovereignty of Parliament (and I was not made aware of any provision of European law that might derogate from its freedom of action in this field), fresh primary legislation may replace existing legislation and "sweep away" earlier protection, subject to any argument under the Interpretation Act. Certainly it is not to be argued that judicial decisions made under earlier legislation can bind Parliament in enacting fresh legislation, though of course in so far as the new legislation still allows scope for them to be applied by decision-makers, they still apply in accordance with the doctrine of precedent.

4. However, I stress that I had no arguments addressed to me on *vires,* and a different conclusion might be reached in a case where such arguments are made.

5. Be that as it may, I conclude that subparagraph (g) means what it says: receipt of a new adverse AWT report entitles (though does not bind, since the whole of s10 and of regulation 6 is couched in terms of "may", not "shall") the Secretary of State to supersede an existing award of incapacity benefit. I am fortified in this view by s10(2) of the primary legislation, which absolves him from considering any issue which did not cause him to act on his own initiative. I adhere to my previously-expressed view that subparagraph (g) was enacted to reverse the effect of CIB/3899/97, under the old law on review, which caused many probably perfectly respectable tribunal decisions to be remitted because of the absence of the earlier AWT report, no doubt leading to ultimate disappointment for claimants.

6. This takes care of the Secretary of State's officer's powers on the initial decision to supersede. The officer may of course decide not to do so,

for example if s/he does not find the AWT report convincing or thinks more points might on the claimant's or other evidence be awarded which would reach the necessary total of 15 on physical or combined physical and mental descriptors, or 10 on mental descriptors alone. This was sometimes done under the old law, because the decision was, then as now, the officer's and not the doctor's. Advice may be sought from departmental doctors. The earlier AWT may also, if the officer thinks fit, be considered. This might happen if it is said in the IB50 questionnaire, or recorded as having been said to the examining doctor, that the claimant has not improved, or has got worse. But what subparagraph (g) does is render this no longer obligatory. It is no longer necessary, as it was under the old law, to identify a ground, such as change of circumstances, or that the earlier AWT was made in ignorance of some material fact, for superseding the awarding decision based on it. (Nor does this in fact leave people worse off than they were before, because where they did not appeal a decision that might have been glaringly wrong, they were no better off under the old law.)

7. What happens if there is a request for revision under s9 and regulation 3 (confusingly termed "reconsideration")? This may well be the point at which the Secretary of State's officer learns that a claimant says he is no better than when he passed the earlier AWT, or has got worse. Subsection (2) of s9 provides that s/he need not consider any issue that is not raised by the application or, as the case may be, did not cause him or her to act on his or her own initiative. But in this situation, the revision request is the application which raises the issue; the officer will not have acted unprompted. If the issue of no improvement is raised, it must be considered, by looking at the earlier AWT. This, indeed, is what happened in CIB/3667/00 at pages 75-6; though the officer disclaimed any actual obligation to do so, he nonetheless looked both at the earlier AWT examination report and at the tribunal decision subsequently made, and I consider that he was right to do so and wrong to say that he need not. The papers were placed on the file and were available to the later tribunal.

8. In CIB/1972/00, on the other hand there is at page 56A a bare, unreasoned statement that following reconsideration the decision is not changed, though it is recited pro forma that the decision maker had considered all the available evidence (unspecified) when making the original decision. This, I think, is not good enough. And the representative told me that his request for a copy of the earlier AWT was either refused on

the basis of regulation 6(2)(g) or simply ignored. He also told me he had heard a rumour that the Benefits Agency was planning to clear out all old AWTs later this year, so that they could not thereafter be produced. In the light of my observations as to reconsideration and appeal, I would think this most unwise.

9. It is also necessary for a tribunal properly to consider the evidence. This will not always require seeing an earlier AWT. Mr Commissioner Jacobs in CIB/2905/00 noted that in that case the later AWT was detailed, it contained a statement that there had been improvement, and the claimant did not raise any point of comparison with the earlier test. In CIB/2338/00 he cited a change in the condition identified as relevant to capacity for work, or the fact that on the earlier test the claimant had recently had an operation, as situations where the previous test results would not be relevant. But in the same decision he suggested that where the comparison was expressly raised, or the condition was a variable one so that it would be useful to have more than one snapshot of eg peak flow readings in assessing a claimant's overall condition, then it would be relevant for the tribunal to see the earlier test.

10. I agree with this view. A tribunal is not to be circumscribed by the power given to the Secretary of State on the initial decision to supersede purely on the basis of a new adverse AWT. It will need to satisfy itself that one of the supersession grounds set out in regulation 6 applies. This may be regulation 6(2)(g) in an appropriate case. In an inappropriate case, it will be one of the others.

11. Mr Commissioner Jacobs in CIB/2338/00, points out, correctly it seems to me, that the question of incapacity for work is under the 1998 Act a "determination" which is not in itself appealable. It is but a building block on the way to an "outcome" decision which affects a claimant's pocket (in the present cases, the withdrawal of benefit). That is the decision which is open to appeal. But a tribunal will still have to consider incapacity as part of its own outcome decision. I do not think that I follow my learned colleague to his conclusion that the introduction of regulation 6(2)(g) was misconceived because it was unnecessary. I can see a use for it, as stated above. However I do agree with him that the new adjudication regime should prevent decisions being overturned on purely formal grounds, as happened under CIB/3899/97, where one had the bizarre experience of the

Benefits Agency persistently omitting to produce to tribunals, or even advert to, an earlier favourable AWT (and often purporting to review and revise some ancient invalidity benefit decision), while Central Adjudication Services, as it then was, urged Commissioners to overturn and remit tribunal decisions for not having looked at the earlier test. Too much procedural formality does no-one any favours, as the appellant's representative in CIB/1972/00 very fairly admitted.

12. Neither in written nor in oral submissions did the Secretary of State dissent from the view that tribunals were entitled to call for whatever they thought necessary to reach a correct decision, including earlier AWTs. Where the dispute arose was (a) whether the Secretary of State was ever obliged to rely on anything other than subparagraph (g), and (b) when a tribunal should exercise its right to call for the earlier results. Mrs Aldred at the oral hearing accepted that regulation 6(2)(g) did not reverse the burden of proof on the Secretary of State to show that there were grounds to supersede, but argued that he was not technically obliged to look at anything other than the current adverse AWT, though she conceded that he might be entitled to look at *other* new medical evidence produced by the claimant. She accepted that tribunals were entitled to call for the earlier AWT but were not required to do so, and urged that they should only do so where there was a *strong* indication that it might be relevant. She reminded me that it was the situation at the date of the latest decision that was to be looked at, and that the earlier test could only be relevant if its contents were fairly referable to that later date (in the same way as later evidence could only be looked at if it was fairly referable back to the date of the decision).

13. The representatives argued for a somewhat looser test, essentially where a claimant raised the comparison issue by saying that he was no better than before, or was worse. They further, understandably, argued that this should apply at the revision/reconsideration stage, and not only before a tribunal.

14. I asked what was to happen if the previous AWT was not available. I hardly imagined it could be argued that in that case any award would have to continue wherever a claimant, or more likely in view of this decision, a representative, raised the comparison issue. Mrs Aldred suggested bespeaking a new examination, if its results could properly be referable to the earlier date (ie the date of the original test which the claimant had

passed). I observed that in my experience any suggestions of this kind were routinely refused as impracticable. The representatives suggested having recourse to the GP's notes or, where there had been a DLA award, to any factual reports made in connection with that application.

15. My conclusions, as will be appreciated, are somewhat broader than the position contended for by Mrs Aldred. Regulation 6(2)(g) is of use to the Secretary of State on the initial decision, but once a comparison issue is raised on a review/reconsideration application, the earlier AWT may become relevant evidence. Certainly a tribunal is entitled to see it if it thinks fit.

16. This has administrative implications. The last thing Commissioners want is to be besieged with applications to set aside tribunal decisions on the ground that they erred in not calling for the earlier test. Doubtless the Appeals Service can do without applications to set aside on the ground that the relevant documents were missing. It has to be said that the sensible course would be for the Benefits Agency routinely to include the immediately previous successful AWT papers in the tribunal papers. I have of course no power whatever to direct this. I merely warn of the possible consequences if it is not done. This does not mean that the Secretary of State must consider the earlier results if his officer does not think it necessary. It simply seems more straightforward than introducing some qualification that it need be done only where the comparison is invoked. This would in any event leave it open to unscrupulous representatives to raise the question routinely, whether justified or not. I hasten to say that I absolve either of the representatives who appeared before me, of whose integrity I have no doubt whatever, from any such suggestion.

17. I add a comment on R(S)4/86, which is regularly invoked to argue that a different medical opinion is not a material fact or a change of circumstance. That case concerned a set of circumstances that would not now be encountered. On the basis of a Med 3 certificate from the GP which advised the claimant to refrain from work for 3 months because of low back pain, a 3-month award of invalidity benefit was made. A departmental doctor then examined the claimant and found him fit for light work, though not for his previous occupation. The GP retaliated with a further Med 3 advising him to refrain from work for 6 weeks because of low back pain and vertigo. A further departmental doctor again found him capable of limited

work. The adjudication officer purported to review the awarding decision and to revise it for the remaining 20 days of the original award (one can only marvel at the speed with which things could be done in 1984). The Commissioner held that a different medical opinion could not *alone* constitute a change of circumstances, and that there could not be a review on grounds of ignorance or mistake as to a material fact when all that the adjudication officer had was a collection of conflicting medical opinions and no primary facts about which he could have been, as he would have had to be, mistaken. A finding of capacity or incapacity for work is the outcome issue, which must be inferred from primary facts.

18. I find a number of problems with this decision. In the first place, I wonder if it would have been the same if the original award had been open-ended rather than finite. If it would have been, it is difficult to see how an initial award of benefit, based only on a GP's certificate, could ever have been overturned on review; yet they routinely were. In the second place, the GP's certificates, other than stating low back pain (and later vertigo), contained no findings of primary fact bearing on capacity for work. They were purely opinions, and as such it is hard to see why the original one should have had primacy over later reports which, as I recollect invalidity benefit reports, did contain *some* clinical findings, presumably capable of being treated as findings of primary fact. In the third place, as R(S)6/78 cited by the Commissioner made clear, a medical opinion may be *evidence* of a change of circumstances, even if not itself one. As I have remarked elsewhere, the AWT was designed to provide a much more detailed, and contemporaneous, medical view that the apparently more cursory departmental invalidity benefit reports, comprising as it does clinical findings and skilled medical observation of what a claimant does when not undergoing the formal examination, as well as a statement by the claimant of his medical history and current and proposed treatment and medication, and of his daily activities. It would be idle to pretend that all medical examiners are uniformly conscientious and scrupulous, but that is a matter that can be dealt with on reconsideration or appeal. While I would not dissent from the bald statement that a different medical opinion does not, *of itself*, constitute a change of circumstances, or a mistake as to a material fact (a point also made by Brown J in the appendix to R(M)5/86), I consider that R(S)4/86 should not be incontinently cited; and so far as the Secretary of State's initial decision is concerned, it has simply been overruled by legislation in the form of regulation 6(2)(g).

19. For completeness, I add that Mrs Aldred submitted that both tribunal decisions were unimpeachable, and both representatives disputed this. The outcome of these submissions can be seen in the individual decisions.