

CHAPTER 2

Incapacity benefit, sickness benefit, invalidity benefit, severe disablement allowance and statutory sick pay

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 CHAPTER 2

Incapacity benefit, sickness benefit, invalidity benefit, severe disablement allowance and statutory sick pay

Part 1: Entitlement

*S. 14(1)(b) of the SS. Act 1975 (for contributory invalidity pension see s. 15 *ibid.*)*

1 Meaning of 'entitled'

i By reason of his contribution record a claimant was entitled to sickness benefit for only 312 days. He was incapable of work for more than 312 days, but benefit had not been payable to him for the first part of his incapacity because he had made a late application for a review and incapacity was not accepted until the review decision was given. It was held that he had not been 'entitled' to sickness benefit for the days for which he had received no payment. See paras 6-10. R(S) 27/52

2 Meaning of 'day' (in particular, but not exclusively, in relation to night workers)

See also reg. 5 of the SS. (Unemployment, Sickness and Invalidity) Benefit Regs. 1975.

i A man was injured as a result of an industrial accident on 8th February, but continued to work until the following 14th February when, after working for one hour only, he became incapable of work. It was held that 14th February was not a day on which he was incapable of work for injury benefit purposes. See also CWI 10/49 and R(I) 74/51. CSI 49/49

ii 'Day' means a period of 24 hours from midnight to midnight. Thus a shift-worker who, after a period of incapacity, resumed work at 10.00 p.m. was held not to have been incapable of work. CS 363/49

iii A man on night shift began work at 8.40 p.m. on Friday and finished at 5.35 a.m. on Saturday. Later that day he was certified to be incapable of work, but it was held that sickness benefit was not payable for the Saturday because the work he did on that day could not be disregarded. See also R(S) 18/53. R(S) 7/52

iv A man was injured as the result of an accident arising out of and in the course of his employment while working on a day-shift on 17th February, but he continued to work until he became incapable of work as the result of the injury when working on the night-shift from 10 p.m. on 28th February to 5.45 a.m. on 1st March. It was held that he was a 'night-worker' and that the 1st March could not be treated as a day of incapacity for work. R(I) 31/55

2.1.3-5

3 Period of interruption of employment

R(S) 1/56 i A woman whose entitlement to sickness benefit was limited to 312 days by reason of her contribution record had been in receipt of sickness benefit and of injury benefit. It was held that when the length of the period of interruption of employment was being determined in her case account must be taken of all days of incapacity for work irrespective of whether the claimant was in receipt of sickness benefit or of injury benefit.

R(S) 3/88 ii A claim for sickness/invalidity benefit was made from Sunday 25.8.85. The claimant had previously been paid invalidity benefit for a period of interruption of employment which ended on Saturday 29.6.85. Saturday 29.6.85 and Sunday 25.8.85 are separated by a period of exactly 8 weeks. The Commissioner held that because of the provision of s.17(1)(e) of the SS Act 75 Sunday was not a day of incapacity for work and was to be disregarded in computing any period of consecutive days in a period of interruption of employment therefore began on Monday 26.8.85 and did not link with the period of interruption of employment which ended on Saturday 29.6.88 (there were in fact 57 days between these dates). Sickness benefit only was payable. In the calculation of the 8 week linking period however Sundays are included because a week is defined by s. 17(1)(d)(ii) as a period of seven days (any seven days).

4 Entitlement to reduced rate sickness benefit

R(U) 6/89 i A claimant did not have enough credited contributions to satisfy the second contribution condition for UB. She argued that she should at least be entitled to a reduced rate of UB, even though s. 33 of the SS Act 1975, which provided that regs. could be passed to allow this, had been repealed on 1.11.86. Her first argument was that reg. 18 of the SS (Unemployment, Sickness and Invalidity Benefit) Regs. 1983 (which allowed for the payment of partial UB and sickness benefit) had not been revoked, and must still have effect. The Commissioner rejected this argument, saying that this reg. could not operate independently of the relevant section of the 1975 Act under which it had been passed. He relied on the case of *Watson v. Winch* [1916] 1 KB 688 and stated that no subordinate legislation can be read in isolation from the enabling Act. Her second argument was that she was assisted by s. 16(1)(c) of the Interpretation Act 1978. This section provides that, unless the contrary intention appears, an Act which repeals a law does not affect any right or privilege which has accrued or been acquired under that law. The Commissioner held that the claimant had not acquired a right or privilege by having "entitlement" to credits, as her entitlement to UB was not to be decided until she actually made a claim to benefit. She made such a claim on 13.4.87. The Commissioner also considered that in fact the legislation which repealed s. 33 of the SS Act 1975 did contain a contrary intention and therefore s. 16(1)(c) of the Interpretation Act 1978 would not have assisted the claimant. See also 1.1.5 i *above*, 17.1.1 xiv, 17.3.3 iii *below*.

5 Meaning of 'engaged in remunerative work'

R(S) 1/02 i In CS/4300/1999, the claimant had been entitled to SDA until 8 April 1998. On 9 April 1998 he started work for a fixed period, which was to end on 1 November 1998. He was awarded disability working allowance from 14 April 1998 to 12 October 1998. On 12 October 1998, he became incapable of work and was paid SSP until the end of his term of employment. His claim for IS on 13 October 1998 was disallowed because his SSP exceeded his applicable amount. On 2 November 1998, he claimed both IS and SDA. His SDA claim was refused by the AO on the ground that he had not been incapable of work and disabled for 196 days. Under s. 68(10) of the SS Contributions and Benefit Act 1992, days of entitlement to disability working allowance were to be treated as having been days of incapacity for work and disablement if *inter alia* the claimant was entitled to disability working allowance for the week in which there fell the last day on which the claimant was engaged in remunerative work. However, the AO considered that s. 68(10) could not assist the claimant because SDA could not be paid from the date when disability working allowance ended, as the claimant was then entitled to SSP. As a result, IS was awarded without a disability premium. The tribunal allowed the claimant's appeal and found he was entitled to SDA from 13 October 1998. The AO appealed to the

Commissioner, before whom it was argued that, as long as a contract of service existed and a person was on sick leave, he was to be regarded as still being engaged in remunerative work.

The claimant in CIB/6904/1999 had been in receipt of long-term IB until 1 April 1997. On 2 April 1997 he started work and was awarded disability working allowance. He became incapable of work on 6 May 1998 and was paid SSP until 18 August 1998, when he asked his employer to stop paying him SSP because he believed that this would enable him to claim long-term IB. The AO awarded only the lower rate of short-term IB, on the ground that the claimant had not been incapable of work for 196 days. Under s. 30C(5) of the SS Contributions and Benefits Act 1992, days of entitlement to disability working allowance were to be treated as having been days of incapacity for work if *inter alia* the claimant was entitled to disability working allowance for the week in which there fell the last day on which the claimant was engaged in remunerative work. The claimant appealed. The AO submitted to the tribunal that IB should not have been awarded until 22 November 1998, when entitlement to SSP would have ceased, and that s. 30C(5) could not assist the claimant to qualify for long-term IB because it required that the claimant be entitled to disability working allowance when the contract of employment was terminated. The tribunal accepted those submissions and the claimant appealed to the Commissioner. Held, allowing both appeals in part, that:

1. a person who is incapable of work and who is not actually working has ceased to be “engaged in remunerative work” notwithstanding that a contract of employment continues to subsist (paras. 7 to 12);
2. IB and SDA are not payable during any period when a claimant is entitled to SSP but days of entitlement to SSP may be taken into account for some purposes when calculation entitlement to IB and SDA so that a claimant may be able to take advantage of s. 30C(5) or s. 68(10) when entitlement to SSP expires (para. 13);
3. in CS/4300/1999, the tribunal had erred in awarding SDA from 13 October 1998, because the claimant was still in receipt of SSP, but the claimant was entitled to SDA from 2 November 1998 provided he had been disabled from 13 October 1998 (paras. 14 and 15);
4. in CIB/6904/1999, the tribunal had correctly held that the claimant was not entitled to IB while entitled to SSP, notwithstanding the fact that he had asked his employer to cease payments, but had erred in not finding that the claimant was entitled to long-term IB from 22 November 1998 (para. 16).

(For list of abbreviations used in this Chapter see
List of General Abbreviations at the beginning of
this volume, immediately after Foreword and Introduction)

Part 2: Incapacity for work pre 13.4.95

Section 17(1)(a)(ii) of the SS Act 1975

1 Meaning of 'incapable of work'

See also Schedule 20 to the SS Act 1975

i A blacksmith's striker was incapable of work and in receipt of injury benefit for some 6 weeks as a result of an injury to his eye. After resuming his employment he attended hospital for treatment for his eye on two occasions, on each of which he lost a day's pay. It was held that he was incapable of work on both days. Compare CI 40/49. CWI20/49

ii The expression 'incapacity for work' is not confined to absolute incapacity, but includes incapacity to work properly. Thus a typist who had to attend hospital for treatment on alternate days in the week and did light work on the other days was held to be incapable of work on the days she attended hospital. CS 69/50

iii A person was held to be incapable of work within the meaning of s.11(2)(a)(ii) of the NI Act 1946 (under the SS Act 1975, cf.s. 17(1)) if, having regard to his age, education, experience, state of health and other personal factors there was no work or type of work which he could reasonably have been expected to do. See paragraph 5 and see also 2.2.8 i *below*. R(S) 11/51 (T)

iv A colliery fitter, aged 51, had been injured at work in 1975. In 1979 and 1980 he was certified as incapable of work in his normal occupation, but capable of work within certain limits. The question in issue was whether the current economic conditions adversely affecting the labour market in the area in which a claimant for invalidity benefit lived could properly be taken into account in deciding whether or not he was incapable of work for the purposes of s.17(1)(a)(ii) of the SS Act 1975. A Tribunal of Commissioners held that it was not right to restrict the fields of employment to which regard had to be had to such employments only as were common in his immediate home locality (paragraph 11); the local level of unemployment was not a relevant consideration in regard to invalidity benefit (paragraph 13); and the correct approach in determining the question of incapacity was whether the claimant was capable of work and not whether he could obtain work (paragraph 11). R(S) 11/51 (T), 2.2.1 iii, R(S) 7/60, 2.2.10 iii and 2.2.15 i and R(S) 2/78, 2.2.2 vi followed. R(S) 10/54 explained. Cited, but distinguished, in R(S) 7/85. R(S) 2/82 (T)

2 Evidence of incapacity

See also Schedule 20 to the SS Act 1975

i A man who stayed away from his work for a week did not consult a doctor, but his employers gave a certificate to the effect that he had been absent between certain dates, and they added: 'In accordance with the usual procedure deductions for sickness benefit were made from (his) salary'. It was held that the employers' certificate was insufficient evidence of incapacity. R(S) 13/51 (T)

ii Whether a person is incapable of work for the purposes of his entitlement to sickness benefit is a question of fact which must be determined in the light of all the medical and other relevant evidence. See also 2.2.3 i *below*. R(S) 1/53

- R(S) 7/53 iii A claimant was certified by his own doctor as incapable of work. On the same day he was certified by the Regional Medical Officer of the Ministry of Health as capable of work. The local tribunal, in relation to the evidence of the claimant's wife, simply recorded that it was 'all hearsay and therefore not of great assistance'. The Commissioner, in allowing the claimant's appeal, explained the procedure adopted in references to the Regional Medical Officer and the necessity of recording all evidence given, including hearsay. R(G) 1/51 and RI 81/51 referred to (Paras 8 to 16).
- R(S) 15/54 iv It was held that the determining authorities under the NI Act were judicial authorities who were bound to determine cases by reference to the evidence before them (para. 6).
- R(S) 1/58 v In the absence of evidence to the contrary the normal inference to be drawn from the fact that a person is an in-patient in hospital is that he is incapable of work. This, in the case of a long-distance lorry-driver who frequently became an in-patient in different hospitals for short periods, but in respect of whom hospital reports were not put in evidence because it was considered they might be detrimental to the claimant's health, it was held that the inference of the claimant's incapacity for work was not rebutted.
- R(S) 2/78 vi A man aged 48, who had been employed as a furniture salesman, had, for a period of about a year, been incapable of work in that occupation, but capable of work within certain limits. The question in issue was whether after that period he was still incapable of work within the meaning of s.17(1)(a)(ii) of the SS Act 1975. On appeal to the Commissioner it was held that the claimant had failed to prove that during the period to which his claim related (25.2.77 to 29.3.77) he was incapable of work within the meaning of s.17(1)(a)(i); that is to say, of 'work which the person can reasonably be expected to do'. It was said that it would be inappropriate to lay down any specific period which must elapse before the 'alternative work' test falls to be applied, but that reasonableness rather than any specific measure of time is the crucial matter. See para 8 and see also R(S) 11/51, 2.2.1 iii *above* and R(S) 7/60, 2.2.10 iii *below*. Followed in R(S) 3/81 and R(S) 6/85.
- R(S) 3/84 vii A claimant for invalidity pension, an auxiliary nurse, was aged 41 and had not worked since April 1975, due to a back injury. In 1981 she was twice examined by divisional medical officers of the DHSS who expressed the view that she was fit for light work. She disputed this and complained that she had unsuccessfully sought to have in evidence before the local tribunal the hospital records and case notes in respect of her. The Commissioner held that the burden of proof of incapacity for work lay with the claimant, but where difficulties were experienced in obtaining specialist medical evidence in support of his claim, it was open to the local tribunal to adjourn for further medical evidence; there was no distinction between the position of the Commissioner and that of a local tribunal in exercising the power given in section 101(7) of the SS Act 1975 to direct the insurance officer to obtain, without expense to the claimant, a report upon material issues from a medical consultant. (Paragraph 4(2).) R(I) 8/73 approved and followed.

3 Medical certification

i There is no question of the statutory authorities under the Act being bound to decide in the same way as any particular doctor certifies. The certificates of the claimant's doctor, the reports of medical officers and other relevant evidence must all be taken into account when it is being determined whether or not the claimant has been incapable of work. R(S) 1/53

ii A medical certificate (doctor's statement) is simply an expression of opinion by the doctor giving it as to a patient's incapacity. It is not conclusive and if, in a particular case, there is direct or circumstantial evidence which raises a strong inference against the opinion on the certificate, the determining authority is entitled to reject the opinion and to find that incapacity has not been proved notwithstanding the certificate. R(S) 4/60

iii Disablement must be distinguished from incapacity and accordingly, even if a doctor takes the view that a person who suffers from some disabling disease is incapable of work and certified accordingly, such certification merely represents the doctor's opinion and is not conclusive. Evidence of incapacity represented by medical certification may be negated by evidence that the claimant *did* a significant amount of work and therefore was not incapable of work. See also 2.2.8 ii and 2.2.9 iii and R(S) 5/60 *below*. R(S) 2/74

4 Evidential effect of previous claims

i A man's record showed a high incidence of claims for sickness benefit for short periods, some of which were for apparently trivial causes. At paragraph 6 of the decision the Commissioner said, with reference to the relevance and materiality of previous claims for sickness benefit, that it had more than once been affirmed that a claimant's record of previous claims may legitimately be taken into consideration when determining whether incapacity has been proved, but that caution must be exercised in drawing instances from it since: 'the fact that a man has a long record of claimed incapacities is by itself quite ambiguous. It may mean that he is a person who is prone to claim incapacity on unsubstantial grounds. But it may equally well mean that he is a person in poor health who is genuinely incapacitated from time to time. To jump to a conclusion from the claimant's previous record *alone* would therefore generally be to beg the very question at issue. If, of course, the record contains unambiguously suspicious features, or if it is allied to other suspicious circumstances, that might be quite a different matter. Even so, there may be a danger of over-estimating the significance of a long record of claims.' R(S) 1/67

5 Claims coinciding with holiday periods

i A man claimed sickness benefit for periods covering the Christmas holidays in 3 successive years. It was held that, in view of that record, the third claim called for careful scrutiny and that the medical evidence was inconclusive and unacceptable. The claim accordingly failed. R(S) 16/54

ii A claimant had made many claims for sickness benefit, most of which were for short periods, and in the preceding 13 months 3 spells for which he had claimed benefit had included his statutory holiday. The Commissioner held that, if a claimant regularly claimed sickness benefit at holiday times and at no other times, such a course of conduct would obviously give rise to a scepticism as to the genuineness of incapacity; in such a case, if there was medical evidence contradicting the opinion of the claimant's doctor as expressed in the medical certificates or, R(S) 5/60

if there were other circumstances rebutting the opinion formed by the claimant's doctor, it might well be that the claimant might be held not to have proved that he was truly incapable of work. However, on the evidence in this particular case, the claimant was held to have been so incapable. (Paras 4 to 11).

- R(S) 1/67 iii A man certified to be incapable of work for a period which coincided with a period of local holidays. His record showed a high incidence of claims for short period, some for apparently trivial causes, and one at least relating to a recent holiday period. Information obtained from a hospital was, however, accepted as confirmation of the claimant's statement that he was attending hospital for X-ray when an officer of the Department called at his home. It was held that incapacity had been proved. See also 2.2.4 i *above*.

6 Incapacity 'by reason of some specific disease'

- CS 221/49 i A claim for sickness benefit by a woman who was 2 months pregnant and who was certified to be incapable of work by reason of 'sickness of pregnancy' was allowed. The Commissioner held that a disease was a departure from health capable of identification by its signs and symptoms and was an abnormality of some sort; sickness fell into that definition and, since the claimant had been certified to be incapable of work by reason of 'sickness of pregnancy', sickness benefit was payable to her (para. 3.).
- R(S) 2/86 ii A Tribunal of Commissioners held that in the context of regulation 2(1)(b) of the Social Security Benefit (Persons Abroad) Regulations 'incapacity' meant 'incapacity for work' and such incapacity must have arisen 'by reason of some specific disease' or bodily or mental disablement'. For other synopses of this case see 2.6.9 iii and 2.6.2 (T) iii *below*.

7 Entitlement to sickness benefit depends upon incapacity 'by reason of some specific disease or bodily or mental disablement'

- CS 561/50 i A merchant seaman who was certified to be unfit for service at sea until he had had a course of dental treatment was held not to be incapable of work by reason of some specific disease or bodily or mental disablement.
- R(S) 8/53 ii A disabled man with an artificial leg was unable to get to his place of work for some days because of a heavy fall of snow. It was held that he was not incapable of work by reason of his bodily disablement and that sickness benefit was not payable to him.
- R(S) 13/54 iii The claimant's doctor certified that she was incapable of work, but when doing so took account the fact that the claimant had to look after her invalid mother. Other medical evidence contradicted the opinion of the claimant's doctor and it was held that she was not incapable of work since incapacity must be the result of some specific disease or bodily or mental disablement apart from extraneous circumstances.
- R(S) 6/59 iv A long-distance lorry-driver entered various hospitals in different parts of the country complaining of symptoms which indicated disease of the kidney. He told inconsistent stories about his medical history and on a number of occasions he left hospital before investigations were complete. Investigations and occasional operations disclosed no evidence of disorder and medical evidence showed that it was a typical case of a syndrome. It was held that the claimant had not shown that he was incapable of work by reason of some specific disease or bodily or mental disablement, but that his condition was due to a defect of character. See para 12.

8 Meaning of 'work'

The Social Security Act 1975, section 17(1)

- i The expression 'work' for the purposes of s.11(2)(a)(ii) of the NI Act 1946 was held to mean remunerative work, that is to say work, whether part-time or whole time, for which an employer would be willing to pay, or work as a self-employed person in some gainful occupation. See also 2.2.1 iii *above*. R(S) 11/51 (T)
- ii In the case of a self-employed man who became incapable of work by reason of bronchitis and asthma, and who had a contract with a local education authority to take a child to and from school by taxi during term-time, it was held that the administration and desk work involved in his business were insignificant, but that driving his taxi to take the child to school was 'work', with the result that he was disentitled to sickness benefit for the days on which he drove the taxi. See also 2.2.3 iii *above* and 2.2.9 iii *below*. R(S) 2/74
- iii The claimant was in partnership with his wife in a toy shop business. During his illness (deep vein thrombosis in the right leg), the claimant's wife ran the shop with the help of a part-time assistant. When he felt fit enough, the claimant 'tinkered' in the business. It was held that the extent of the claimant's work in the business, though more than negligible, was not 'work' for the purposes of s.17(1)(a)(ii) of the SS Act 1975 but was 'work' of the type envisaged by r.7(1)(g) of the SS (USIB) Regs. 1975. The claimant received sufficient encouragement from his doctor to be able to regard himself as doing the work for therapeutic reasons and so had good cause for doing it. See also R(S) 10/60, R(S) 4/83 and R(S) 3/86. R(S) 4/79
- iv It was held that 'work' for the purposes of s.17(1)(a) of the SS Act 1975 did not necessarily mean manual work or work for which a person was paid; organising, directing and supervising other work constituted work (para 15). See also 17.10.3 vi and R(I) 1/71 at 17.9.2 v *below*. R(S) 2/80
- v It was held by the Court of Appeal that occupation as a local Councillor was 'work' for the purposes of regulation 3(3) of the SS (Unemployment, Sickness and Invalidity Benefit) Regulations. For a report of the CA judgement see R(S) 3/86, 18.6.2 v *below*. See R(S) 6/86, 2.3.5 iii *below*, with regard to the meaning of 'earnings'. R(S) 3/86

9 Burden of proof

- R(S) 21/51 i A woman was certified by her doctor to be incapable of work, but an examining medical officer reported that, in his opinion, she was fit for her former work of a shorthand-typist. It was held that on the weight of evidence the claimant had failed to prove that she was incapable of work.
- R(S) 5/53 ii A farmer was seriously handicapped by arthritis and heart trouble and, having regard to his health, could not reasonably be expected to work in any capacity. Nevertheless, because no-one else was available to do it, he dealt with such paper work as was necessary. It was held that sickness benefit was not payable to him because, although there might have been days on which he transacted no business at all, it was for him to prove when those days occurred. See also and compare R(S) 9/53 and R(S) 13/54, para 16.
- R(S) 2/74 iii In the case of a man who drove a child to school in a taxi it was said that, since he was unable to specify the days on which he did not drive the taxi, or give evidence on which reliable estimates could be made, it could only be inferred that he was not incapable of work throughout the period in question. See also 2.2.8 ii *above* and cf. R(U) 7/72.
- R(S) 3/84 iv A claimant for invalidity pension, an auxiliary nurse, was aged 41 and had not worked since April 1975, due to a back injury. In 1981 she was twice examined by divisional medical officers of the DHSS who expressed the view that she was fit for light work. She disputed this and complained that she had unsuccessfully sought to have in evidence before the local tribunal the hospital records and case notes in respect of her. The Commissioner held that the burden of proof of incapacity for work lay with the claimant, but where difficulties were experienced in obtaining specialist medical evidence in support of this claim, it was open to the local tribunal to adjourn for further medical evidence; there was no distinction between the position of the Commissioner and that of a local tribunal in exercising the power given in s.101(7) of the SS Act 1975 to direct the insurance officer to obtain, without expense to the claimant, a report upon material issues from a medical consultant. (Paragraph 4(2).) R(I) 8/73 approved and followed.
- R(S) 3/90 v Prior to 11.4.88 any claim to IVB was for the period covered by the medical statement and awards were normally limited to the period of the instrument of payment. The Commissioner held that, from 11.4.88, regulation 17(1) of the Social Security (Claims and Payments) Regulations 1987 requires a claim to be treated as made for an indefinite period except where paragraph (3) applies. Any subsequent indefinite award can only be terminated on review under paragraph (4) if the adjudication officer has established that the claimant is no longer incapable of work. Whereas in new awards the burden is on the claimant to show that he is incapable of work, on a review the onus of proof falls on the adjudication officer to demonstrate that the requirements for entitlement are no longer satisfied.

10 Capable of work within limits

- R(S) 5/51 i A man who was crippled by rheumatoid arthritis was the landlord of a butcher's shop, a partner in a smallholding and director of a company. It was held that the small amount of unremunerative supervisory work which he did at the butcher's shop could be disregarded but that the supervision of his other interests carried on for the purpose of earning remuneration could not be disregarded for the purpose of determining his capacity for work. He was held not to be incapable of work and, therefore, not entitled to sickness benefit. See also R(S) 33/52 and compare R(S) 37/52.
- R(S) 22/51 ii A man had been in receipt of sickness benefit on account of bronchitis, emphysema and minor epileptic fits, but an examining medical officer reported that he was acting as manager of his own box-making business and that he was fit for that work. It was held that the claimant was not incapable of work since, if he had not been capable of managerial work, he would have had to make arrangements for the management of his factory to be carried on by somebody else. See also CS 9/48 and R(S) 5/53, and compare CWS 2/48 and R(S) 37/52.

- iii A company director suffering from neurasthenia who had been certified incapable of work for seven years was held not to be incapable of work because, although he could not undertake the duties of a company director, he could undertake light work on a part-time basis. See also 2.2.15 *i below* and CS 507/50. R(S) 7/60
- iv A farmer who normally ran his small dairy farm of 50 acres with the aid of one man suffered an injury to his shoulder, with the result that he was unable to do a number of the things he had formerly done and had to employ an extra man at weekends to do them. He was, however, able to let in the cows, keep poultry, drive a car, keep the accounts and do such little supervisory work as was necessary. It was held that he was not incapable of work, for it could be said that the work he was able to do was so trivial as to be negligible. See para. 8 where a number of unreported decisions were compared. See also R(S) 34/52, R(S) 8/55 and R(S) 2/74. R(S) 2/61
- v A colliery fitter, aged 51, had been injured at work in 1975. In 1979 and 1980 he was certified as incapable of work in his normal occupation, but capable of work within certain limits. The question in issue was whether current economic conditions adversely affecting the labour market in the area in which a claimant for invalidity benefit lived could properly be taken into account in deciding whether or not he was incapable of work for the purposes of s. 17(1)(a)(ii) of the SS Act 1975. A tribunal of Commissioners held that it was not right to restrict the fields of employment to which regard had to be had to such employments only as were common in his immediate home locality (para. 11); the local level of unemployment was not a relevant consideration in regard to invalidity benefit (para. 13); and the correct approach in determining the question of incapacity was whether the claimant was capable of work and not whether he could obtain work (para. 11). R(S) 11/51 (T), 2.2.1 ii, R(S) 7/60, 2.2.10 iii and 2.2.15 i and R(S) 2/78, 2.2.2 vi followed. R(S) 10/54 explained. Cited, but distinguished, in R(S) 7/85. R(S) 2/82 (T)
- 11 No work or type of work a person could reasonably be expected to do**
- i An ex-miner aged 57, who suffered headache, neurosis and a stiff left ankle had not worked for twelve years, but was considered by an examining medical officer to be capable of some type of restricted employment, the nature of which was not certified. The claimant had approached various employers without success and it was held that he was incapable of work. R(S) 10/54
- ii A news vendor was incapacitated for work by chronic foot trouble which prevented him doing his daily rounds, with the result that he had to employ boys to do the work for him. He did little more than collect the proceeds of the sales and pay the newspaper account. It was held that he was incapable of work during the period under review and that the amount of work he had been able to do could be disregarded as negligible. See also R(S) 24/52. R(S) 10/61
- iii A claimant for invalidity benefit was incapable of work in his former occupation and had been so incapable for some considerable period of time; but he was capable of work within limits. However he was not in fact able to get any work which he could reasonably have been expected to do, unless the National Coal Board, his former employers, could have found him suitable light work. There was, though, limited prospect of that and there was virtually no work otherwise. It was held that for the purposes of title to sickness benefit and invalidity benefit the test was the claimant's capability for work, not his ability to get it. That might have given title to UB, but not, of itself, to sickness or invalidity benefit. See also R(S) 2/82 (T) *above*. R(S) 14/81
- iv A 26 year old machine operator (the claimant) had a history of back trouble. In January 1983 a Divisional Medical Officer of the DHSS expressed the view that the claimant was not fit for heavy work (which was an incidence of his normal employment), but was fit for light work within certain limits and strongly recommended him for retraining at an Employment Rehabilitation Centre (ERC). About 14 months later another Divisional Medical Officer took a similar view and recommended that the R(S) 6/85

2.2.11

claimant was fit for a light job, preferably semi-sedentary and one where he could frequently change his position. He further recommended that the claimant was of average intelligence and would benefit from a course at an ERC for assessment with a view to training. The question in issue, regarding capacity for work within the meaning of the SS Act 1965, was whether the claimant was incapable of work from January 1983. The Commissioner held that it was not normal practice to assess a claimant's capacity for work by reference to an alternative occupation until a period of six months had elapsed (R(S) 2/78 - also R(S) 7/60) (para 3). The test was whether the claimant was capable of any work which he could reasonably be expected to do and to consider his employability **without** retraining (para. 4). He further held that, notwithstanding that the burden of proof of incapacity lay on the claimant and that often it could be properly concluded of a particular claimant that as a matter of common knowledge there was a range of occupations, or at least one occupation, of which the claimant must have been capable at the material date, there were other cases, of which the present was one, in which, having regard to the medical and general circumstances of the case, it was not acceptable to decide against him without forming an affirmative conclusion, within reasonably precise and practical parameters, as to what work, within the overall sphere of employments for which an employer would pay, it was of which the claimant was properly to be considered to have been capable (as distinct from holding the claimant as capable of work upon mere abstract assumption that there "must be something by way of work which he could reasonably have been expected to do and for which an employer would have paid") (para. 5). He also indicated that the determining authorities would be much assisted if provided with evidence of specific job descriptions, not job vacancies, which are relied upon by the AO as descriptive work of which a particular claimant is capable at the material time (para. 6(1)). In the circumstances of the present case, the Commissioner held that the claimant had discharged the burden of proof which lay upon him and allowed his appeal (paras. 1(4) and 10).

R(S) 7/85 v A bricklayer, aged 52, suffered from lumbar disc lesion and heart disease and had been in receipt of sickness benefit, followed by invalidity benefit, since 1980. In 1984 he was certified by Divisional Medical Officers of the DHSS as being incapable of his normal work, but capable of light work or sedentary work in warm conditions. The question in issue was whether he was incapable of work for the purposes of entitlement for benefit. The Commissioner held that it was necessary to examine carefully whether medical views expressed in general terms corresponded with the "actualities" (para. 4). It had to be clearly established whether there was any work which the claimant could reasonably be expected to do (para. 6). Where the existence of such work was in issue, the AO should suggest suitable occupations for consideration of the determining authorities (para. 7). A similar procedure to that followed in special hardship allowance claims should be established (para. 8). In the present case there was no work which the claimant could reasonably have been expected to do and the appeal was allowed (para. 9). R(S) 2/82 (T) cited with approval, but distinguished.

R(S) 4/94 vi Two different Departmental doctors assessed the claimant as capable of work within certain limits. A tribunal held that the claimant had failed to prove that she was incapable of work. The Commissioner held that:

1 the onus of proof was on the AO to show that the claimant was no longer incapable of work (R(S) 3/90);

2 R(S) 6/85 and R(S) 7/85 did not require detailed job specifications in all cases;

3 job specifications where required should be brief and relevant;

4 where the question was whether a woman was incapable of various kinds of work there should if at all possible be a woman member of the tribunal. For another synopsis of this decision see 17.6.4.

12 Married woman

i A married woman admitted that she was doing cooking and other housework in her own home while she was certified to be incapable of work by reason of phlebitis. At para. 6 a tribunal of Commissioners said that in considering the case of a woman who occupies herself in domestic work in her own home it is necessary to take into account the amount of work of which she appears to be capable as part of the relevant evidence and that, if a woman is capable of doing the domestic work of a normal household, it would be evidence to support the view that she was capable of remunerative work. On the other hand, a similar inference might not arise in the case of a woman living alone in a small house or flat. See also 2.2.2 iii *above*. R(S) 11/51 (T)

ii A married woman aged 54 could only use one hand because of hemiparesis. She was helped in her housework by her two daughters and the employment exchange did not consider that she could usefully fill any job in either factory or household. It was held that she continued to be incapable of work. R(S) 17/51

13 Capable of working at home

i A young woman who had been in receipt of sickness benefit for two years in respect of agoraphobia was held not to be incapable of work on the ground that she could work as an outworker in her own home. R(S) 20/52

14 Incapacity by reason of mental disablement

i A woman was certified to be incapable of work by her doctor by reason of anaemia, psychasthenia and neurasthenia, but examining medical officers of the Ministry were of the opinion that she was not incapable of work. A consultant psychiatrist who examined the claimant at the instigation of the Commissioner was of the opinion (see para. 15 of the decision) that she should have treatment in hospital for her mental condition. Held that the claimant was incapable of work. R(S) 4/56

15 Change of work after long spell of incapacity

i In the case of temporary illness of short duration a claimant's capacity for work should be judged by reference to his normal field of employment because he could not, in such circumstances, reasonably be expected to embark on a new career. But when a claimant's disabilities have lasted for a long period the field of employment to be taken into account must be enlarged. The fact that a claimant's past experience and means disincline him to consider many forms of work as appropriate does not enable it to be said that he cannot reasonably be expected to do that work if it is a type of work he could do if willing to try it. See also 2.2.10 iii *above*. Followed in R(S) 6/85. R(S) 7/60

ii When it is being considered whether, in the case of a person who has been in receipt of benefit for a period of months, there is "work which the person can reasonably be expected to do" it is the reasonableness rather than any specific measure of time which is the crucial matter. It is not normally reasonable, in the case of a short-term incapacity, to expect a claimant to change his occupation, but if the incapacity is continued it may become reasonable to do so, though at what stage must depend on the circumstances of each particular case. A man who had been in receipt of sickness and invalidity benefit for some twelve months was held not to be incapable of work on the ground that he could reasonably be expected to attempt work other than as a furniture salesman (which had been his regular work) within the restrictions indicated by the regional medical officer followed in R(S) 3/81. Followed in R(S) 6/85. R(S) 2/78

iii A claimant for invalidity benefit, first injured in 1976, remained incapable of his normal occupation as coastguard but by 1978 was found capable of alternative employment within certain limits by a MAT. It was argued that before disallowing the claim account should have been taken that, had he sought alternative employment before compulsory retirement from the Civil Service, he R(S) 3/81

would have had valuable financial benefits. In determining whether it was reasonable to expect the claimant to seek other employment a balance had to be struck between his financial interests and the NI Fund's interests. It was not on the facts unreasonable to extend the claimant's field of employment. R(S) 2/78 followed.

- R(S) 14/81 iv A claimant for invalidity benefit was incapable of work in his former occupation and had been so incapable for some considerable period of time; but he was capable of work within limits. However he was not in fact able to get any work which he could reasonably have been expected to do, unless the National Coal Board, his former employers, could have found him suitable light work. There was, though, limited prospect of that and there was virtually no work otherwise. It was held that for the purposes of title to sickness benefit and invalidity benefit the test was the claimant's capability for work, not his ability to get it. That might have given title to UB, but not, of itself, to sickness or invalidity benefit.

16 Contribution conditions - jurisdiction to determine "relevant past year"

- R(S) 5/93 i From 18 November 1985 to 22 March 1986 the claimant was awarded and paid maternity allowance. On 20 June 1988 she claimed sickness benefit supported by evidence that she had been incapable of work since 27 March 1986. The AO allowed backdating to 20 June 1987, but refused the claim on the grounds that the claimant did not satisfy the condition laid down in para. 1(3) of Sch. 3 to the Social Security Act 1975 because she had not paid or been credited with sufficient contributions in the "relevant past year" as defined in para. 1(4) of the Sch. The relevant past year was the year ending 5 April 1986 because the period of interruption of employment which included the date of the claim had commenced on 20 June 1987. The claimant contended that there was no rule preventing days of incapacity prior to the date to which the claim had been backdated from forming part of the period of interruption of employment. On that basis the period of interruption of employment had commenced on 18 November 1985 (as the maternity and sickness benefit claims "linked") and so the relevant past year was the year ending 5 April 1984 for which the claimant's contribution record was sufficient. The Court of Appeal held, allowing the appeal, that:

1 the S of S had exclusive jurisdiction over all matters arising under para. 1 of Sch. 3 to the Social Security Act 1975. Para. 1(4) did no more than certain definitions for the purposes of paras. 1(2) and 1(3). Therefore the functions allotted to the S of S by s. 93(1)(b) of the Act, the language of which was quite general, necessarily included those of applying those definitions and of determining any questions that might arise in the course of such application;

2 in so far as decision R(G) 1/82 was based on the proposition that questions arising under para. 1(4) of the Sch. did not fall to be determined by the S of S, it was wrongly decided. The Court set aside the Commissioner's decision and ordered that the question of the date on which the period of interruption of employment which included the sickness benefit claim commenced should be referred to the S of S for determination. The Commissioner should make a fresh decision on the appeal in the light of that determination. (see 18.6.2 for a fuller synopsis of the Court of Appeal decision).

Part 3: Deemed to be incapable of work

Regulation 3 of the SS (Unemployment, Sickness and Invalidity Benefit) Regs. 1983.

1 Under medical care

- R(S) 24/54 i A school teacher who was pregnant was advised by her doctor not to continue at work because of an outbreak of German measles at the school at which she was employed. A specialist agreed that there was a risk to the baby, if she contracted German measles. It was held that the claimant could not be deemed under r.3(a) of the NI (USB) Regs. 1948 to be incapable of work since there was nothing in her state of health to affect her working capacity. Her abstention from work arose from conditions at her place of work rather than from any disease of disablement from which she was suffering.
- R(S) 1/72 ii A trained children's nurse who was 2 months pregnant told her doctor that she had recently been in contact with at least one case of German measles at the nursery where she was employed. The doctor arranged for blood tests to ascertain whether she was liable to contract the disease if she came into contact with it or whether she had antibodies which rendered her immune from it. She was referred to a hospital consultant for his opinion and, while the test were being carried out, her doctor issued medical certificates certifying that the claimant was incapable of work. It was held that the claimant was under medical care in respect of a disease, namely German measles, and as there was no medical evidence which certified that she should abstain from work, and no work was done during the relevant period, she could be deemed to have been incapable of work under r.3(1)(a) of the NI(USB) Regs 1967 (cf.r.3(1)(a) of the SS (USIB) Regs 1983). See paras 16-17.

2 Exclusion from work on the certificate of a medical officer

- R(S) 8/61 i A nursery student who normally worked at a nursery for 3 days a week and attended a polytechnic as part of her training on 2 other days was excluded from work at the nursery for 2 weeks on a certificate by a Medical Officer of Health of the local authority because she had been in contact with a case of measles. It was held that she could not be deemed to have been incapable of work during the period covered by the certificate because (a) Saturdays and the days on which she attended the polytechnic were not covered by the exclusion as she did not normally work at the nursery on those days, and (b) whilst excluded from work at the nursery on the other 3 days of each week she was not at any time under medical observation by a doctor or other medical person. See para 17 for observations by a Tribunal of Commissioners on the meaning of 'under medical observation'.
- (T)

3 Deemed incapacity throughout a day on which no work is done

i A man was certified to be fit for work and resumed his employment at 11 p.m. on a Saturday. It was held that the performance of one hour's work was no so trifling that it could be disregarded for the purpose of deeming incapacity throughout the day. See as to meaning of 'day', 2.1.2 *above*. Under the SS (USIB) Regs 1983 see r.5. R(S) 18/53

4 Discretion of statutory authorities

i A claimant for invalidity benefit produced doctor's statements in the form set out in Part II of Schedule 1 to the Social Security (Medical Evidence) Regulations 1976 advising him to refrain from work but the Commissioner found as a fact that he was not incapable of work. However, he went on to hold that the doctor's statements were certificates within the meaning of r.3(1)(a) ii of the SS (USIB) Regs 1975 (which provides for a person not incapable of work to be deemed so incapable in certain circumstances); that once the conditions mentioned in the regulation are shown to be satisfied in relation to a claimant the statutory authorities have no discretion in the matter and, notwithstanding the use of the word 'may' in the regulation, he must be deemed incapable of work. On application by the DHSS an order of certiorari was granted to quash the decision. The majority of the Divisional Court held that 'may' meant 'may' and that the statutory authorities had a discretion whether to deem a claimant incapable to be exercised having regard to all the circumstances of the case. For summary of Divisional Court's judgement see 18.1.2 vii. Also see R(S) 2/79 (T) *below* and R(S) 4/83. R(S) 1/79

ii Following the quash of decision R(S) 1/79, the claimant's appeal was reheard by a Tribunal of Commissioners. It being accepted that the claimant was no in fact incapable of work during the relevant period and that the conditions for the exercise of the discretion conferred by regulation 3(1)(a) were satisfied, the sole question before the Tribunal was whether that discretion should be exercised in the claimant's favour. The Tribunal had that as a general rule a claimant should be deemed incapable of work only if it appears from the evidence as a whole that there is some medical reason why he should abstain or should have abstained from work. Sub-para (ii) of regulation 3(1)(a) was amended with effect from March 1978 to read—
'(ii) it is certified medical practitioner that for precautionary or convalescent reasons consequential on such disease or disablement he should abstain from work'

The Tribunal said, *obiter*, that the deeming provision is intended for cases in which the certifying doctor knows or suspects ... that his patient is in truth not incapacitated for work but on medical grounds wishes him to stay away from work. See also R(S) 1/79, 2.3.4 i *above* and 18.1.2 vii *below*, and R(S) 4/83.

iii In allowing the appeals of two claimants from the respective decisions of Commissioners, the Court of Appeal held that the correct construction of regulation 3(3) of the SS (Unemployment, Sickness and Invalidity Benefit) Regulations was that the words 'by reason only of the fact that he has done some work while so suffering' were not to be read as a pre-condition to the remainder of the regulation. If a claimant had worked but had satisfied either sub-paragraph (i) or (ii), and had not exceeded limit, regulation 3(3) conferred a discretion for incapacity to be deemed. For a report of the judgement see R(S) 3/86, 18.6.2 *v below*. R(S) 3/86

5 Deemed incapacity, notwithstanding work done

i The claimant had for many years been in respect of sickness benefit and subsequently invalidity benefit on account of incapacity diagnosed as the effects of a fractured skull. It was subsequently discovered that he was working part-time at a public house albeit for purely token remuneration. It also subsequently R(S) 4/83

transpired that the claimant had in fact been actively encouraged by his doctor to work part-time for therapeutic reasons. One of the question which arose in connection with this matter was whether, under r.3(3) of the SS (USIB) Regs 1975 as amended by SI 1979/1299, r.2, the claimant should be deemed to be incapable of work, notwithstanding that he was in fact working. The Commissioner held that:

1. incapacity to be deemed under regulation 3(3) it was necessary that -
 - (a) the claimant was, during the period under consideration, found not to be incapable of work; and
 - (b) he be so found by reason only of the fact that he had done some work while suffering from some specific disease or bodily or mental disablement; and
 - (c) the work as such as fell within either head (i) and (ii) or regulation 3(3);
2. if these conditions are fulfilled regulation 3(3) conferred a discretion to deem such a person as incapable of work;
3. incapacity might also be deemed for days on which the claimant had done no work and for which he had been found not to be incapable of work by reason of having worked on other days.

The Commissioner (in para 10) also described the circumstances which should be taken into account in relation to the exercise of his discretion. R(S) 1/79, R(S) 2/79 and R(S) 4/79 followed. See also decision of the Court of Appeal in R(S) 3/86, 2.3.5 ii and 18.6.2 *v below*.

R(S) 3/86 ii In allowing appeals by two claimants from decisions of Commissioners, the Court of Appeal held that in regulation 3(3) of the SS (Unemployment, Sickness and Invalidity Benefit) Regulations the words ‘by reason only of the fact that he has done some work while so suffering’ were not to be read as a pre-condition to the remainder of the regulation. The regulation was not to be construed in separate stages. The reference to ‘some work’ must be equated with the reference to ‘that work’, and ‘that work’ was work which fell either within sub-paragraph (i) or (ii). If a claimant had worked but had satisfied either sub-paragraph (i) or (ii), and had not exceeded the earnings limit, regulation 3(3) conferred a discretion to deem the claimant as incapable of work. (The decisions of the Commissioners were not themselves reported, but a report of the CA judgement is given in R(S) 3/86, see 18.6.2. *v below*.) See also R(S) 2.3.5 iii *below*.

R(S) 6/86 (T) iii The claimant was a local councillor who, during a period of sickness, continued to attend the council meetings but did not claim attendance allowance in respect of those meetings. The question was whether he could be deemed incapable of work under reg. 3(3) of the SS (USIB) Regs 1975. The Commissioners held that in the context of reg. 3(3) of them ‘earnings’ means those amounts to which a claimant is entitled, and is not limited to payments he actually receives. For the purpose of reg. 3(3), weekly earnings ordinarily exceed a specified amount if they exceed it in more than half of the weeks in the reference period. With regard to the length of the reference period the Commissioners held that in general a period shorter, or much longer, than 13 weeks should be avoided if possible. Weeks in which the claimant had no earnings should be left out of account. See also R(S) 3/86, of which a full summary is at 18.6.2 *v below*.

Part 4: Days not be treated as days of incapacity for work

Reg 7(1)(c) of the SS (USIB) Regs 1983

1 Effect of disqualification for receipt of benefit

i A married woman who was not paying contributions and believed that she was not entitled to sickness benefit became incapable of work and sent a first medical certificate to her employers, who sent it on the local office of the Department. The claimant was treated as having made a claim for benefit within the prescribed time for the first day of the incapacity, but no further certificates were received, nor was any further claim made until a year later. It was held that the claimant was disqualified for receiving sickness benefit and that by force of reg. 6(1)(c) of the NI (USB) Regs 1948 the days to which the disqualification applied fell not to be treated as days of incapacity for work. See paras. 13 et seq. See also CS 174/49, R(S) 6/83 and R(S) 11/83. Considered in R(U) 7/95. R(S) 2/65

2 Whether work undertaken was under medical supervision

i A man suffering from tuberculosis worked as an employed person for a day or two half-days a week at a factory operated by an association which had been formed specifically to help tuberculous patients. He attended the tuberculosis hospital at which he was an out-patient every two months, but no medical officer was attached to the factory at which he worked although the hours and conditions of the work were agreed by medical men. It was held that sickness benefit was payable to the claimant in respect of days on which he worked for the association on the ground that: (a) as the work was done under the general supervision of a tuberculosis office it could fairly be said to be 'undertaken under medical supervision'; (b) as the claimant was an out-patient of a tuberculosis hospital he was a patient 'of' a hospital; and (c) as the association's activities were for the treatment and care of tuberculosis the work was undertaken as part of his treatment. Compare R(S) 5/52. R(S) 3/52

3 Work which he has good cause for doing

i A man who for many years had been certified to be incapable of work by reason of a blood disease drove a tractor to take feeding stuff to sheep on mountain pasture. He was in the habit of doing so several times a week, but said that an examining medical officer told him he could do a few light jobs on his farm. It was held that the claimant had shown good cause for breaking the rule forbidding the doing of work which the medical officer had recommended for the purpose of taking his mind off his condition. See also and compare CSS 25/50. R(S) 10/60

Part 5: Disqualification for receipt (General)

Reg. 17 of the SS (USIB) Regs. 1983

1 Incapacity due to misconduct

R(S) 2/53 i A man was incapable of work by reason of alcoholism. It was held that drinking to such an extent as to endanger health is *prima facie* misconduct and that, if it is a direct cause of a person's incapacity for work, he had become incapable of work through his own misconduct. The inference of misconduct could only be rebutted if the alcoholism was involuntary, and since in the case of the claimant the evidence did not establish that that was so he was disqualified for receiving sickness benefit.

2 Failure without good cause to attend medical examination

R(S) 12/59 i On being direct to attend for examination by an examining medical officer the claimant obtained a final certificate that he would be fit to resume work the day before the day of the examination, which he did not accordingly attend. However, on the day on which the examination was due to take place, he submitted an intermediate certificate obtained two days previously which rendered the final certificate ineffective. He had avoided medical examination on several previous occasions and it was held that he had not shown good cause for his failure to attend and that he was disqualified for receiving sickness benefit for six weeks. See also R(S) 4/61.

R(S) 1/64 ii A claimant failed to attend for examination by an examining medical officer, but it was held that she was not disqualified for receiving sickness benefit because, although she had failed to prove good cause for her failure to attend the examination (see para. 13), there had not been due compliance with the reg relating to notification of the time and place of the medical examination.

R(S) 1/87 iii A claimant was disqualified for receiving invalidity benefit on the ground that he had failed without good cause to attend for routine medical examination, and this decision was confirmed by the SSAT. In remitting the case to a fresh tribunal the Commissioner directed that findings should be made on the following: whether the contents of the notice to attend satisfied the prescribed requirements, and included date, time and place (see also R(S) 1/64, 2.5.2 ii *above*); whether the notice was given by or on behalf of the S of S, what was the day on which it was posted; whether the claimant had good cause for failing to comply with the notice, the onus of proof being on the claimant, if good cause not shown what should be the period of disqualification - reasons should be given for the period chosen as the tribunal were exercising a discretion. Other synopses of this decision are at 17.3.16 i and 17.3.2 xix.

3 Good cause for not attending a medical examination

i A Christian Scientist who was suffering from nervous exhaustion refused to attend for, or submit herself to, a medical examination. It was held that, since her objection was based on a firm conviction that her religious belief required her to do so, she had good cause for her refusal to attend the examination. She was not, therefore, disqualified for receiving sickness benefit. See para 8. R(S) 9/51

4 Behaviour calculated to retard recovery

i A blind woman who was undergoing a course of vocational training gave it up in order to have a baby, whereafter she declined to resume the course, which was designed to fit her for work but would have had no effect upon her blindness. It was held that her failure to attend the course was not behaviour calculated to retard her recovery. 'Recovery' means recovery from the disease or disablement causing incapacity and the training would not have improved the claimant's blindness. Furthermore, she had not refused medical or other treatment which means treatment for the disease or disablement. See para 6. R(S) 3/57

5 Being absent from home without leaving word where he may be found

i A man who had been in receipt of sickness benefit for several years was not at home on the 3 occasions when a visiting officer from the local office of the Department called upon him. On the first and second occasions the visiting officer left written notice of a further future visit, but the claimant did not call at the local office to offer any explanation for his absence from home. In answer to a letter enquiring why he failed to observe the relevant rule of behaviour he said that he was either in the park or at the cinema, that he lived with relatives who were out at work when the officer called, that his doctor had told him to get out in the fresh air as much as possible and that he had no-one with whom he R(S) 6/55

could have left a message. It was held that the claimant had proved good cause for his failure to leave word where he might be found since he was only away for a few hours and had *bona fide* difficulty in leaving word. See also R(S) 21/52.

- R(S) 7/83 ii A claimant for sickness benefit who has no place of residence at the inception of a claim period and has not acquired one during its currency cannot properly be said to be so 'absent from his place of residence' as to invoke the obligation to leave word where he may be found (paragraph 7(5) and (6)). The burden of proof that the claimant has committed a breach of the rule of behaviour rests upon the insurance officer (paras 9 and 10). See also R(S) 1/87.

Part 6: Disqualification for receipt on ground of absence from GB

S. 82(5) of the SS Act 1975 (see also reg. 2(1)(b) and (c) of the SS Benefit (Persons Abroad) Regs. 1975)

1 Temporarily absent from GB

i This appeal was one of three heard by the Commissioner in which he held that he was bound by a decision of the High Court on the meaning of “temporary absence”. On a judicial review Hodgson J had held that the word “temporary” should be given its primary meaning of “not permanent” and the Commissioner followed that judgment. On appeal by the AO the CA held that in construing reg. 2(1) of the SS (Persons Abroad) Regs. 1975 it was wrong to treat the word “temporary” as synonymous with “not permanent”. The Court held that the correct approach was to look at the facts at the date of the decision, including past absence and future intended or likely period of absence. The quality of absence may change with the passage of time and as time passes it may be more difficult to demonstrate it is temporary. Although the claimant’s intentions will always be relevant as time goes by his plans should be more closely scrutinised. R(S) 1/96

2 Meaning of being treated

i “Being treated” imports some activity by someone other than the claimant and involves some treatment administered by a person or agency other than the patient himself. See paras. 3 and 4 and see also CC 7/49, CS 474/50 and R(S) 16/51. See R(S) 2/86, in which a tribunal of Commissioners held that his decision had been correctly decided. R(S) 10/52 (T)

ii The meaning of “treatment” or “being treated” is a question of law, and the fact that a doctor or any other person uses either of those expressions in a colloquial sense cannot be conclusive of their lawful meaning. A person can only be absent from GB for the specific purpose of “being treated” if he is absent in order to enlist, while absent, some kind of medical or surgical skill or service to be administered by some person qualified to supply it; such skill or service being intended to remedy the relevant disease or disability or to palliate its ill effects or the pain or discomfort caused by it. See also R(S) 2/86, in which a tribunal of Commissioners held that this decision had been correctly decided. R(S) 2/69

iii Although reg. 2(1)(b) of the SS Benefit (Persons Abroad) Regs. spoke in terms of a person being treated for incapacity, the reality was that the claimant was to be treated for a medical condition which had given rise to the incapacity. For another synopsis on this case see 2.2.6 ii *above*. R(S) 2/86 (T)

3 Absence from GB for the specific purpose of being treated

4 Non-medical treatment

5 Absence prolonged by supervening incapacity

6 When the purpose for which a person has left GB is frustrated

7 Leaving GB for the purpose of convalescence

8 Absent for the enjoyment of a warm climate, etc.

9 Incapacity which commenced before leaving GB

- CS 317/49 i A civil servant was sent to Austria in the course of his duty and approximately a year later returned to GB on leave, when he was informed that he would be required to resume duty in England when his leave was over. He was, however, permitted to return to Austria for a day or two to collect his belongings, but meanwhile he consulted a doctor, who found that he was suffering from bilateral inguinal hernia. The necessary operation could not, however, be performed at once and the claimant accordingly went back to Austria to collect his belongings. While there an operation became urgent and necessary so that his return to GB was delayed, and it was held that his absence was for the specific purpose of being treated for incapacity which commenced before he left GB. In R(S) 2/86 a tribunal of Commissioners expressed the view that the conclusion in this decision, that when he entered hospital the claimant's absence was for the specific purpose of being treated for incapacity, merited reappraisal. In decision R(S)1/90 a tribunal of Commissioners rejected the interpretation of "absence ... for the specific purpose of being treated" which is set out in this decision.

10 Incapacity which commences while travelling in a ship or plane

- R(S) 23/52 i A mariner on a British ship in a foreign harbour was taken ill and, some days later, was removed to a hospital. He was, however, able to rejoin his ship before it sailed. It was held, however, that a British ship in territorial waters of another state is not a part of GB and that the claimant was, therefore, disqualified for receiving sickness benefit on the ground that the treatment he received in hospital was not for incapacity which commenced before he left GB.

11 Calculation of period of absence

12 Division of functions between the statutory authorities and the S of S

Reg. 2(1)(a) of the SS Benefit (Persons Abroad) Regs. 1975, as amended by S.I. 1977/1679, S.I. 1983/186 and S.I. 1984/1303.

- R(S) 8/83 i A claimant for invalidity benefit during a period of absence abroad satisfied the conditions of both sub-para. (b) and sub-para. (c) of reg. 2(1) of the SS Benefit (Persons Abroad) Regs. 1975 (relief from disqualification for benefit while abroad), but no certification under sub-para. (a) of that reg. was issued by the S of S and it was consistent with the proper administration of the SS Act 1975 that the disqualification should not apply. It was contended that sub-para. (a) was *ultra vires*; that accordingly the S of S had no power to give or refuse a certificate and the question whether it was consistent with the administration of the Act that the claimant should escape disqualification was for determination by the statutory authorities. Those were the sole issues in the case. The Commissioner held that sub-para. (a) was not *ultra vires* and that, except in regard to matters referred to in s. 93 and 95 of the above Act, adjudication on benefit questions was the province of the statutory authorities, but questions of administration fell within the province of the S of S (para. 9). The decision that reg. 2(1)(a) is not *ultra vires* was subsequently upheld by the CA (see R(S) 8/83, second app.).

13 Discrimination

- R(S) 2/93 i The provisions disqualifying a person for being absent from GB (s. 82(5)(a) of the SS Act 1975 and reg. 2(1) of the Persons Abroad Regs.) do not discriminate, either directly or indirectly, on the grounds of nationality. In particular they do not have a disproportionate impact upon non-British EEC nationals compared with British nationals. See also 19.3.5 i, 19.4.6 i and 19.4.6 ii.

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ii A Moroccan national claimed for an increase of invalidity benefit for his wife who resides in Morocco. The AO decided that the increase was not payable because the claimant's wife was "absent from GB". The Commissioner decided that the tribunal erred in failing to take account of Article 41(1) of the Co-operation Agreement between the EC and the Kingdom of Morocco which prohibits discrimination against workers of Moroccan nationality. The reg. which provides that an increase can only be paid if a person **is residing** with his wife who is absent from GB indirectly discriminates against Moroccan workers. That discrimination cannot be objectively justified and could not therefore be applied to workers covered by the Co-operation Agreement. The appeal was remitted to a new tribunal to decide entitlement under the normal rules which permit payment if a claimant is residing with or supporting his wife financially.

R(S) 1/00

Part 7: Imprisonment and detention in legal custody

Section 82(5)(b) of the SS Act 1975 (see also regulations 2 and 3 of the Ss (General Benefit) Regulations 1982).

1 Meaning of 'legal custody'

i It was held that the context in which the expression 'detention in legal custody' was used in s.29(1)(b) of the NI Act 1946 indicated that it was not to bear its full meaning since that would have included the preceding terms 'penal servitude' and 'imprisonment'; it therefore followed that the expression had to be taken to refer only to detention which had some connection with criminal proceedings. Accordingly a man charged with a criminal offence before a court of summary jurisdiction, who was received and detained in hospital in accordance with an order of the court made under s.24(a) of the Criminal Justice Act 1948, was held to be undergoing detention in legal custody for the purposes of the above mentioned s.29(1)(a)(b). See also CS 16/48, R(S) 21/53 and R(S) 22/54. (R(S) 20/53 and R(S) 21/53 were upheld by the Divisional Court, see *R. v. National Insurance Commissioner, ex parte Timmis* [1954] 3 WLR 614, summarised at 18.1.1i below). See also R(S) 3/55, para 6 to 7. R(S) 20/53

2 'Broadmoor patients'

In the Criminal Justice Act 1948 the term 'Broadmoor patient' was substituted for 'criminal lunatic'

i A man was certified to be insane while in prison awaiting trial and was ordered to be removed to a mental hospital as a Broadmoor patient. On arraignment at the Assizes he was found to be insane and a further order for his detention as a Broadmoor patient was made. It was held, following CS 16/48 (q.v.), that persons detained as 'Broadmoor patients' are detained in legal custody. R(S) 11/52

3 Mental defectives

i A man was convicted by a criminal court, which made an order directing presentation of a petition under the Mental Deficiency Act 1913. As a result of the petition there was made in respect of the claimant an order under section 6 of that Act that he be detained in an institution for defectives. It was upheld, applying the basis of R(S) 21/53 (q.v.), that the claimant was detained in legal custody. See para 12. R(S) 4/55 (T)

ii While serving a prison sentence for a criminal offence a man was found to be a mental defective and was transferred to an institution for defectives pursuant to an order made by the Secretary of State. He was later transferred to another such institution and it was held that while he was in an institution for defectives he was being detained in legal custody. R(S) 5/55

4 Remand in custody

- R(S) 16/53 i A claimant was remanded in custody to a National Health Service mental hospital for 4 weeks. He was then placed on probation, but was required to re-enter hospital as a voluntary patient. It was held that he was disqualified for receiving sickness benefit for the period during which he was remanded in custody.

5 Allowed out on licence

- R(S) 23/54 i A claimant who was detained under the Mental Deficiency Act 1913 was allowed out to work on daily licence. He became incapable of work for a period and claimed sickness benefit, but it was held that it was not payable to him on the ground that he was detained by an order made in criminal proceedings and continued to be undergoing detention in legal custody.

- R(S) 10/56 ii A claimant, while subject to an order for his detention in an institution for defectives, was properly absent, having been allowed out on licence. Successive licences authorised his residence at a hostel, with his parents and with his wife, and, when he became incapable of work, in a hospital under the personal care and control of the matron. It was held that when residing under licence with his wife the claimant was not undergoing detention in legal custody and that his transfer to the hospital did not revive his detention in legal custody. See para 11 *et seq.*

6 Detention in an industrial school

- R(S) 3/55 i A boy aged 10 was detained in an industrial school pursuant to an order made by the Secretary of State. Whilst in the school he was found to be a mental defective and was transferred to an institution for defectives. It was held that he was not detained in legal custody. See para 6 and 7.
(T)

7 Effect of r.2(3) of the SS (General Benefit) Reg 1982

- R(S) 7/59 i On 29th May a woman was charged with assaulting a police officer and was remanded in custody for 3 weeks for a medical report. Subsequently she was convicted and conditionally discharged. She made a claim for sickness benefit from and including 29th May. It was held that since she was not undergoing detention in legal custody at the commencement of 20th May the first day of her detention must be regarded as having been 30th May; as she was incapable of work on 29th May she escaped disqualification by reason of what was then regulation 6(2) of the NI (General Benefit) Regulations 1948 from 29th May for the period of her incapacity. Under the SS (General Benefits) Regs 1982, see r.2(3).

8 Suspended sentence

i A claimant was awarded sickness benefit from 2nd January to 2nd April, but on 17th March he was arrested and detained in legal custody until 24th June. He pleaded guilty to fraud charges and received a sentence of 9 months' imprisonment suspended for 12 months. It was held that, having regard to the provisions of s.39 of the Criminal Justice Act 1967, a suspended sentence of imprisonment at the conclusion of the criminal proceedings constituted a penalty for the purposes of what was then r.6(3) and (4) of the NI (General Benefit) Regs 1948, as amended by SI 1960/1282. Under the SS (General Benefit) Regs 1982, for meaning of 'penalty' see r.11(8)(c). R(S) 1/71

9 Meaning of 'imprisonment'

i A claimant in receipt of invalidity benefit was committed to prison by order of a Magistrates' Court for non-payment of maintenance for his wife. It was held that the claimant's imprisonment had nothing to do with a criminal offence but was for a form of civil contempt of court. Accordingly the claimant should not be disqualified for receiving invalidity benefit for the period of his imprisonment under s.82(5)(b) of the SS Act 1975 because 'imprisonment' in that section means only imprisonment imposed by a court exercising criminal jurisdiction. R(S) 20/53, at 2.7.1i *above*, and R(S) 3/55. R(S) 8/79

**(For list of abbreviations used in this Part see
List of General Abbreviations at the beginning of
this volume, immediately after Foreword and Introduction)**

Part 8: Free in-patient treatment in hospital

As to when a person is to be regarded as receiving free in-patient treatment in a hospital see regulation 2(2) of the Social Security (Hospital In-Patients) Regulations 1975: and for the provisions of those regulations relating to the adjustment of the amount of benefit payable after continuous periods of in-patient treatment see Part II of those Regulations.

1 Calculation of period of free in-patient treatment

- CS 131/49 i When the period of in-patient treatment is being calculated, the state of things which existed at the beginning of the day may be assumed to have lasted throughout the day. Thus, when an inmate of a mental hospital was allowed to return home on 10th September and returned to the hospital on the following 9th October, it was held that she was in receipt of free in-patient treatment on the former date but not on the latter date.
- R(S) 9/52 ii When a man was discharged from hospital at 8 a.m. on 1st August and admitted to another hospital at 4 p.m. on the following 29th August it was held that the interval did not exceed 28 days and that the 2 periods of free in-patient treatment must be regarded as having been continuous.
- R(S) 4/84 iii A claimant for non-contributory invalidity pension, a young woman of 20, suffered from spina bifida. She was an in-patient in hospital from 10 p.m. to 8 a.m. each day, where she required and was given free hospital treatment. During the rest of each day she attended a nearby training college as a normal student, only returning to the hospital each night. The question arose whether, after 8 calendar weeks, her pension should be reduced under r.4 of the SS (Hospital In-Patients) Regs 1975. The Commissioner held that periods of hospital in-patient treatment of less than a day should be disregarded; the references to 'any period' and 'a period' in regs 2(2) and 4(a) must refer to periods of a day or more than a day; the linking provisions of r.17(4) must also be construed as linking between periods of one day or more; 'free in-patient treatment' for the shortest period contemplated by r.2(2) (24 hours) required (a) maintenance free of charge for the whole day and (b) medical or other treatment as an in-patient during some part of that day. Accordingly he held that the benefit was not to be reduced. (Paragraphs 1, 7 and 8).
- R(IS) 8/96 iv In determining whether a person is an in-patient for the purposes of regulation 2(2) of the Hospital In-Patients Regulations, the circumstances existing at the beginning of the day are to be treated as continuing throughout the day. A day on which a person is admitted or returns to hospital is not a day of free in-patient treatment, but a day on which a person is discharged or leaves hospital is to be treated as such a day.

2 When in receipt of free in-patient treatment

- R(S) 2/52 i A hospital nurse who was a patient in the nurses' sick-bay of the hospital at which she was employed was held to have received free in-patient treatment notwithstanding a deduction was made from her salary for board and lodging which would not have been made if she had been in a public ward. See also CS 591/49 and compare R(S) 28/52.

3 Not in receipt of free in-patient treatment

i The matron of a hospital received medical and nursing treatment in her living quarters at the hospital at which she was employed and was held not to have received free in-patient treatment. See para 5. R(S) 28/52

ii An in-patient in a home for disabled soldiers contributed 30s a week towards his maintenance, the balance being paid by the charity by which the home was maintained. It was held that he was not receiving free in-patient treatment and that the amount payable to him by way of sickness benefit did not fall to be reduced. R(S) 4/53

4 Detention in legal custody

i A man was remanded in custody in a National Health Service mental hospital for examination and report. Approximately a month later he was put on probation, a contribution of which was that he re-entered the hospital as a voluntary patient. It was held that during the period of remand he was receiving free in-patient treatment. R(S) 16/53

5 Meaning of 'free of charge'

i 'Free of charge' in the definition of free in-patient treatment in r.1(2) of the NI (Hospital In-Patients) Regs 1948 (under the SS (Hospital In-Patients) regs 1975, see R.2(2) means 'free of charge to himself'. Accordingly, when a claimant who had pulmonary tuberculosis was admitted to a sanatorium where part of the cost of his treatment and maintenance was met by the Regional Hospital Board and the balance from Red Cross funds, it was held that he was maintained free of charge. R(S) 2/54

6 Interruption of period of free in-patient treatment

- R(S) 8/51 i A patient in a mental hospital who was allowed to go home for short periods of less than 28 days was held not to be receiving free in-patient treatment during those periods. See also CS 131/49, *above*.
- R(S) 25/54 (T) ii A man who was an in-patient in a mental hospital for 3 years was discharged and went home to live with his wife. Nine days later he had to be re-admitted to the hospital and it was held by a Tribunal of Commissioners that a new period of residence had begun and had lasted for 9 days.
- R(S) 4/84 iii A claimant for non-contributory invalidity pension, a young woman of 20, suffered from spina bifida. She was an in-patient in hospital from 10 p.m. to 8 a.m. each day, where she required and was given free hospital treatment. During the rest of each day she attended a nearby training college as a normal student, only returning to the hospital each night. The question arose whether, after 8 calendar weeks, her pension should be reduced under r.4 of the SS (Hospital In-Patients) Regs 1975. The Commissioner held that periods of hospital in-patient treatment of less than a day should be disregarded; the references to 'any period' and 'a period' in regs 2(2) and 4(a) must refer to periods of a day or more than a day; the linking provisions of r.17(4) must also be construed as linking between periods of one day or more; 'free in-patient treatment' for the shortest period contemplated by r.2(2) (24 hours) required (a) maintenance free of charge for the whole day and (b) medical or other treatment as an in-patient during some part of that day. Accordingly he held that the benefit was not to be reduced. (Paragraphs 1, 7 and 8).

7 Residence in 'prescribed accommodation'

For the meaning of which see regulation 15(4) of the SS (Hospital In-Patients) regs 1975

- R(S) 4/54 i A claimant was admitted to residential accommodation under Part 3 of the National Assistance Act 1948 and was permitted to reside therein otherwise than temporarily. A little over a month later he entered hospital and it was held that he was to be regarded as having received free in-patient treatment while in the residential accommodation and that the period of residence therein was deemed under the proviso to r.12(2) of the NI (Hospital In-Patients) Regs 1949, as amended (under the SS (Hospital In-Patients) Regs 1975, see r.17(2)) to have been a period of 52 weeks.
- R(S) 25/54 ii A claimant lived in a hostel which formed part of a rehabilitation centre administered by a voluntary organisation. Medical services were supplied by what was then the Ministry of Health and responsibility for the claimant's maintenance was accepted by the Regional Hospital Board. The hostel was held to be 'prescribed accommodation' within the meaning of the NI (Hospital In-Patient) Regs 1975. See also and compare R(S) 15/55.
- R(S) 6/58 iii A man who was suffering from tuberculosis lived in a hostel provided by a local authority for homeless, ambulant, infective tuberculous men and he was permitted to stay there as long as he liked. There was a visiting medical officer, but no other medical or nursing services were provided. It was held that the hostel was prescribed accommodation and that the claimant was permitted to reside there otherwise than temporarily so that, after his admission to hospital, the amount payable to him by way of sickness benefit fell to be reduced. See para 12.

8 Discharge ‘by and with the approval of a person authorised to discharge him’ reg. 15(1) of the SS (Hospital In-Patients) Regs. 1975

i A beneficiary was a free in-patient in a hospital for 19 months, having been detained on the petition of his father. He was “claimed” out of hospital against the advice of the medical authorities and it was held that resettlement benefit was not payable. See as to the meaning of “discharge” paras. 5 to 8. R(S) 1/54

ii A certified mental patient escaped from a mental hospital and after 14 days was formally certified as having been discharged for the reasons given at paras. 5 and 6 (see also para. 7). It was held that the claimant had not been discharged “by and with the approval of a person authorised or empowered to discharge him”. R(S) 12/56

Part 9: Mariners

A mariner, as defined by reg. 1(2) of the SS (Mariners' Benefits) Regs. 1975 may escape disqualification for the receipt of sickness benefit by reason of absence from GB under reg. 4 of those Regs.

1 Exemption from disqualification

2 Not exempted from disqualification

3 Under contract to travel for the purposd of commencing employment as a mariner

4 What is a 'proper return port' within the meaning of the proviso to reg. 4 of the SS (Mariners' Benefit) Regs. 1975

- R(S) 6/63 i A mariner of Netherlands nationality signed on as a member of the crew of a British ship for a voyage from Manchester to Amsterdam, Rotterdam, Liverpool and back to Manchester. He was taken ill on the outward voyage and put ashore at Amsterdam, whence he was taken to his home in Rotterdam. It was held that for the claimant Amsterdam and Rotterdam were proper return ports and that he could not derive any benefits from what was then reg. 9 of the NI (Mariners) Regs. 1948. He was, accordingly, disqualified for receiving sickness benefit on the ground that he was absent from GB.

Part 10: Severe disablement allowance

S. 36 of the SS Act 1975, as substituted by s.11 of the Health and SS Act 1984. See also the SS (SDA) Regs. 1984. (SDA replaced non-contributory invalidity pension in November 1984, but decisions given in relation to that pension, insofar as they might be of assistance in determining entitlement to the allowance have been retained below. Other decisions relating to the superseded pension are listed in Part II of the Annex to this Chapter.)

1 Prescribed conditions as to residence and presence in GB

- R(S) 3/78 i On 4.9.75 a man, who had suffered from poliomyelitis and been incapable of work all his life, made an anticipatory claim for a non-contributory invalidity pension from 20.11.75, that being the first day on which that pension became available to the public. Early in November he went abroad with his wife for a month and the question arose whether, having regard to regs. 3(1) and 4(2) of the SS (Non-Contributory Invalidity Pensions) Regs. 1975, he satisfied the condition of entitlement to the pension laid down in s.36(1) of the SS Act 1975 that he had been incapable of work for a period of not less than 196 consecutive days ending immediately before the day in respect of which he claimed to be entitled to the pension. (Reg. 3(1) made the claimant's presence in GB a condition of entitlement to the pension and reg. 4(2) made provision for a day not to be treated as a day of incapacity for work for the purposes of the 196 consecutive days condition, if on that day the claimant was absent from GB.) The Commissioner held that reg. 4(2) was *ultra vires* on the grounds that it was not permissible to prescribe one set of circumstances in which a person was to be treated as incapable for the purposes of one part of subsection (1) of s. 36 of the above Act and another set of circumstances for the other part of the same sub-section. He accordingly decided that, although the claimant was not entitled to payment of the pension for any day while he was absent from GB, he had satisfied the 196 consecutive days condition (paras. 17 and 18). The Divisional Court subsequently held that reg. 4(2) was not *ultra vires* and quashed the Commissioner's decision insofar as it restricted the non-payability of or the non-entitlement to the pension to the period when the claimant was absent from GB. (see *sub nom R. v. National Insurance Commissioner. ex parte Fleetwood* [1978], unreported, save in the App. to R(S) 3/78. For summary of Divisional Court's judgment see 18.1.2 *vi below*).
- R(S) 7/81 ii Reg. 4(2) of the SS (Non-Contributory Invalidity Pension) Regs. 1975 in effect imposes a condition as to presence in GB. Reg. 3(2) was held not to relieve the wife of a serving member of the forces, who was residing with her husband in Germany, from the requirement in reg. 4(2). The relevance of Council Reg. (EEC) No. 1408/71 was considered. The reciprocal agreement between the Federal Republic of Germany and the UK together with the principle of extra-territoriality were also discussed.
- R(P) 1/97 iii. The claimant was born on 26.4.74. She left GB for Germany with her parents in 1977 and did not return to GB until 1.7.88. A claim for SDA was made on 21.11.90. The claimant was not entitled to SDA from 26.9.90 because she did not satisfy the ten residence condition at reg. 3(1)(c)(ii) of the SS (SDA) Regs. 1984. It was contended that the claimant would have been helped by the Family Allowances, NI and Industrial Injuries (Germany) Order 1961 in that her residence in Germany should be treated as a period of residence in the UK, and that the residence requirement at reg. 3(1)(c)(ii) was *ultra vires*.

That Commissioner decided that:

1 reg. 3(1)(c)(ii) of the SS (SDA) Regs. 1984 was not *ultra vires* and the claimant was not resident in GB for an aggregate of ten years since her birth;

2 the claimant could not rely on the Family Allowances, National Insurance and Industrial Injuries (Germany) Order 1961, to count her period of residence in Germany as a period of residence in the UK; and

3 the claimant satisfied the residence and presence requirements for an award of SDA from 6 April 1992 onwards [SS (SDA) Regs. 1984, reg. 3 as amended by S.I. 1992 No. 704]. See also 16.4.5.ii, 19.2.3.iii *below*.

2 Entitlement immediately before attaining pensionable age

i A woman claimed a non-contributory invalidity pension some 15 months after she attained pensionable age and, through Counsel, submitted that she could show good cause for the delay in making the claim. The Commissioner held that, if a person failed to make a claim within the time prescribed by reg. 14 of the SS (C and P) Regs. 1979, he failed to make out title *ab initio* (para. 14). He further held that the effect of s. 82(2)(c) of the SS Act 1975 (no sum to be paid on account of certain benefits in respect of any period more than twelve months before date of claim) was to take away the claimant's entitlement to a non-contributory invalidity pension for any period more than twelve months before her claim for it. Accordingly, she was not entitled to that pension immediately before she attained pensionable age and so, by virtue of s. 36(4) *ibid*, she could not make a valid claim for it at any time thereafter (paras. 11 to 18). See also 17.4.1 x and 17.4.4 vi *below* and R(S) 11/83, 13.1.1 xi, 13.1.2 iv *below*, R 2/85 (NCIP), 2.10.2 ii, 18.6.2 i *below*, and R(A) 1/86, para. 9, 15.3.1 vii *below*. Followed in R(S) 8/85. R(S) 6/83

ii A woman claimed a non-contributory pension under s. 36 of the SS (Northern Ireland) Act 1975 after she had attained pensionable age. Before she had attained that age she had already satisfied the relevant conditions for entitlement to that pension as provided in s. 36(1). However, the insurance officer disallowed her claim on the grounds that by virtue of s. 79(1) of the above Act, it was a condition precedent to entitlement that the respondent made a claim for the pension in the prescribed manner and within the prescribed time. The claimant had not made her claim until after she had attained pensionable age and accordingly she had not been entitled to the pension before she attained that age and so, by virtue of s. 36(4) of the above Act, she was not entitled to the pension thereafter. The Northern Irish Commissioner held that the words used in s. 79(1) referred to a person's right to the payment of any benefit, and not to his basic entitlement, which was dealt with in s. 36. The word "entitled" in s. 36(4) merely required that the basic statutory conditions were satisfied. A person could be "entitled" to a non-contributory invalidity pension, although not entitled to receive payment thereof, without having made a claim. He accordingly dismissed the appeal against the decision of the local tribunal allowing the claimant's appeal against the insurance officer's disallowance of her claim (paras. 7 and 10). Decision of tribunal of Commissioners of Northern Ireland, R 1/85 (NCIP) followed - claim to NCIP not a condition precedent of entitlement within meaning of s. 36(4) of above Act: R(S) 6/83 distinguished. (The Commissioner's decision in this case was subsequently upheld in the Court of Appeal of Northern Ireland and thereafter by the House of Lords. For summary of the House of Lords' see 18.6.2 i *below*). See also R(S) 6/83, 2.10.2 i *above*, and 13.2.3 viii, 17.4.1 xii, 17.4.4 vi, *below*. R 2/85 (NCIP)

iii A woman aged 61 claimed ICA. That claim was disallowed in accordance with s. 37(5) of the Social Security Act 1975 because she was over pensionable age (which is 60 for a woman) and had not been entitled to ICA immediately before reaching that age. Pensionable age is 65 for a man. The Commissioner decided that: R(G) 3/89

2.10.2

- a. s. 37(5) of the Act discriminated against women contrary to EC Directive 79/7;
- b. this discrimination was not permitted by article 7(1)(a) of that Directive;
- c. as a result women are entitled to ICA on the same terms as men. Therefore for the purposes of s. 37(5) of the Act pensionable age should be regarded as 65 for women.

The S of S appealed against that decision. The Court of Appeal dismissed that appeal and decided that

1. the exceptions in article 7(1)(a), which set out when the Directive will not apply, must be applied strictly and in accordance with the principle of proportionality;
2. Member States can only retain conditions of entitlement for benefits other than retirement or old age pensions which are linked to the different pensionable ages for RP when this is a necessary consequence of the different pensionable ages for men and women for RP purposes;
3. the discrimination in s. 37(5) of the Act is not excluded from the effects of Directive 79/7/EEC by exclusions in article 7(1)(a).

The S of S made a further appeal to the House of Lords. On 27 November 1991 the House of Lords referred preliminary questions to the ECJ. The ECJ (case 328/91) decided that:

- a. the discrimination which results from linking the condition of entitlement for benefits other than RP to the different pensionable ages for men and women for RP purposes is only acceptable if it is necessarily and objectively linked to these different ages;
- b. the awarding of non-contributory benefits such as SDA and ICA has no direct influence on the financial equilibrium of contributory pension schemes;

The ECJ referred the case back to the House of Lords for a final decision. On rehearing the House of Lords confirmed the decision of the Court of Appeal.

R(S) 2/91 iv The claimant was 65 on 22 May 1977. On 23 May 1988 he claimed SDA from 1 May 1988. His medical condition was such that he could have been entitled to NCIP since its introduction in 1975 and SDA which replaced NCIP in 1984. The AO decided that the claimant was not entitled to SDA because, at the date of claim, he had attained pensionable age. He could not be treated as entitled to NCIP before reaching that age because a claim for that benefit had never been made. And since 2 September 1985, when s. 165A of the 1975 Act limited the effect of the *Mc Caffrey* judgment, entitlement could not arise unless a valid claim was made. The Commissioner held that:

1. to be entitled to SDA, a person has to satisfy s. 36(4)(d) of the 1975 Act. This claimant had to show that he was entitled to NCIP on 21 May 1977, the day before he reached pensionable age;
2. House of Lords judgment *Insurance Officer v. McCaffrey* [1985] 1 All ER 5 made it possible for a person to be entitled to a benefit without having made a claim;
3. the effect of s. 165A of the Social Security Act 1975 was not retrospective in requiring a claim to be made before entitlement could arise and did not apply before 2 September 1985;

4 the claimant satisfied the conditions of entitlement for non-contributory invalidity pension prior to 2 September 1985 so was entitled to non-contributory invalidity pension on 21 May 1977 in accordance with the CA judgment in *McCaffrey* and so entitled to payment of SDA from 1 May 1988.

Note: S. 165B of the 1975 Act came into force on 13 July 1990. It confirms the retrospective effect of S. 165A to periods before 2 September 1985.

3 Transitional provisions

i In May 1984 the Commissioner found in an interim judgment that the claimant was not incapable of performing normal household duties during the period 18 December 1981 to 18 June 1982 and that non-contributory invalidity pension was not payable for a period down to 31 December 1982. In the light of further medical evidence subsequently produced the Commissioner held that the claimant had been incapable of normal household duties since 18 June 1982, and awarded non-contributory invalidity pension from 1 January 1983 until 28 November 1984 when that benefit was replaced by SDA. On the question of the claimant's entitlement thereafter to SDA the Commissioner held that the transitional provisions of reg. 20(1) of the SS (DLA) Regs. 1984 had been met; that the provisions of S. 79(1) of the SS Act 1975 were deemed to be satisfied by the Secretary of State's acceptance of the claim for non-contributory invalidity pension as a claim for SDA; that S. 165A of the 1975 Act, which came into operation on 2 September 1985, was similarly satisfied; and that the claimant was entitled to SDA for 29 November 1984 and for subsequent days which fell within a single period of interruption of employment. The Commissioner concluded that in accordance with reg. 11(1) of the SS (Claims and Payments) Regs. and R(S) 14/81, para. K of the Appendix (see 13.8.1 ii *below*), SDA was payable to the claimant down to the date of his decision and for 26 weeks thereafter, subject to her continuing to satisfy the conditions for payment. See R(S) 1/83 (13.8.2 i *below*) on the reasons for an interim decision initially. R(S) 1/86

4 Full-time education

i The claimant had been profoundly deaf since birth and was studying for GCE and CSE examinations at a school which catered for severely deaf pupils, using special teaching techniques. She attended the school for over 25 hours each week. The Commissioner held that reg. 8 of the SS (SDA) Regs. 1984 gave a concession to handicapped children that was not limited to the teaching of special skills but extended to special methods of teaching ordinary subjects. The words "instruction" and "tuition" in the reg. related to the method of teaching rather than the content of what was taught. He held that no account was to be taken of the hours spent in class by the claimant because the whole of the teaching would have been unsuitable for non-handicapped children of the same age and sex; she was therefore not receiving full-time education as defined by reg. 8. R(S) 2/87

5 Multiple disabilities and personality change

i Following a claim to SDA, the adjudicating medical authorities assessed disablement at 63% taking account of a personality change and several other disabilities. The MAT expressed difficulty in making separate assessments of the various different aspects of disablement saying they had to consider "the whole person". The Commissioner held that, in assessing the extent of disablement, adjudicating medical authorities must use their own expertise to decide whether to aggregate the various aspects of disablement or make separate assessments of the various disabilities and then aggregate them. It was further held that where there is evidence that there has been a personality change, the adjudicating medical authorities should make enquiries, obtain evidence about the personality before the change and make a comparison with it after the change. R(S) 4/89

Part 11: Overlapping benefits

1 Overlapping benefits

- CS 166/49 i A man who had for some years before the coming into force of the NI (Industrial Injuries) Act, 1946 been incapacitated by reason of pneumoconiosis and in receipt of workmen's compensation was awarded an unemployability supplement under S. 32 of that Act (under the SS Act 1975, see S. 53) and the question that fell to be decided was whether, for the purposes of and in the context of, the NI (Overlapping Benefits) Regs 1948 the unemployability supplement was a benefit by way of pension under the above Act. It was held that the supplement was "benefit by way of pension" with the result that the claimant's workmen's compensation payments fell to be reduced by the amount of the unemployability supplement.
- R(S) 13/55 ii A claimant for an increase of sickness benefit for his wife from whom he was separated was required by a court order to contribute to her support and was also in receipt of a war disability pension under the provisions of the Royal Warrant (Cmd.7699). He had also been awarded under the warrant a sum of 2 shillings a week in respect of his wife. That sum was paid directly by the Ministry of Pensions and National Insurance to the wife but the terms of the Royal Warrant made it clear that the award was to the claimant and not to his wife. It was held that the allowance of 2 shillings was a dependency benefit which was "payable" to the claimant within the meaning of the NI (Overlapping Benefits) Regs. 1948.
- R(S) 9/58 iii A married man with three children whose wife had left him sent for his mother to keep house for him and to look after the children. She had no home of her own and the arrangement that she should live with the claimant was expected to last indefinitely. She was, and continued to be in receipt of RP. Shortly after the claimant's mother went to live with him he became ill and made a claim for sickness benefit together with an increase thereof for his mother. It was held that the conditions that she was residing with the claimant and had the care of the children were satisfied but that the dependency benefit had to be adjusted under the NI (Overlapping Benefits) Regs. to take account of the mother's RP.
- R(S) 5/94 iv The amount of an increase to invalidity benefit payable to a claimant in respect of a partner falls to be reduced by the amount of the basic and additional components of the partner's RP. No such deduction can be made for the partner's graduated retirement benefit.
- R(IB) 7/04 The claimant had been in receipt of invalidity benefit and an adult dependency increase to that benefit. When invalidity benefit was converted to IB, the claimant's entitlement to the adult dependency increase was preserved by virtue of reg. 24(7)(b) of the SS (Incapacity Benefit) (Transitional) Regs. 1995. Those regs. provided that entitlement to the adult dependency increase would cease if it was not "paid or payable" for 57 continuous days. The claimant's wife was awarded IB in her own right with the result that the adult dependency increase was suspended by virtue of the SS (Overlapping Benefits) Regs. 1979 which provide that where a personal benefit exceeds a dependency benefit, the dependency benefit "shall not be paid". The award of IB to the claimant's wife ceased after a period of more than 57 days and the claimant requested re-instatement of the adult dependency increase. The DM decided that entitlement to the adult dependency increase had been lost. A tribunal however decided that the adult dependency increase remained payable while, because of the effect of the SS (Overlapping Benefit) Regs. 1979 not actually in payment with the consequence that the transitional protection was never lost. The Secretary of State appealed to the Social Security Commissioners.

The case eventually reached a Tribunal of Commissioners (convened because there were conflicting decisions of single Commissioners). The Commissioners decided that the natural reading of the words "shall not be paid" in reg. 10(2) of the SS (Overlapping

Benefit) Regs.1979 meant that the adult dependency increase was not payable. The context of the regulations as a whole also supported this conclusion. Thus transitional protection was lost. The Secretary of State's appeal was allowed.

Part 12: Statutory sick pay

Part I of the SS and HB Act 1982, the SSP (General) Regs. 1982 and Part III of the SSP (Adjudication) Regs.1982.

1 Qualifying days

i A turner, who was employed under a contract of service to work for 39 hours a week (Monday to Friday) voluntarily worked overtime on Saturday mornings. It was held that only Mondays to Fridays were qualifying days for the purposes of SSP, because it was not obligatory for the claimant to work on Saturday mornings (paras. 11 and 12). Method of establishing “qualifying days” explained (para. 10). R(SSP) 1/85

2 Period of entitlement

i A claimant notified her employer that she was incapable of work as from 1 December 1983. Her incapacity continued until 31 December 1983. Held that the “relevant date” for SSP purposes was 1 December 1983 but that, as there was a stoppage of work due to a trade dispute at her place of employment on that date (the stoppage continued until 4 December 1983), no period of entitlement arose and the claimant was excluded from SSP for the whole of her period of incapacity. There was no provision to defer the start of the period of entitlement to a later date when the stoppage of work due to a trade dispute at the place of employment ended. R(SSP) 1/86

ii The claimant, a pregnant veterinary assistant who was not incapable of work, was refused SSP after being recommended by her doctor to refrain from work pending the outcome of investigations into her immunity to toxoplasmosis, a disease usually transmitted by cats and posing a risk to the life of her unborn child. The Commissioner held that she was under medical care whilst awaiting the result of the tests and therefore deemed incapable of work under the terms of reg. 2(1)(a)(i) of the SSP (General) Regs. 1982. R(S) 4/93

3 Establishing the relevant period

i The claimant was employed as a teaching assistant and claimed SSP from 30 September 1985. She was normally paid each Thursday during term time and had received a holiday “retaining fee” in a lump sum at the start of the summer vacation on 11 July 1985. Benefit was refused because her average weekly earnings in the relevant period were below the lower earnings limit for SSP. The Commissioner held that the relevant period as defined in reg. 19(3) of the SSP (General) Regs. 1982 should be determined by reference to the claimant’s normal pay-days immediately before the critical day. The adjudicating authorities had no discretion to fix what it considered to be a suitable relevant period. Unless a claimant had an entitlement to holiday pay or a holiday “retaining fee” according to normal payment practice during term time, then a claimant has two different normal pay-days depending on whether it is term time or a period of school holiday. R(SSP) 1/89

Part 13: Incapacity for work from 13.4.95

1 Activities and descriptors - general

- R(IB) 2/99 i The decision concerned variable and intermittent conditions and considered whether the AWT must literally be satisfied on each day of a period of incapacity. It was decided that it was not necessary for the AWT literally to be satisfied in respect of each day of a period of incapacity. In those cases where relevant descriptors were expressed in terms that the claimant “cannot” rather than “sometimes cannot” perform an activity, one should not stray too far from an arithmetical approach that considered what the claimant’s abilities were most of the time during what was claimed to be a period of incapacity. The frequency of “bad” days, the length of periods of “bad” days and the intervening periods, the severity of the claimant’s disablement on both “good” and “bad” days and the unpredictability of “bad” days were all relevant when considering whether a claimant could be treated as satisfying the AWT on those days when it was literally satisfied but also other intervening days.

2 Activities and descriptors - physical

- R(IB) 1/98 i The decision concerned activity 7 (manual dexterity) and descriptor 7(b) (cannot use a pen or pencil). The claimant was right handed. He could not hold a pen or pencil in his right hand and could not write legibly with his left. The Commissioner held that “cannot use a pen or pencil” means cannot use for the purposes for which a pen or pencil are normally used. If a person cannot write reasonably clearly and at a reasonable speed the descriptor is satisfied. The words “with either hand” are implied within the descriptor. An ambidextrous person would not satisfy the descriptor if he had sufficient use of one hand.
- R(IB) 1/99 ii The decision concerns descriptor 2(e). The claimant moved one step at a time only when going down stairs. The Commissioner decided that the descriptor meant an inability to go up and down a flight of stairs without the necessity at some stage at least to restrict one’s movements to one step at a time.
- R(IB) 2/02 iii The decision concerns activity 6(b) and (c). The claimant could only pick up a piece of paper from the floor by squatting. It was held that a person would normally pick up a piece of paper from the floor by a combination of bending at the waist and bending at the knee. The descriptors therefore include bending at the knee so a person who only bends at the knee, or squats, does not satisfy the two descriptors.
- R(IB) 3/02 iv The decision concerns activity 6(b) and (c). No points were awarded for bending and kneeling because it was found that the claimant would be able to kneel, even if, at times, he could not bend. It was held that descriptors (b) and (c) of activity 6 are not satisfied by a claimant who can reach the floor and straighten up again by bending, or by kneeling, even if he cannot do both.
- R(IB) 2/03 v A claimant who has to rely on some part of the chair, for example, or the seat or the back, (but not the arms) to deliver the force necessary to rise or provide stability whilst rising is ‘holding on to something’. They would score points providing that they cannot rise from sitting without using their arms to provide power or stability and that the disability arises from a specific bodily disease or disablement.
- R(IB) 4/03 vi The claimant had suffered an amputation of the index and middle fingers of his right hand at their base and his right ring finger was held in a fixed flexion deformity.

Held that:

1. the effect of the amendment to activity 8 had been to preclude taking into consideration those activities which are often associated with lifting and carrying but which are separate components of one continuous manoeuvre e.g. walking, reaching and bending, walking up and down stairs and standing and rising from sitting. However the use of hands is an integral part of the activity of lifting and carrying and not a separate component of it.

vii The claimant indicated problems with lifting and carrying and standing. R(IB) 5/03

Held that:

1. from 6.1.97 the descriptors which refer to a claimant's ability to pick up and carry an object do not require him to be able to do more than move the object by means of his upper body and arms, and in particular do not require him to be able to walk with it.
2. placing both palms on the table while standing could have provided support for the claimant's back above and beyond the only support i.e. that of a walking stick contemplated in the definition of the activity of standing.

viii The wording of para. 14 – Remaining conscious was amended at the same time as that of SS (Incapacity for Work) (General) Regs. 1995. In *Howker v. Secretary of State for Work and Pensions* the Court decided that the amendment to reg. 27(b) was invalidly made. The Commissioner held that whilst the actual decision in *Howker* was limited to reg. 27(b) the reasoning on which the decision was based could be applied to other amendments. The effect of the amendment to para. 14 was adverse to claimants in its potential effect and not neutral as it had been described to the Social Security Advisory Committee. The amendment was of no force or effect and the claimant's incapacity for work was to be determined using the original wording of para 14. He held that other amendments made at the same time were not at issue in this case. It was for Tribunals to apply the reasoning on which the *Howker* decision was based to decide whether they were in fact neutral in their potential effect, if that is how they had been described to the Social Security Advisory Committee. R(IB) 3/04

ix The claimant has Crohn's Disease. He had an operation (Ileostomy) to create an opening from his intestines through his abdomen to divert the flow of faecal waste into an externally fitted bag. It was held by the Tribunal of Commissioners that– R(IB) 4/04

1. Ileostomy and colostomy bags and incontinence pads do not affect a person's capacity to perform activity 13 – continence;
2. a person wearing an ileostomy or colostomy bag falls within descriptor 13(a);
3. CIB/14210/1996 was wrongly decided.

x The test is how long the person can stand before either needing to, or having to, sit down or move about usually because of pain. The quasi-involuntary movements that most people make in standing for prolonged periods do not count as moving around for the purposes of the assessment. R(IB) 6/04

xi The issue was whether the amendment to activity 14 of the Sch. to the Social Security (Incapacity for Work) (General) Regs. was validly made. The Tribunal of Commissioners set out the test to be applied and held that, applying that test, it was validly made. It also provided definitions of "episode of ... altered consciousness", "seizures" and "similar seizures". It also held that a Commissioner who has held a tribunal to have erred in law need refer the case to another tribunal only if they themselves are not able properly to deal with any outstanding factual issues. R(IB) 2/07

3 Activities and descriptors - mental

4 Scoring the All Work Test

i The claimant was awarded nine points under the AWT for the "occasional" loss of control of his bowels. He appealed and the tribunal awarded a further seven points for mental disabilities so that he satisfied the AWT. The AO appealed to the Commissioner on the ground that the tribunal had erred in considering mental disabilities without medical evidence. The Commissioner held that although a SSAT had to investigate all relevant matters it should be hesitant in going into the question of possible mental R(IB) 2/98

disabilities unless they have been raised before and there is some medical or similar evidence on the point. Tribunals should be careful not to elevate to “mental disabilities” mere disinclination to do things. The matters specified in Part II of the Sch. under the heading ‘Mental Disabilities’ can qualify for ‘points’ only if they result from ‘mental disablement’. They must not be mere matters of mood but must relate to a mental disablement in the nature of an illness not shared by healthy members of the population.

- R(IB) 3/98 ii The claimant scored points under activity 12 (vision). Points were awarded under activity 2 (walking up and down stairs) as the claimant could not walk up and down stairs without holding on because of defective vision. The Commissioner said that points could be scored under each activity because the AWT is a test of the extent of a person’s incapacity to perform the prescribed activities. There was nothing in the reg. to prevent duplicate scoring for the same incapacity except for activities 1 (walking) and 2 (walking up and down stairs) which specifically prevent duplicate scoring (reg. 26(2)).

5 Self-assessment questionnaire

- R(IB) 1/00 i The first self-assessment questionnaire was issued to the claimant on 17 October 1996 (day 1), the second questionnaire was issued on 14 November (day 29). On 29 November 1996 (day 44) the AO, and, on appeal, a tribunal, decided the claimant was no longer entitled to IB as pursuant to reg. 7(1) of the SS (Incapacity for Work) (General) Regs. 1995. “At least” six weeks had elapsed since the first request “at least” four weeks had elapsed between the issue of the first and second requests, and a further two weeks had elapsed after the second request. The Commissioner held that for the purpose of reg. 7(b) four clear weeks must elapse between the date of issue of the first request, and the date of issue of the second request. The dates of issuing the requests are to be excluded in determining the period so that it begins after the day of issuing the first request and ends the day before issuing the second request. The burden is on the AO to show the conditions on which reg. 7 depended were satisfied, and computer records might record the day a letter was generated rather than issued. The tribunal failed to determine on the balance of probabilities, on the basis of evidence, the day on which the request was posted.

6 Failure to attend medical examination

- R(IB) 1/01 i The claimant was called for a medical examination but telephoned the BA Medical Services asking for a postponement as he had the opportunity of treatment abroad. He was told it would be cancelled. The AO decided the claimant had failed to attend the examination without good cause and the tribunal dismissed the appeal. The Commissioner decided that the claimant did not fail to attend and was therefore not to be treated as capable of work on that ground.

Held that:

1. someone answering a telephone has no authority to decide whether the claimant has good grounds for postponing the examination; the case should be referred to an AO;
 2. the period to which a decision under reg. 8(2) of the SS (Incapacity for Work) (General) Regs. 1995 relates ends immediately before the date from which a new claim or application is effective. The decision may prevent, for 26 weeks, the claimant from being treated under reg. 28(1) as incapable of work pending an AWT assessment, but if then found incapable of work, benefit can be backdated to the start of the period.
- R(IB) 2/01 ii The AO decided the claimant was capable of work because she failed to attend or submit to a medical examination. The AO claimed two appointments had been arranged and rejected the claimant’s explanations that she had not received notice of these. The Commissioner held that the tribunal’s summary of grounds did not adequately explain why it had rejected the claimant’s case that she had not received notice of the examinations. The burden of proving the notices had been sent lay on the AO. A notice is not sent “to” a person if it is sent to the wrong address. As the claimant had asked

where the notices had been sent, it was incumbent on the AO to prove they had been sent to the correct address.

7 Personal capability assessment - general

i The claimant was issued with an incapacity for work questionnaire and was also asked to obtain a form Med 4 from his GP. He returned the questionnaire, but the form Med 4 was not produced. Following examination by a medical officer, the AO decided that the claimant did not satisfy the AWT and benefit was disallowed. The claimant appealed. The tribunal allowed the appeal on the grounds that, in the absence of a Med 4, the AO's decision had been taken on insufficient evidence (having regard to reg. 6(1) of the SS (Medical Evidence) Regs. 1976). The AO appealed to the Commissioner. The Commissioner held that the wording of reg. 2(1)(c) of the SS (Medical Evidence) Regs. 1976 empowered the Secretary of State to request a form Med 4, however it did not oblige him to do so. Where that discretion was exercised, that request for form Med 4 was not irrevocable; and if no Med 4 were produced, then a decision to proceed without it could be taken. Form Med 4 is not therefore necessary before an applicant can be assessed to see whether they satisfy the AWT. R(IB) 5/98

ii The claimant challenged the validity of an electronically-prepared IB85 as evidence as it was not signed. The Commissioner held that: R(IB) 7/05

1. there was no statutory requirement for an IB85 to be signed and the electronic IB85 did not purport to contain an electronic signature;
2. in proceedings to which the strict rules of evidence apply, s. 7 (of the Electronic Communications Act 2000) allows an electronic signature to be authenticated by means of a certificate in the prescribed form; however it does not lay down a procedure which is to be used in every case where the authenticity of an electronic document or of electronic data is in dispute;
3. however, even assuming that the electronic form IB85 did contain an electronic signature, s. 7 has no application to tribunals constituted under the Social Security Act 1998, since the strict rules of evidence do not apply to proceedings before those tribunals.

8 Personal capability assessment - exemptions

i The claimant suffered from bi-polar disorder and was stable on medication. It was decided that she was neither exempt from the personal capability assessment by virtue of suffering from a severe mental illness (reg. 10(2)(e)(viii) of the Social Security (Incapacity for Work) (General) Regulations 1995) or could be treated as incapable (reg. 27 of the Social Security (Incapacity for Work) (General) Regulations 1995). Having failed to score sufficient points under the assessment, the claimant was found capable of work. Regarding the application of reg. 10(2)(e)(viii), the Commissioner held that R(IB) 1/08

1. citing CIB/16182/96 and R 2/00 (IB), when considering the effects of a medical condition, account must be taken of both the beneficial and adverse effects of medication or other treatment that it is reasonable for a claimant to accept;
2. citing CSIB/169/05, the amendments to the current form of reg. 10(2)(e)(viii), which came into effect on 6 January 1997, were found to be valid;
3. regarding the application of reg. 27 and 'substantial risk', account should be taken of whether stabilisation is likely to be affected if the claimant were to undertake the stresses of the type of work they might be required to look for when claiming jobseeker's allowance.

9 Personal capability assessment - treated as incapable

R(IB) 1/05 i The claimant stopped sending in medical evidence and so was no longer treated as incapable for work until the personal capability assessment (PCA) was carried out. It was held:

1. the outcome of the PCA can relate back to any undetermined days;
2. ceasing to satisfy a condition for the application of regulation 28 does not justify the removal of entitlement.
3. the relevant change of circumstances is the carrying out of the PCA which determined that the claimant was not incapable of work;
4. supersession for that relevant change of circumstances could not take effect from a date before the date of the decision. Carrying out of the PCA is an 'incapacity determination' but the conditions for making the decision effective from the date of change were not met.

10 Personal capability assessment - exceptional circumstances

R(IB) 2/09 i This decision concerns the correct interpretation of reg. 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995. The Court, endorsing CIB/360/2007, held that; the first consideration is whether the claimant suffers from some specific disease or bodily or mental disablement. The second consideration is whether, by reason of such disease or disablement there would be substantial risk to the mental or physical health of any person, if the claimant were found capable of work. In assessing substantial risk it was held that; this must be done in the context of the journey to and from work and the workplace itself. In identifying the type of work a claimant might be capable of will depend on their background, experience and health condition. However, there need be no greater identification of the type of work other than that which is dictated by the need to assess risk arising from the work or workplace.

11 Deemed Incapacity

R(IB) 8/04 i The person made a claim from a date that was within six months of a previous adverse determination. The claim was refused on the ground that the first five days of the period of claim were within six months of an earlier determination finding them capable of work. Therefore they could not be treated as incapable of work pending the PCA being carried out. It was held that:

1. the question of whether a person is incapable of work falls to be determined in respect of each day of claimed incapacity within the period of claim. The six-month period in reg. 28(2)(b) must be run back from each such day in the period covered by the relevant claim;
2. the date to be run back to is that of a still valid determination of the Secretary of State on the claimant's capacity for work at some earlier time, not a tribunal decision confirming it on appeal;
3. while days which fall within six months of such a determination cannot be **treated as** days of incapacity – unless a fresh disease or disablement or significant worsening of an existing one is shown – such days may nevertheless **be** days of incapacity and this question must be addressed by carrying out the PCA.

Part 14: Working and incapacity for work

1 Councillor's allowance

i The claimant an LA councillor, was paid by his council both a basic and a responsibility allowance. The allowances were paid net of income tax and NI contributions. The tribunal accepted the claimant's arguments that in calculating the net amount of the allowance for the purpose of the reduction in benefit provided for by S. 30E of the SS Contributions and Benefits Act 1992, the claimant was entitled to deduct the income tax and NI contributions paid by him as an expense and to average heating and lighting costs. The Secretary of State appealed on the ground that the liability to pay income tax and NI contributions was not an expense within the meaning of S. 30E(3). The averaging of heating and lighting expenses was not disputed. R(IB) 3/01

Held, allowing the appeal, that:

1. neither income tax nor NI contributions were expenses in connection with the claimant's membership of the council and so could not be deducted in calculating the net amount of the allowances. Liability to income tax depended on an individual's overall income from all sources and did not arise only because the individual claimed IB. Whether or not there was any unfairness in the claimant having to pay contributions at the same time as receiving a contributory benefit, rather than receiving credits, was a matter for Parliament rather than a matter that arose in applying S. 30E (paras. 9 -19);
2. S. 30E(3) did not require that expenses be defrayed before they were allowed nor that the amount to be defrayed be identified. Consequently the allowance of expenses based on agreed averages and estimates was not wrong in law. CS/7934/1995 was not followed (paras. 20-25).

2 Domestic tasks

i The claimant took foreign students into her home. She provided bed and breakfast, evening meal and changed bed linen. R(IB) 1/03

It was *held* that:

1. these services for money were not 'domestic tasks';
2. it was the nature, context and purpose of the work which was material not the amount of work provided;
3. the references to 'care' and 'domestic tasks' in reg. 16 were distinct from each other and should be construed separately.

3 Earnings

i The provisions in the SS Benefit (Computation of Earnings) Regs. 1996 apply to calculations for the purpose of determining entitlement to benefit on the basis of incapacity for work. R(IB) 1/06

ii The claimant provided board and lodging accommodation in her own home. It was not in dispute that the income received from the boarders was earnings derived from self-employment. The Commissioner considered how these earnings should be calculated under regs. 12 and 13 of the SS Benefit (Computation of earnings) Regs. Firstly, reg. 12(2) provides that earnings do not include the disregards in paras. 1, 2, and 3 of Sch. 1. Secondly, in arriving at the net profit to be taken into account actual expenses incurred must be deducted in accordance with reg. 13(4). Finally, reg. 13(2) provides that in calculating net profit there shall be deducted or disregarded any sum specified in Sch. 1. The calculation therefore was: total receipts, less the disregard in R(IB) 3/07

2.14.4

para. 3 of Sch. 1, less actual expenses incurred, less the disregard in para. 3 of Sch. 1 again.

4 Treated as capable

R(IB) 1/07

i The claimant worked two days a week during term-time. He claimed and was refused benefit for the five days a week when he did no work. He also claimed and was entitled to benefit during college vacations. He argued that he could make separate claims for each period of five consecutive days and as each were linked periods of incapacity he was entitled to benefit in respect of all of them. He also argued that reg. 16(3) of the SS (Incapacity for Work) (General) Regs. applied to him so that he was to be treated as capable of work only on the days he worked. It was held that the claimant's work was not exempt work by virtue of his earnings and he was to be treated as capable of work on each day of any week in which he worked. His pattern of work was such that each period of incapacity for work was linked. Reg. 16(3) only applies in the first or last weeks of any period of incapacity for work. As none of the intermediate weeks were either the first or last such week, reg. 16(3) did not apply.

Part 15: Incapacity Benefit and effect of Occupational Pension

1 Reduction of Incapacity Benefit for Occupational Pension Payments

R(IB) 1/04

i Fifty percent of the claimant's occupational pension was paid directly to his former wife under a court order made under S. 25B of the Matrimonial Causes Act 1973. The DM decided that the full amount was "payable to" the claimant. If the sums earmarked as payment to his former wife had not been treated as payable to the claimant, no reduction in incapacity benefit would have applied. The claimant appealed and the appeal tribunal dismissed the appeal. The Commissioner substituted his own decision holding that the amount of IB was not reduced by reason of the claimant's occupational pension. This was because the sums paid to the claimant's former wife were not "payable to" him within the ordinary meaning of those words.

R(IB) 3/05

ii In calculating the reduction of occupational pension in the claimant's case, the DM used the gross weekly amount of pension. The claimant's appeal to a tribunal failed. On appeal to the Commissioner, he argued that the amount of pension net of tax should have been used in calculating the reduction. The Secretary of State argued that on the literal construction of S. 30DD the reference to "pension payable" was to the gross amount. Appeal dismissed and held that the most reliable guide to the meaning of S. 30DD was R(U) 8/83, of which Parliament must be taken to have been aware when it enacted S. 30DD. Although that case dealt with different wording, referring to pension payments which "are made", that difference of wording could not affect the amount of money that is in issue. Therefore, following R(O) 8/83, the DM was correct in using the gross amount of pension in calculating the abatement of the claimant's IB.

Part I: The decisions listed below are not included in chapter 2

A Decisions which relate to questions of fact and/or to special circumstances

CS 44/48	Free in-patient treatment prior to 5th July 1948
CS 33/49	Obsolete Health Insurance certificates accepted as claim for sickness benefit
CS 152/49	On the facts a man was incapable of work
CS 420/49	Effect of receipt of workmen's compensation on entitlement to sickness benefit
CS 658/49	Late age entrant
CS 4/50	Over pensionable age on 5th July 1948
CS 52/50	Calculation of 'household fund'
CS 78/50	Value of a meal
CS 288/50	Deemed to be incapable of self-support
CS 344/50	Unable to obtain financial assistance
CS 490/50	Value of school meal
CS 499/50	Incapable of work
CWS 14/50	Notice of incapacity
R(S) 12/51	Calculation of wife's expenses
R(S) 24/51	Continued payment of workmen's compensation
R(S) 12/53	Definition of 'tuberculosis patient' in 1949 Regulations
R(S) 5/54	Sickness benefit not payable after pensionable age
R(S) 12/55	Calculation of income from taking in lodgers
R(S) 7/58	Calculation of 'household fund'
R(S) 13/59	Sickness benefit not payable after pensionable age

B Decisions relating to overlapping benefit CSS 27/50

C Decisions under Reciprocal Agreements

CS 118/49	} Agreement with Eire	R(S) 19/54	Agreement with France
R(S) 1/52		R(S) 3/58	Agreement with Italy
R(S) 7/54			

D Decisions relating to an increase of sickness benefit for adult or child dependants

CS 2/48	CS 41/49	CS 185/50	R(S) 26/52	R(S) 8/58
CS 3/48	CS 55/49	CS 243/50	R(S) 6/53	R(S) 1/59
CS 4/48	CS 58/49	CS 509/50	R(S) 17/54	R(S) 4/59
CS 6/48	CS 70/49	CS 541/50	R(S) 20/54	R(S) 8/60
CS 7/48	CS 133/49	CWS 36/50	R(S) 2/55	R(S) 1/61
CS 11/48	CS 262/49	R(S) 1/51	R(S) 10/55	R(S) 3/61
CS 25/48	CS 343/49	R(S) 3/51	R(S) 11/55	R(S) 9/61
CS 30/48	CS 547/49	R(S) 18/51	R(S) 14/55	R(S) 1/62
CS 33/48	CS 638/49	R(S) 23/51	R(S) 2/56	R(S) 2/64
CS 43/48	CS 726/49	R(S) 6/52	R(S) 8/56	R(S) 2/68
CS 7/49	CS 788/49	R(S) 17/52	R(S) 11/56	R(S) 3/70
CS 11/49	CS 801/49	R(S) 22/52	R(S) 7/58	R(S) 3/74

E Decisions relating to claims and good cause for delayed claims

CS 35/48	CS 100/49	CS 596/49	CS 524/50	R(S) 18/52
CWS 3/48	CS 156/49	CS 613/49	CS 537/50	R(S) 19/52
CS 34/49	CS 286/49	CS 42/50	CWS 36/50	R(S) 25/52
CS 51/49	CS 371/49	CS 50/50	R(S) 2/51	R(S) 36/52
CS 80/49	CS 537/49	CS 270/50	R(S) 4/51	R(S) 3/53

2 Annex

CS 99/49	CS 554/49	CS 453/50	R(S) 4/52	R(S) 9/54
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E *Decisions relating to claims and good cause for delayed claims (contd)*

R(S) 12/54	R(S) 3/56	R(S) 11/59	R(S) 7/61	R(S) 5/63
R(S) 14/54	R(S) 5/56	R(S) 2/60	R(S) 2/63	R(S) 1/68
R(S) 21/54	R(S) 10/59	R(S) 6/60	R(S) 3/63	R(S) 1/73

F *Decisions relating to adjudication*

CS 817/49	R(S) 7/51	R(S) 12/52	R(S) 14/53	R(S) 3/59
CSS 87/49	R(S) 19/51	R(S) 13/52	R(S) 1/55	R(S) 3/64
CWS 13/50	R(S) 20/51	R(S) 15/52	R(S) 7/56	R(S) 2/70
R(S) 6/51	R(S) 25/51	R(S) 16/52	R(S) 2/58	R(S) 1/88

Part II: Decisions omitted from a part of this chapter for reasons indicated against the group headings shown below

(the Part, or as the case maybe, the Part concerned and the relevant section of that Part, being shown in brackets against the reference no. of the decision).

Group 1 *Decisions omitted because the points of principle involved are covered by other decisions in the same Part of the Chapter*

CI 8/49 (10.1.2)	Injury benefit, definition of 'incapable of work' - see R(S) 11/51 (T)
R(S) 9/55 (Pt. 6.1)	Disqualification for sickness benefit, absence from GB - see R(S) 1/85
R(I) 13/55 (10.1.2)	Injury benefit, doctor's certificate not conclusive evidence of incapacity - see R(S) 4/60
R(S) 5/59	Disqualification for sickness benefit, absence from GB - see R(S) 1/85
R(S) 9/59 (Pt. 6.1)	
R(S) 14/81 (Pt. 2.1 and 10)	Test of incapacity for work: claimant's incapacity for work, not his ability to obtain it - see R(S) 2/82 (T)
R(S) 10/83 (Pt. 6.1)	Disqualification for sickness benefit, absence from GB - see R(S) 1/85
R 1/85 NCIP (2.10.5)	Claim for NCIP after attaining pensionable age - see R 2/85 NCIP

Group 2 *Decisions omitted because the law to which they relate has since been materially changed*

CI 8/49 (10.1.2)	Injury benefit
R(I) 13/55 (10.1.2)	Injury benefit
R(IB) 3/03 (Pt. 13)	Vires of amendment to IFWGR reg. 27 effective from 6.1.97
R(S) 1/70 (Pt. 11)	Earnings related supplement
R(S) 4/78 (Pt. 10)	Non-contributory Invalidity Pension, ability to perform normal household duties to a 'substantial extent'
R(S) 5/78 (Pt. 10)	Non-contributory invalidity pension, 'normal household duties'
R(S) 7/78 (Pt. 10)	
R(S) 6/79 (Pt. 10)	Non-contributory Invalidity Pension, ability to perform normal household duties to a 'substantial extent'
R(S) 7/79 (Pt. 10)	
R(S) 9/79 (Pt. 10)	Non-contributory Invalidity Pension, 196 consecutive days of incapacity to perform normal household duties
R(S) 5/81 (Pt. 10)	Non-contributory Invalidity Pension, ability to perform normal household duties to a 'substantial extent'
R(S) 11/81 (Pt. 10)	

R(S) 5/94 (Pt. 11)

Graduated retirement benefit

Group 3 *The following decisions are no longer of authority regarding the proper interpretation of “absence ... for the specific purpose of being treated”. These decisions were rejected by a Tribunal of Commissioners in R(S) 1/90.*

R(S) 6/61

CS 1/71

R(S) 1/75

R(S) 1/77