

SOCIAL SECURITY ADMINISTRATION ACT 1992**APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW****DECISION OF SOCIAL SECURITY COMMISSIONER**

Name:

Social Security Appeal Tribunal: Glasgow

Case No: 581 95 08790

[ORAL HEARING]

1. This claimant's appeal succeeds. I hold the appeal tribunal decision dated 19 September 1995 to be erroneous in point of law and accordingly set it aside. I remit the case to the tribunal for determination afresh in light of the directions and guidance which follow.

2. In June 1995 an adjudication officer determined, for the purpose of the claimant's national insurance credits, that she was not to be treated as incapable of work from and including 8 June 1995. The claimant appealed. The tribunal adhered and refused the appeal. The claimant again appealed, with leave of a Commissioner.

3. The case came before me at a hearing at which the claimant was represented by Mr Chris Orr, a Welfare Rights Officer with what is now the City of Glasgow Council and the adjudication officer was represented by Mr William Neilson, of the Office of the Solicitor in Scotland to the Department of Social Security. I am grateful to both for their assistance.

4. I need not much rehearse the facts or the tribunal's findings and reasons. The principal matters argued before me concerned primarily the correct interpretation and application to cases such as the present of certain of the statutory tests in connection with the "all work test", the own occupation test having ceased to apply to this claimant - section 171A-C of the Social Security Contributions and Benefits Act 1992. Regulations made thereunder provide for the detailed application of the test, namely in Part III of the Social Security (Incapacity for Work) (General) Regulations 1995. Only physical disabilities were in question in this case. Regulation 25(1)(a) requires, to qualify as incapable of work under the all work test, 15 points in respect of descriptors specified in Part I of the Schedule to the Regulations. The tribunal awarded 13 points in respect of descriptors 2(c), 3(d) and 5(c). In short they found that the claimant could not walk up and down 12 stairs without holding on and taking a rest; that she could not sit comfortably for more than one hour and sometimes could not rise from sitting without holding on. These terms are taken from the Schedule attached to the tribunal decision. For the reasons which follow it will be necessary for the new tribunal to pay rather closer attention to the precise statutory wording of the

activities and of the descriptors before determining which, if any, the claimant satisfies. Only two activities were in question before me and I concentrate upon them. But I should note that any activity will be open for the new tribunal's consideration in view of the old tribunal's decision having been set aside.

5. Mr Orr challenged first the tribunal's decision in respect of activity 3. It concerns a person's ability for:-

"Sitting in an upright chair with a back, but no arms."

Mr Orr was more concerned with the descriptors themselves but Mr Neilson drew my attention to some of the evidence which, I think correctly, he doubted whether the tribunal had properly considered. Thus, in the clinical history recorded by the doctor appointed to examine the claimant for the purposes of this case it was said in document 33 of the bundle that she reads a lot or may look at television and that she goes to a local club to play bingo to pass an hour. He assessed the claimant as being unable to sit comfortably for more than one hour without having to move from the chair. Thereby he agreed with the claimant's assessment but the evidence, such as it is, did not indicate that consideration had been focused precisely upon "an upright chair with a back, but no arms". It might be expecting too much for the claimant, in completing Form IB50, to make a clear differentiation if one was required. I consider, however, that the examining doctor should make clear how he has reached his conclusion in respect of the prescribed chair. Thus the chair in which somebody may be comfortable to read or watch television, or even to sit and play bingo for an hour, may be very different from that prescribed. In this case, at document 34, the examining doctor notes that the claimant had sat, during the assessment, without any distress for more than 30 minutes. But again he did not mention upon what she was sitting and of course the nature of the chair may much affect an individual's comfort. So far as the tribunal was concerned the evidence given by the claimant was that she did not have a special chair but a low one supported by pillows. In justifying their finding that the claimant satisfied only descriptor 3(d) the tribunal made this finding of fact:-

"4. She experiences some discomfort in sitting in a chair for prolonged periods. She cannot sit comfortably for more than an hour without having to move from the chair."

The tribunal reasoned, having noted that they had had regard to the adjudication officer's guide which had stated that "the duration of sitting is related to having to move from the chair." that this:-

"...is therefore something more than moving around whilst remaining seated in order to get comfortable, or deciding to get up to stretch one's legs. It is a discomfort sufficient to mean that some activity being done, whilst seated, has to be stopped, or postponed, because of the discomfort which makes it impossible to continue sitting. The tribunal consider that the statement "cannot sit comfortably" must be read in the context of the descriptors or coming under this activity. Since the next descriptor, 3(b), states "cannot sit comfortably for more than 10 minutes without having to move from the chair", we cannot accept that the statement "cannot sit comfortably" refers simply to the presence of some discomfort from sitting. It must refer to a condition

where the claimant is unable to take up the seated position without experiencing extreme discomfort or is simply unable to take up a seated position. We accept that this a matter of degree but we prefer the opinion of the Benefits Agency Medical Services doctor who examined [the claimant] and also rely in part, on [her] own evidence to the effect that she is able to sit for reasonably long periods. Although [she] described the chair which she uses within her own home, where she gets some support from additional pillows, she does not require to use an orthopaedic chair and she appeared to sit during the tribunal hearing which lasted in excess of half an hour without indicating any discomfort."

In the first place that reasoning does not record any consideration of the designated type of chair nor does it show how, from the evidence about the amount of sitting the claimant could do in the chairs that she described, an appropriate deduction could be or was made or, for example, that the tribunal chair was of the prescribed kind. That failure was an error in law.

6. Mr Orr's criticism of the tribunal decision, however, concerned rather what they had said about "sitting comfortably". He contended that that concept in the initial descriptor concerned only an ability to sit comfortably - at all. Obviously an inability to sit down would satisfy that but the real emphasis of that descriptor is upon somebody who has sat upon the prescribed chair but then finds that he cannot do so "comfortably". Mr Orr went on to submit that the same concept had to be taken as at the root of the following descriptors in each of which there was included a time qualification. Unlike the walking descriptors there was no definition or qualification of "discomfort" as by "severe". There was therefore nothing to justify reading in to descriptors that the discomfort had to be of such a degree as to require movement from the chair. There was simply a set of descriptors which laid down increasing time periods before an individual felt that he had to move from the chair - but not on account of such a degree of discomfort as to so require. The tribunal had applied too severe a test and seemed to have been looking to discover the point of time at which the claimant had had to leave her chair because her discomfort had become uncomfortable. The test did not itself so state.

The text of the subsequent descriptors reads, typically, for 3(b):-

"..sit comfortably for more than 10 minutes without having to move from the chair."

Mr Orr contended that comfort involved a positive state and was not just a lack of discomfort. I doubt that. "Discomfort" connotes only the state of being uncomfortable and the prefix "un-" is simply a negative. Accordingly, in sitting, a person who is not actually or positively comfortable falls to be described as uncomfortable or in discomfort - to however minor a degree. I doubt whether a possible semantic position of neutrality in this test is relevant to or practicable in such an exercise as the "all work" test. What the descriptors, other than the first, require for satisfaction, in my judgment is first whether the individual is suffering discomfort from sitting which, after a time becomes so uncomfortable that the chair has to be left. Whether or not an activity can be carried on, as the tribunal sought to consider, is strictly irrelevant. That they did so is a further error in law. The time concerned then simply determines which of descriptors 3(b) to (c) is satisfied in the particular case.

7. The other activity canvassed before me was number 6:-

“Bending and kneeling.”

The descriptors are:-

- “(a) Cannot bend to touch his knees and straighten up again.
- (b) Cannot bend or kneel as if to pick up a piece of paper from the floor and straighten up again.
- (c) Sometimes cannot bend or kneel as if to pick up a piece of paper from the floor and straighten up again.
- (d) No problem with bending or kneeling.”

The evidence before the tribunal consisted, from the claimant's completed Form, document 19, that she could bend but had difficulty. If there was something heavy to lift she could feel the strain on her hip. She did not assign any particular descriptor. The examining doctor did not agree with her “choice of descriptor” and found that she had no problem with bending and kneeling. He referred again to the problem only being in relation to picking up heavy objects. He noted that she had been able to bend to take off her shoes without any distress. His clinical examination showed that she was able to touch both knees bending forward. That seemed to be the end of descriptor 6(a). But before the tribunal the claimant said that she had been advised at physiotherapy to bend her knees and crouch to pick things up rather than bend over. She added that she would need to have something to hold on to. She said that sometimes she got pain when she tried to bend forward and earlier said that she had been advised not to lift anything heavy. In her written grounds of appeal to the tribunal the claimant had said that she had been told that it would be a hip replacement in 10 years time if she did not abide by the physiotherapy advice not to bend or lift things up because her hip had seized up with wear and tear. The tribunal found:-

“9. There is no significant limitation in respect of bending or kneeling.”

That means that they were rejecting or at least doubting the claimant's evidence I find no explanation of the matter in the reasons and so to that extent I accept Mr Orr's criticism. His case was really on 6(c) namely that the claimant sometimes could not bend or kneel for the purpose given *and then straighten up again*. I note that the tribunal do not appear to have made anything about the latter part of the test and seem to have simply proceeded upon simple “bending or kneeling”. Mr Neilson and Mr Orr were really at one, as I understood it, that the tribunal decision was flawed by their failure to consider the evidence about the advised limits on the claimant's bending and the extent to which she could kneel in order to pick up objects without also bending her back and further whether she could straighten up again without holding on to something from time to time as her evidence had rather indicated. I conclude that the tribunal have not fully considered the issues before them on this activity. That is a further error in law.

8. The new tribunal will require to consider first whether they take the view that the claimant can bend to pick up the material piece of paper from the floor, given the medical

advice that she has been given. Mr Neilson started by contending that that medical advice fell to be ignored but that it is a submission which I do not think that I can accept. I would rather accept his alternative approach which meant that any risk consequent upon bending has to be borne in mind and if it be a real risk which would deter a reasonable person from bending then it may be legitimate to say that they are unable to bend for the purpose of the descriptor. That I think it is a legitimate approach bearing in mind that the whole object of the descriptors is to try to present a picture of the extent to which an individual can perform various activities with a view to determining whether he can work. I doubt if an activity which could only be undertaken with some risk to the individual's health was intended to be discounted for that purpose.

9. Next, the new tribunal will require to consider the extent to which the claimant can straighten up again, especially given what the old tribunal held about her being unable to stand, sometimes, from a chair without holding onto something. Mr Neilson submitted that as an aid was not mentioned in activity 6 if somebody could only straighten up again with assistance that was not in the terms of the descriptor a simple "straightening up". However, I note that under activity 4 standing is described as being without the support of another person or the use of an aid except a walking stick. Equally activity 1 is walking on level ground with a walking stick or other aid if normally used. Activity 5 refers to "without the help of another person" and in the descriptors there is then specific references to "without holding onto something". In the case of the activities I suspect that the mention of assistance is only to define the scope of the activity; if assistance is required descriptor (a) will be satisfied.

9. Mr Orr also contended that the tribunal had been too reliant upon the adjudication officer's guide or had accorded it too much authority. I do not so read their decision. He also made a submission that the adjudication officer had proceeded under regulation 17 to review an award. It is not clear to me from the submission to the tribunal that any review was actually involved in this case. But if it was then the power to review is contained in section 25 of the Social Security Administration Act 1992 and regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987, is simply the trigger or gateway to the legitimate operation of said section 25. I do not find that regulation referred to by the adjudication officer originally concerned and the law in the matter is now to be found in the appendix to CSIS/137/94, a Tribunal decision. Finally Mr Orr raised the possible application to this case of R v Secretary of State for Social Security ex parte Moule, a decision by the Divisional Court on 12 July 1996. That case was concerned with the interpretation and legitimacy of regulation 27 of the Incapacity for Work, (General), Regulations. I do not myself at this stage see that it is liable to play any part in the present case and so I refrain from any comment - particularly as I have not had a copy of the Court's full reasoning put before me. If it is thought to be likely to be of relevance then I direct that the adjudication officer make a submission upon the matter for the benefit of the new tribunal.

11. The appeal succeeds and the case is remitted accordingly.

(signed)
W M WALKER QC
Commissioner
Date: 27 January 1997