

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Newcastle social security appeal tribunal (the tribunal) of 14 August 1997 is erroneous in point of law, and accordingly I set it aside. I remit the case for determination by a freshly constituted tribunal in the light of such guidance as I am able to give in this decision.
2. The claimant, who was born on 7 October 1960, was in receipt of invalidity benefit which became an award of incapacity benefit on the introduction of the new benefit on 13 April 1995. Under the conditions of entitlement for the new benefit, the all work test applied to the claimant and steps were taken to collect the necessary information to enable the adjudication officer to review entitlement to incapacity benefit in the light of the application of the all work test to the claimant's circumstances.
3. The claimant suffers from migraine. He completed an all work test questionnaire which was received in the Department on 15 October 1996. The claimant said that he suffered from severe migraines, which he experienced about four times a week. He reported that they made him feel sick and that he had to go into a dark room for five to six hours. He had seen a specialist and tried many different types of medication. He found some slight relief taking cocodamol. The only difficulties he reported under the various descriptors were for bending and kneeling, where he said that he crouched because bending brought on his headaches. He reported similar effects on lifting and carrying. He said his sight was not good but that he could read large print, though he went on 'cannot see from bedroom window to door downstairs.' He said he had difficulty with his hearing, being unable to hear well enough to follow a television programme with the volume turned up, and could not hear someone talking to him in a loud voice in a quiet room. He reported that he had had a fit or blackout in March 1993.
4. The claimant's GP was asked for a factual report, and on 11 November 1996 reported that the claimant suffered from migraine, which produced frequent 'incapacitating headaches' which were treated with cocodamol and another drug (the doctor's handwriting is unclear—it is probably pizotifen). He added that the claimant's condition was likely to continue as at present.
5. On 2 January 1997 the claimant had a brief examination (lasting from 11.07 to 11.20) with a Benefits Agency Medical Services (BAMS) doctor. This reported that the claimant had throbbing headaches accompanied by flashes of light, sometimes

- making him sick. He has four or five attacks a week requiring him to spend five or six hours in the dark on each occasion. He saw a specialist at the hospital about three years previously. His medication was cocodamol; he takes 12 daily.
6. The examination revealed no condition affecting the back or legs such as to limit bending, and gross examination of the central nervous system was normal. Similarly there was no condition of the arms or shoulders which limited lifting and carrying. The claimant is reported to have told the doctor that his vision was normal. His hearing was observed to be normal during the examination, and the doctor notes that his own voice is quiet and that the examination room has a moderate background noise. The doctor accepts that the claimant had a blackout or fit in March 1993, but queries the cause.
 7. On 5 February 1997 the adjudication officer issued a review decision the effect of which was that there was no entitlement to incapacity benefit from and including 5 February 1997, since the claimant was regarded as capable of work because he had failed to reach the required score on the all work test.
 8. The claimant appealed against the decision terminating his incapacity benefit on 20 February 1997.
 9. The appeal came before the tribunal on 14 August 1997. It appears that neither the claimant nor any presenting adjudication officer was present. After taking advice from the medical assessor, the tribunal found that the claimant was no longer incapable of work from and including 5 February 1997.
 10. The tribunal's findings of fact are as follows:

[The claimant] suffers from migraine. He has a serious attack of migraine approximately four times per week which incapacitates him but for most of the time is able to carry out the functional activities under the All Work Test without any problem.
 11. The relevant part of the tribunal's reasons are as follows:

The Tribunal accepted that [the claimant] does suffer from migraine and that when he has a serious attack it will incapacitate him. In particular it will likely affect his vision and restrict his mobility. The Tribunal noted that the examining doctor ... noted that [the claimant] does have a variety of medication and had in fact been referred for neurological assessment to Sunderland Hospital some 3 years ago. It seems therefore that this is quite a serious condition and the Tribunal accept that [the claimant] does have a number of attacks per week. He is reported as having told the examining doctor that the last attack was 10 days before the examination though maintains in his application form that he has approximately 4 attacks per week. Taking into account the medication that is prescribed the Tribunal consider that he does have 4 attacks per week.

The Tribunal then considered whether the effect of the migraine brings him within any of the scoring descriptors under the All Work Test. The evidence was clear that at the date of the medical examination [the claimant] could perform all activities without any difficulty. This presumably was on a day where he did not have an attack. Although the tribunal accept that when he does have a migraine attack he may not be able to walk and his vision is likely to be affected this in the Tribunal's view taken overall is not for a significant part of the week or day and the Tribunal conclude therefore that for most of the time he is able to carry out the scoring descriptors of the All Work Test.
 12. The claimant then sought advice from the Sunderland East Welfare Rights Service, and filed an appeal on the grounds that the tribunal had erred in law in not awarding any points under the descriptors dealing with lost or altered consciousness. The appeal comes before me by leave of the tribunal chairman. It is not supported by the adjudication officer.

13. Though I have considerable sympathy with the tribunal's handling of this case, I have come to the conclusion their decision contains an error of law because it does not address explicitly the issue of points arising under descriptor 14. This was particularly important since, if, as the claimant argues, he experiences an involuntary episode of lost or altered consciousness at least once a week, descriptor 14(b) carries 15 points. The award of 15 points would, of course, have resulted in the claimant being regarded as incapable of work and continuing to be entitled to incapacity benefit.
14. Since the tribunal has erred in law, I set aside their decision, and for the reasons set out below remit the case for hearing by a fresh tribunal.
15. Unfortunately, none of the submissions before me address in any detail the applicability of descriptor 14 to the claimant's circumstances. Having regard to the legislation and the authorities, the new tribunal should approach the issues raised in this case guided by the advice which follows. It will be most helpful if the claimant attends the new hearing (accompanied if possible by a representative) and if a presenting adjudication officer is also present to assist the tribunal.
16. Though the case is not exclusively concerned with descriptor 14, it may assist to start with consideration of that descriptor. It should be noted that the wording in Column 1 relating to descriptor 14 was amended with effect from 6 January 1997 in a way which may prove to be very significant in this case. The former wording was 'Remaining conscious other than for normal periods of sleep', whereas the revised wording is 'Remaining conscious without having epileptic or similar seizures during waking moments'. The wording of the relevant descriptors in Column 2 was not changed, but they do, in my view, take some of their meaning from the words in Column 1.
17. Defining 'altered consciousness' is far from easy. The guidance given to medical services doctors is as follows:

'Altered consciousness' implies that, although the person is not fully unconscious, there is a definite clouding of mental faculties resulting in loss of control of thoughts and actions. The causes most likely to be encountered are:

- temporal lobe epilepsy
- absence seizures (petit mal)
- metabolic disturbances: hypoglycaemia, hyperventilation.

For both lost and altered consciousness, establishing an exact diagnosis is less important than establishing whether or not any disability is present. The need is to consider the person's ability to continue an activity in safety. In this context, even a momentary disturbance of consciousness, as for instance in a petit mal attack, may be significant.

....

Giddiness, dizziness and vertigo do not amount to a state of 'altered consciousness'. These conditions are therefore not taken into account when assessing the factual area of remaining conscious. If they affect functional ability in other categories, they should be taken into account when considering the relevant categories.

Incapacity Benefit Handbook for Medical Services Doctors, pages 137-8

18. Such guidance is not binding on tribunals or the Commissioners (nor indeed adjudication officers), though it does provide an insight into the way in which the medical profession views 'altered consciousness'. It also explains why the BAMS doctor did not address the effects of the claimant's migraines under this descriptor.

19. The *Handbook* goes on to state:

Migraine, even when headache is preceded by an aura, does not result in altered consciousness.

An aura occurs in about 25% of sufferers (the remaining 75% have paroxysmal headaches without any preceding aura). The aura, when it occurs, is usually visual, experienced as flashing lights or other disturbances of vision: but there is no loss of consciousness.

The effect of migraine headaches on any other functional category should be assessed in the same way as the effect of any other pain, bearing in mind the frequency and severity of the attacks.

Incapacity Benefit Handbook for Medical Services Doctors, page 139

Again it should be stressed that this is guidance for doctors and not an authoritative interpretation of the law, which is a matter for adjudication officers, tribunals and the Commissioners. In particular, the tribunal is not in any sense bound by the statement that migraine does not result in altered consciousness, though they should take account of this medical view of the consequences of migraines alongside all the evidence before them.

20. The question of defining 'altered consciousness' arose in a case in which the earlier wording of descriptor 14 was in issue: *CSIB/14/1996* (*73/97). The Commissioner sought to avoid any definition of 'altered consciousness' and offered the following advice:

The discussion satisfied me that it is not possible to lay down guidelines as to what, in law, is meant by 'altered consciousness'. It is, I am equally satisfied, essentially a practical matter for a tribunal to determine in the light of medical guidance from their assessor and by the application of commonsense. But where, as here, episodes of pain are the disabling condition it will be necessary for the tribunal to explore, and for the claimant to present, appropriate evidence to allow such exploration, in some detail how the pain affects the individual during an episode. It is not, in my view, sufficient to find as a fact that during the period 'the appellant is disabled'. Nor that he 'is unable to conduct his normal daily activities'. It is for determination first how the pain forecloses these and the way in which and the extent to which it does so. Thus ... if an individual is so distracted by the pain that he requires to lie down and otherwise retire from what he is doing then it may be possible to conclude that his consciousness has become altered by the degree of pain and he is incapable of doing anything effective other than coping with it. But that would be a secondary finding which would require proper primary findings to justify it. Above all, I am persuaded that the concept of 'altered consciousness', which may have some medical significance, is impossible of legal definition and is a concept of difficulty for application by lay tribunals. For these reasons I do not think that it is appropriate that I should give any further guidance to the new tribunal in this case. (para. 9).

21. The above decision was made in the context of descriptor 14 as originally worded. The new wording requires a further issue to be considered. The descriptor is now concerned with lost or altered consciousness arising from 'epileptic or similar seizures during waking moments'. In the context of the claimant's circumstances, it is not just the effects of pain which will need to be considered but all the incidents of a migraine attack.

22. So, how does all this apply to cases such as the claimant's which involve difficulties flowing from severe migraine attacks? First, it will be for the tribunal to determine what weight can be given to the medical guidance quoted above which states that 'migraine ... does not result in altered consciousness.' The new tribunal must first make detailed findings of fact on how the claimant's migraine attacks affect him, and about what the claimant can and cannot do for the duration of those attacks; the duration of the attacks should also be clearly specified. Applying their

commonsense in the light of the advice they receive from the medical adviser and of their own findings of fact, they must decide whether the claimant experiences what can properly be described as 'altered consciousness' resulting from a 'seizure' similar to an epileptic seizure. I will simply observe that the new wording would, on the face of it, make it more difficult to bring the effects of a migraine attack within the term 'altered consciousness' since under the previous wording there was no reference in Column 1 to 'epileptic or similar seizures'. The nature of 'altered consciousness' has been narrowed by the revised wording. However, the new wording does not transfer the decision to doctors; it remains for tribunals to decide for themselves whether a person comes within the terms of any of these descriptors.

23. It follows that the new tribunal should have before it a full copy of *CSIB/14/1996* (*73/97), together with written submissions (if possible from both parties and delivered in advance of the hearing) addressing the issues raised in paragraphs 16-22 of this decision.
24. If the tribunal concludes that descriptor 14 (b) or (c) applies to the claimant's circumstances as at 5 February 1997, then the claimant will be treated as incapable of work and incapacity benefit would be re-instated. However, if they conclude that the application of descriptor 14 results in the award of fewer than 15 points, there is a further enquiry that will need to be made.
25. It is now accepted in the context of the application of the all work test that a person cannot do things which are accompanied by an unacceptable level of pain or discomfort, which is to be determined by the tribunal in the light of all the circumstances of each case. On this issue, the Commissioner gave the following guidance in joined cases *CIB/13161/1996 and CIB/13508/96* (*29/97),

... the possibility of pain and fatigue and the increasing difficulty of performing a given activity on a repeated basis must ... be taken into account by considering how far the claimant's normal capabilities are impaired by comparison with those of a healthy person in normal working order. The choice of descriptor should take into account whatever effects pain and fatigue may have on the claimant's ability to perform the task so far as they are beyond the normal by reason of his specific disability (para. 41).
26. So the new tribunal must consider the application of each of physical descriptors when the claimant is experiencing a migraine and decide which of them the claimant cannot do. This will inform them as to the capacity of the claimant to meet the functional tests in the physical descriptors during the times at which he experiences migraine attacks. If the score at such times is (when added to any score of less than 15 under descriptor 14) still less than 15, then the claimant would be regarded as capable of work. But if the score at such times is 15 or more, then a further enquiry must take place. If the new tribunal concludes, as the original tribunal had done, that the claimant suffered attacks on four days each week, then the tribunal will need to consider whether the claimant is to be regarded as achieving a score of 15 on a day to day basis.
27. The proper approach to the application of the all work test where intermittent or varying conditions are in issue has given rise to a number of Commissioner's decisions which do not all take the same view. *CIB/1316/1996* and *CIB/13508/1996* (*29/97) suggests that the all work test must be considered on a daily basis. This means that incapacity must be considered in relation to each day of claim. In my view this would be impracticable and insofar as the decisions can be read as requiring this, I have to disagree with them. I prefer and agree with the approach taken by the Deputy Commissioner in *CIB/15231/1996* (and I take comfort from the approval of this formulation in *CSIB/597/1997* (*50/98) and *CIB/5065/1997*) who said:

The claimant does not fail the [All Work Test] simply because he can perform the descriptors on a particular day nor does he pass it simply because he cannot perform the descriptors on that date. The test is to be applied on a daily basis but compliance with it is not dependent upon circumstances prevailing on a particular day. The assessment of compliance on a particular day should be based on the claimant's functional ability over such periods as the tribunal consider appropriate to enable [it] to get a true and fair picture of the claimant's capacity. The latter should be left to the judgment of the tribunal having sensible regard to circumstances; much will depend on the claimant's disability.

28. In summary, the new tribunal should consider the following issues in the light of their detailed findings of fact on the frequency of the attacks and the effect the claimant's migraine has on him:
- Can it be said that the claimant experiences episodes of altered consciousness arising from seizures similar to epileptic seizures?
 - If so, what is the frequency of those episodes?
 - If the claimant does not experience episodes of altered consciousness, what can he not do during a migraine attack having regard to the physical descriptors in the all work test?
 - If assessment of his capacity during those attacks results in a score of 15 or more points, can it properly be said in all the circumstances of the case and having regard to the frequency of those attacks that the claimant does or does not satisfy the all work test?
29. In focusing on issues arising from the claimant's migraine, the tribunal should take care not to overlook consideration of the claimant's statements that he has poor vision and hearing (though these matters look to be clearly resolved in the report of the BAMS doctor).
30. Since this appeal was made prior to 21 May 1998, the new tribunal should consider for itself whether, during the period from and including 5 February 1997 down to the date of the hearing (unless some claim, decision or circumstance operates to supersede the decision under appeal), the claimant satisfies the all work test: *CIB/14430/1996* (*66/97).
31. The new tribunal's task will not be an easy one, but the difficult issues raised by this appeal can be resolved by a meticulous attention to detail in making findings of fact.
32. I would wish to make clear to the claimant that this appeal has been allowed because the tribunal erred in law in its failure to consider the application of descriptor 14. As such, my decision cannot say anything about the merits of the claimant's case. That is a matter which will now be considered wholly afresh by the new tribunal.

(signed) Robin C A White
Deputy Commissioner

6 January 1999