

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the Incapacity Benefit Appeal Tribunal dated 3 July 2003 on case No. U/45/177/2003/00210 is erroneous in law. I set that decision aside and, as empowered by section 14(8)(a)(ii) of the Social Security Act 1998, I give my own decision which is:-

The claimant was not incapable of work in the weeks beginning 8 July 2002, 5 August 2002, 12 August 2002, 19 August 2002, 26 August 2002, 7 October 2002, 14 October 2002 and 21 October 2002 because in those weeks she was in remunerative employment in which her net earnings exceeded the earnings limits specified in regulation 17(2)(a) of the Social Security (Incapacity for Work) (General) Regulations 1995.

2. The claimant appeals, with my leave and the support of the Secretary of State's representative, against the tribunal's decision that the claimant was not incapable of work from and including 1 February 2002 by reasons of her having been working from that date.

3. The claimant was in receipt of Incapacity Benefit from 1 February 2002 on account of incapacity for work certified by her general practitioner as being due to stress, hypertension and psoriasis. On 23 August 2002 the claimant underwent a medical examination as part of the Personal Capability Assessment prescribed for the purposes of section 171C of the Social Security Contributions and Benefits Act 1992 by regulation 24 of the Social Security (Incapacity for Work) (General) Regulations 1995 and the schedule to those regulations. In the course of the examination the claimant told the examining medical officer about her activities in providing bed and board for language students boarded with her by a local language school. The Secretary of State's decision maker, having obtained further information about those activities and the remuneration received by the claimant from the language school, decided that as the claimant was working in work not undertaken on the advice of her doctor she was, by virtue of regulation 16 of the Incapacity for Work (General) Regulations, not incapable of work from and including 1 February 2002. The claimant appealed.

4. The tribunal's reasons for dismissing the claimant's appeal are explained thus. –

"Facts

1. [The claimant] claimed Incapacity Benefit from 01.02.02. Her claim form stated that she had been a part-time Secretary and was currently not working.

2. On 23/08/02 [the claimant] had a medical examination for the purposes of the Personal Capability Assessment.

3. At that examination she told the Examining Medical Officer that she had students living with her for whom she provided bed, breakfast and an evening meal. She shopped and prepared food for those meals and washed the student's bedding.

4. As a result of a request for further information, it was ascertained that [the claimant] had been a host family for students for a local language school since May 2001. She has between 2 and 4 students at a time. She spends 14 – 15 hours a week shopping, cleaning their rooms, doing washing and ironing and preparing meals. She receives £65 per week for bed and breakfast and £85 per week for half-board.

5. On 16/12/02 it was determined by an Incapacity Decision-Maker that [the claimant] was not entitled to Incapacity Benefit from 01/02/02 because she was working as a host family for [the language school]

6. Legislation provides that work cannot be treated as exempt unless undertaken on the advice of a doctor and it must help to improve, or prevent or delay deterioration – her disease or disablement. [The claimant's] work was not exempt because it was not undertaken on medical advice. I have seen letters from [the claimant's] GP supporting the work which [the claimant] carries out but those letters are dated 09/05/03 and 02/06/03, more than 2 years after the work commenced.

Evidence

1. I have considered notes taken by the Examining medical Officer on 23/08/02 setting out what [the claimant] told them about the work she carries out in connection with the students.

2. Also [the claimant's] letter to the Social Security Office of 09/12/02 giving further information about the number of students, what they pay and what she does for them.

Summary of Reasons.

From [the claimant's] own evidence it is apparent that she is working in connection with the students who she has to stay in her house for 14 – 15 hours per week. She is paid for this work.

This work cannot be considered exempt under the regulations as it was not undertaken on the advice of a doctor.

In any event, [the claimant] has between 2 and 4 students staying with her each week. Each student pays a minimum of £65 per week. This means that the weekly limit for earnings from exempt work (£66 from 1/10/01) is exceeded. [The claimant's] work does not fall within any of the exempt categories because it was not undertaken on the advice of a doctor.

Her work cannot be treated as exempt, therefore [the claimant] is not incapable of work and is not entitled to Incapacity Benefit from 01/02/02.”.

5. Before I would determine the claimant's application for leave to appeal the tribunal's decision to a Commissioner I directed the Secretary of State's representative to make a submission on the following:-

1. Has the tribunal made adequate investigation to establish the claimant's earnings which would be the sum received from her boarder's net of her outgoings on food, electricity, cleaning materials and maintenance of stocks of bedding, napery, crockery and utensils?
 2. Has the tribunal given adequate explanation of how it applied CIB/4090/1999?
 3. What relevance has CSIB/08/97 had since the current regulation 17(1)(a) came into force on 5 October 1998?
6. At the relevant time regulations 16 and 17 of the Social Security (Incapacity for Work) (General) Regulations 1995 were, insofar as relevant to this appeal, in the following terms:-

16(1) ----- A person shall be treated as capable of work on each day of any week commencing on Sunday during which he does work to which this regulation applies (notwithstanding that it has been determined that he is, or is to be treated under any of regulations 10 to 15 or 27 as, incapable of work or that he meets the conditions set out in regulation 28(2) for treating the all work test as satisfied until assessment unless that work –

- (a) falls into any of the categories of exempt work set out in regulation 17(1); and
- (b) is done within the limits set out in regulation 17(2).

17(1) The categories of exempt work referred to in regulation 16(1)(a) are –

- (a) Work undertaken on the advice of a doctor which –
 - (i) Helps to improve, or prevent or delay deterioration in, the disease or bodily or mental disablement which causes that person's incapacity for work;-

 - (ii) The weekly limits in relation to exempt work are –
 - (a) that earnings from work referred to in paragraph (1)(a) do not exceed [£66 until 1 October 2002 and £67.50 thereafter];

- (b) that, subject to paragraph (3), the combined total of the number of hours spent doing work referred to in paragraph (1)(a)(i) ----- is less than 16.

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7. In a written submission of 19 February 2004 the Secretary of State’s representative supported the application for leave to appeal. She argued that in CIB/4090/1999 the Commissioner decided that the only days on which a claimant is to be treated as not incapable of work by virtue of regulation 16(1) are days on which she does work. In this case the tribunal decided that the claimant was not exempt from the regulation 16(1) provision because the work she had been doing was not done on the advice of her doctor. However, argued the representative, according to the evidence before the tribunal, the work was done with the approval of the doctor and there is no requirement that the doctor’s advice should be in writing. The tribunal’s decision that the work was not exempt from regulation 16(1) because it had not been undertaken with the approval of a doctor was, therefore, erroneous in law.

8. The submission then goes on to answer in the negative my question as to the adequacy of the tribunal’s findings as to the amount earned by the claimant. The work, argued the representative, was less than 16 hours per week. What was not known from the evidence so far available was whether or not the net earnings in any week exceeded the £66 limit for exemption enacted in regulation 17(2).

9. I agreed with the submission for the Secretary of State and granted leave to appeal. As I wished to make my own decision on the appeal if possible rather than remit the case to a new tribunal for rehearing I directed the claimant to produce as much documentary evidence as possible to establish her gross earnings from boarding students and her outgoings on heating, lighting, food, laundry, napery, crockery and cutlery etc.

10. The claimant produced invoices from the language school for the sums paid in respect of student boarders from January to December 2002, electricity bills, a council tax bill and a record of the claimant’s payments of rent. She also stated laundry costs were about £15 per week and that she spent £50 - £60 per week on food. I issued a direction asking the Secretary of State’s representative if the claimant’s net earnings in the relevant week could be calculated from that information.

11. In a written submission of 1 October 2004 the Secretary of State’s representative says that the claimant’s net earnings cannot be calculated from the information provided so far. Earnings have to be calculated in accordance with the Social Security (Computation of Earnings) Regulations 1996 as those regulations are explained in Commissioner’s decision CIB/502/00. To enable that calculation to be made the claimant would need to provide details of her income and expenditure during (a) the period starting with the first day of her employment and ending on 31 January 2002 and (b) the year starting with the first day of her employment. The representative suggests that it would be helpful if the claimant could produce her tax return.

12. I do not agree that the Computations of Earnings Regulations are relevant although, in fairness to the Secretary of State's representative, I have to admit that it took me longer to arrive at that conclusion than it takes to state it or explain it. Regulation 3 of the Computation Regulations provides that those regulations are for the calculation of earnings for the purposes of Parts II to V of the Social Security Contributions and Benefits Act and the regulations made under those parts of that Act: but the Incapacity for Work (General) Regulations are made under and for the purposes of Part X11A of the 1992 Act. The preamble to the Computation Regulations invokes none of the regulation making powers enacted in Part X11A of the Act. Moreover the averaging of earnings as required by the Computation Regulations is inconsistent with the purpose of regulation 17(2) of the Incapacity for Work (General) Regulations which is to enact a number of hours of work and a level of actual earnings which if exceeded in any particular week excludes the work done by the claimant in that week from provisos (a) and (b) to regulation 16(1) with the result that in that week the claimant, by virtue of having worked, is not incapable of work even although the work is medically approved. As was explained in CIB/4090/1999 the question of whether or not a claimant satisfies the regulation 17(2)(a) and (b) conditions for exemption from the regulation 16(1) rule that a claimant is not incapable of work in any week in which he does work must be decided on the basis of the amount earned in each week in question and not by averaging his earnings over a period within which that week falls. It seems to me that averaging as required by the Computation Regulations could produce the result that a claimant whose earnings from otherwise exempt work exceeded the regulation 17(2)(a) limit in several weeks of the year would still be entitled to Benefit in those weeks while another claimant whose earnings in a few untypical weeks substantially exceeded the limit would be disqualified throughout the year. There are, therefore, in my view no enacted rules for the calculation of earnings for the purposes of regulation 17(2)(a) of the Incapacity for Work (General) Regulations. CIB/502/2000 was concerned with a claimant's entitlement to an increase in Incapacity Benefit in respect of his dependant spouse which is legislated for in Part IV of the 1992 Act.

13. In order to dispose of the case without further delay I have made my own calculation of the claimant's earnings in the weeks between 1 February 2002, the date from which the Secretary of State has disallowed benefit, to the date of his disallowance decision, 16 December 2002, on the basis of the information provided by the claimant. In the period from 1 February 2002 to 30 September 2002 the regulation 17(2)(a) limit was £66. From 1 October 2002 for the rest of the period under consideration it was £67.50. I have used the language school's fortnightly payment advice notes to calculate the claimant's gross earnings in each relevant week.

14. To calculate the claimant's outgoings in the relevant period it is necessary to deal in approximations because exact calculation is not possible. The claimant's annual rent and council tax I have divided by 52 which produces weekly figures of £95.76 and £10.35 and I have assumed that in the weeks in which the claimant has students staying with her (a maximum of 4 and a minimum of 1 but on average 2) at least half of those figures are attributable to the cost of accommodating the students, £48 in respect of rent and £6 in respect of council tax. Electricity bills for the period from 21 November 2001 to 25 November 2002 amounted to £423.50 which is roughly £8.13 per week. Again I have taken the view that in the weeks when students were in residence a conservative estimate of the cost of electricity attributable to their presence would be rather more than half which I have put at £5 per week. The cost of food I have taken as being the minimum of £50 stated by the claimant and for laundry I have accepted the claimant's figure of £15 per week. Those costs would vary

according to the number of students resident in any one week and according to whether they were on half board or bed and breakfast but the variations would not be significant.

15. On the foregoing basis my estimate of the claimant's total outgoings in any week in which she had students boarding with her is £124. There were weeks in the relevant period when there was only one student in residence and the £124 estimated on the basis of the norm of 2 or 3 might seem excessive but the most which the claimant ever grossed per week for any one student was £85 and if outgoings in that week were taken to be a third of £124, £42 rounded up, the claimant's net earnings would be only £43. On the basis that her outgoings are £124 per week to exceed the regulation 17(2)(a) limit in any one week before 1 October 2002 the claimant would have needed to have grossed in excess of £190, and in any week after that date £191.50. The college's accounting weeks with the claimant began on Mondays. The week for the purposes of regulation 16 begins on a Sunday. Therefore, any payment to the claimant by the language school in respect of any particular accounting week was, for the purposes of regulation 16(1), earnings in the benefit week beginning on the immediately preceding Sunday. The only benefit weeks before 1 October 2002 in which the claimant grossed more than £190 were those beginning on 8 July and on 5, 12, 19 and 26 August. The only weeks after 1 October 2002 in which she grossed more than £191.50 were those beginning on 7, 14 and 21 October. Therefore those were the only weeks in the period from 1 February 2002 to 26 December 2002 in which the claimant was, by virtue of regulation 16(1), not incapable of work.

16. For the foregoing reasons the claimant's appeal succeeds and my decision is in paragraph 1 above.

(Signed)

**R J C Angus
Commissioner**

(Date)

3 March 2005