

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCAPACITY BENEFIT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 31 October 2000

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, with the leave of Mrs Commissioner Brown, against the decision of the Appeal Tribunal sitting at Belfast ("the Appeal Tribunal") given on 31st October 2000. For the reasons which we give, that decision is erroneous in point of law. We therefore set it aside and refer the case to a differently constituted Tribunal ("the New Tribunal") for rehearing in accordance with the guidance given below.
2. In exercise of the powers conferred on him by Article 16(7) of the Social Security (Northern Ireland) Order 1998 the Chief Commissioner directed this appeal should be dealt with by a Tribunal of Commissioners. The appeal was the subject of a hearing which took place before us in Belfast on 10th October 2001. The claimant was not present but she was represented by Mr John Campfield of the Coleraine Citizens Advice Bureau. Her husband was present. The Department was represented by Mr Colin Fletcher of the Decision Making and Appeals Unit. We are grateful to Mr Campfield and Mr Fletcher both for the assistance which they gave us during the hearing and for their carefully constructed written submissions.
3. This appeal arises out of the following decision of a decision maker which was given on 17th July 2000: -

"This decision is given in respect of [*the claimant's*] claim for Incapacity Benefit. The test of incapacity of work for [*the claimant*] from and including 18/5/99 is the personal capability assessment. The own occupation test is not applicable from that date.

This is because she has not been or would not normally have been engaged in one occupation (for payment or in expectation of payment) for 16 hours or more a week for more than 8 weeks in the 21 weeks preceding 18/5/99.

She cannot be treated as incapable of work from and including 17/7/00 because none of the exempt conditions apply.

She does not satisfy the personal capability assessment from and including 17/7/00 because she has not reached [*the requisite number of points*].

The total points were 10, which were calculated as follows [*there then followed a table setting out her scores*]

I have considered all the available evidence and have concluded that [the claimant] has no significant limitations in the remaining functional and mental health areas of the personal capability assessment.

Therefore she is capable of work and cannot be treated as incapable of work because there are no exceptional circumstances.

I have superseded the decision of the Adjudication Officer dated 1/6/99 awarding Incapacity Benefit from and including 21/5/99.

This is because the Department have made a determination that [*the claimant*] is no longer incapable of work from the medical evidence received following an examination in accordance with regulation 8 of the Incapacity for Work Regulations.

My decision only for the period from and including 17/7/00 is that [*the claimant*] is capable of work and is not entitled to Incapacity Benefit from and including 17/7/00."

As already indicated, the claimant appealed that decision but her appeal was unsuccessful. The Decision Notice records that the unanimous decision of the Appeal Tribunal was:

"Appeal disallowed. There are grounds to supersede the decision awarding Incapacity Benefit being relevant change of circumstances as the claimant scores only 10 points on the personal capability assessment and she is therefore not entitled to Incapacity Benefit from and including 17.7.00."

4. It is appropriate to set out the relevant facts before turning to the findings and reasoning of the Appeal Tribunal. The claimant is a married woman [now aged 43]. It is not in issue that she suffers from serious problems with her feet. According to the Examining Medical Practitioner the claimant said that these were due to spina bifida occulta. In the form Med 4, which he signed on 6th December 1999, the claimant's own general practitioner said that the claimant suffered from "congenital foot deformities, with previous surgery, most recently 1985. Increasing pain in feet, again mainly over past 1 - 1 1/2 years". In addition, her general practitioner said that she was suffering from anxiety and depression and that she had been on a daily dose of 30 mgs of seroxat since September 1998. The claimant said that her anxiety and depression were made worse by the relatively recent failure of her husband's business.

5. It was not disputed that the claimant suffers from problems with her feet and it was accepted that one of these problems is the very rapid formation of calluses in several places on the soles of both feet which make walking, and other activities which

involve her feet, extremely painful. These are sometimes referred to in the evidence as "lesions", that being a medical term for such calluses. The Examining Medical Officer had drawn a diagram showing the whereabouts of these calluses at box 10 of his report. It was the claimant's case that she has to attend a chiropodist on a regular basis to have her calluses treated. She said that there is a regular cycle of build up and treatment. We shall examine this aspect in more detail later. For the moment it is sufficient to say that she visited a chiropodist about every three weeks to have her calluses attended to. Following treatment she is relatively free of pain but, as the calluses build up again, walking, and other activities involving her feet, such as standing, become progressively more painful and difficult.

6. The claimant became unfit for work and claimed Incapacity Benefit from 18th May 1999. On 1st June 1999, the Adjudication Officer decided that she was entitled to Incapacity Benefit from and including 21st May 1999. It is convenient to call that decision the "original decision". It is common ground that at all relevant times the claimant's capacity for work fell to be determined by what is now known as the Personal Capability Assessment but which was at the time of the first award called the All Work Test. For simplicity, we shall continue to use that name. In the circumstances, regulation 28(1) of the Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995 (SR 1995/41), in its then existing form, applied. At the relevant time, regulation 28(1) was as follows: -

“(1) Where the all work test applies, the test shall, if the conditions set out in paragraph (2) are met, be treated as satisfied until a person has been assessed or until he falls to be treated as capable of work in accordance with regulation 7 or 8.”

In the present case the conditions in regulation 28(2) were met. Accordingly, the All Work Test was treated as satisfied until such time as the claimant was assessed.

7. The process of assessment began at the end of 1999. On 6th December 1999, the claimant obtained from her general practitioner the form Med 4 to which reference has already been made. On 29th December 1999, she completed an incapacity for work questionnaire. The New Tribunal will be concerned with the entire questionnaire. For present purposes the following passages are particularly relevant. The claimant began by saying: -

“Congenital feet problems which are causing increasing pain (this is a form of spina bifida). The restricting nature of the illness, along with personal problems have also brought about serious depression, anxiety and stress.”

She went on to say that her problems were, first, feet problems and, secondly, depression, anxiety and stress. In relation to her feet, she said that she attended a clinic every two to three weeks to have her feet treated and that without this regular treatment she would not be able to walk. In relation to her depression and allied problems she said that she was then taking 30 mgs of seroxat a day and 7.5 mgs of zepiclone at night. In relation to the activities of sitting in a chair, getting up from a chair and bending and kneeling, the claimant explained her problems in some detail. Amongst other matters, she said: -

"The bones in my feet are deformed, the bones cause pressure points on my feet and I do not walk in a normal or straightforward way, particularly when the lesions are requiring podiatric treatment. ..."

"I can not put pressure on my feet in the way a person with normal feet would when getting up from a chair. The lesions and feet deformities has given me problems with my balance for even tasks as simple as this."

In relation to the walking and standing she said that when the lesions were bad she could not stand for more than a minute and could not take more than a few steps without serious discomfort. She explained: -

"To stand in one place creates pain on the pressure points of my feet, created by the deformities. This pain is exaggerated as the lesions grow in between my podiatric appointments, when the lesions are cut back. The week before I attend my appointment for example, this kind of activity [standing] would be very painful for me. I can not do house chores like ironing for example."

"[In relation to walking] the week prior to my podiatric appointment I would do very little walking, by the time of my appointment I would do no walking unless absolutely necessary."

Towards the end of the questionnaire, under the heading "Information about anxiety, depression and other mental problems", she answered "yes" to the question whether she had been treated for, or thought she had, a mental problem. She then went on to add: -

"Over the last 2 years my feet have deteriorated rapidly. The restrictions this has brought to my life, socially and for employment has caused me major anxiety. Coupled with this has been the forced closure of my husband's business, through which we lost our home, all our savings and money issues from this continue to persist. These things have made me quite reclusive, though I appear outgoing I am extremely nervous around people and suffer from panic attacks. I do not know how to describe how low and dark I feel sometimes. I am currently on Seroxat 30 mg. and attend the Doctor on a regular basis."

8. The claimant's general practitioner was then asked for a report which he supplied on 1st February 2000. He recorded that he had seen the claimant that day. He said that her problem were bilateral congenital foot deformities which had previously required surgery and that she had been suffering from anxiety and depression since September 1998. With regard to her feet, he stated that the claimant suffered from persistent pain and discomfort and that she had to attend chiropody regularly due to current callus formation. In regard to her mental state, he said that she was not depressed but suffered from persistent anxiety and poor sleep. She was being treated with seroxat on a daily basis and her depression was controlled. He did not foresee any change in the claimant's condition or treatment.

9. The claimant was medically examined on 2nd May 2000. At that time an attempt was being made to take her off seroxat. The Examining Medical Officer's general description was as follows: -

“(1) Deformity of both feet. (Due to spina bifida occulta)

At age 15 she had arthrodesis of [left] big toe. At age 26 she attended Prof. Mollán, orthopaedic surgeon and had further surgery to all her toes. She had some improvement. Feet are stiff in morning. Now she has wear and tear in feet and toes. She has callous formation and attends chiropodist about every 3 weeks to pare down callous. Feet can be sore immediately after chiropody treatment, for a few days. Then she has a good week when she is less limited. Then as callouses build up, any weight bearing can cause pain. No further surgery is planned.

(2) Suffered depression – Partly due to chronic foot problems.

There have also been family problems. Husband had business problems, also recent health problems in family. She feels tired, despite sleeping tablets. Not suicidal. Mood swings a lot. Copes poorly with any stress. She has panic attacks, if stressed – difficulty breathing. Feels dizzy, has difficulty thinking clearly.

Worked in husband's business, stopped a year ago when business folded.

Typical day

Lives with husband. Gets up at 8.30 – 9.00 am

When feet are bad, - unstiffens slowly, has light breakfast, sits on settee. Does only necessary chores eg. empties dishwasher, husband does all ironing. She can cook a meal, simple meal.

On better days, can take short walks with dog, could Hoover and polish.

Friend might take her shopping or take her to hairdresser.

Attends weightwatchers every Monday evening.

Might go out in car with husband at weekend.

Can go out for a meal.”

10. The Examining Medical Officer was of the opinion that the claimant could not stand for more than 30 minutes without having to sit down, could not walk more than 400 metres without stopping or severe discomfort and could not walk up and down a flight of 12 stairs without holding on. On the basis of such views the claimant was entitled to 10 points in respect of physical activities. The Examining Medical Officer added the following information beginning at box 12 of his report: -

“When feet have been treated she can walk dog about a mile along beach (easier to walk on sand). When feet are bad she walks about home or to car, but wouldn't walk further.

Wouldnt stand for long when feet are bad.

Always holds rail on stairs – eases pressure on feet.”

At the bottom of the same page, he went on to add the following: -

"3 week cycle of feet – 1 good week, then gradual deterioration until feet are treated again by chiroprapist.

Walking distance varies 50m to over a mile. We appropriate average. Always uses stair-rail. Doesn't stand long, even when feet are quite good. Standing time varies 10 mins – 30 mins."

(The expression "*We appropriate average*" was the subject of discussion at the hearing before us without anyone being able to suggest a satisfactory meaning.)

11. The Examining Medical Officer went on to consider the mental health descriptors. His opinion was that the following descriptors applied.

- (1) The claimant is frequently distressed at some time of the day due to fluctuation of mood (descriptor DLc – 1 point).
- (2) She frequently feels scared or panicky for no obvious reason (descriptor CPb – 2 points).
- (3) She is not able to cope with changes in daily routine (descriptor CPd – 1 point).
- (4) She gets irritated by things that would not have bothered her before becoming ill (descriptor Opd – 1 point).

On that basis, the claimant scored 5 points in respect of the mental health descriptors. However, regulation 26 of the General Regulations provides that such a score is to be ignored for aggregation purposes.

12. The Adjudication Officer then considered the evidence and gave the decision set out above. He accepted the opinion of the Examining Medical Officer in respect of most matters. However, he did not consider that the claimant satisfied descriptor DLc and therefore only scored her 4 points for mental health descriptors. His reasoning appears to be this. The Examining Medical Officer had commented, in relation to this descriptor, "Mood varies. Can have bad days". The Adjudication Officer's notes contain the comment "DLc – Can have bad days. Not at some time every day". Mild anxiety/depression. Low mood seems secondary to foot pain. Pleasant co-operative manner." (On reconsideration, the Decision Maker commented as follows: -

"DLc – 0 point – can have bad days, not bad every day.)"

13. The claimant appealed. Her notice of appeal dealt with both her physical difficulties and her mental problems. We do not quote what she said in full, although it will be relevant for the purposes of the rehearing, but we do consider the following passages are of importance. In respect of her feet, the claimant said: -

“My feet are treated every 3 weeks, although after 2 weeks my feet become very seriously restricted because of the pain. For this last week prior to my podiatric appointment I often cannot walk any distance at all or do any household chores that might require me standing for more than 5 minutes on one spot, eg ironing.”

The claimant dealt with her mental problems on a separate sheet of paper. Amongst other matters she said this: -

“My condition is so frustrating because for short periods I can function quite well, maybe just suffering from back pain and pain in my hip joints.

Also, getting me down is the fact that I have needed anti-depressants for the last 3 years because of all this, it is frightening for me to think even of employment in my current mental state, as I feel I would breakdown under this pressure I am currently taking fluoxetine capsules 20mg which are no longer working. I am having the dose increased when the current ones are finished this coming week. This is hard for me as I spent some months trying to reduce and come off anti-depressants altogether only to find I could not cope at all.”

14. The claimant's appeal came before the Appeal Tribunal sitting at Cleaver House, Belfast on 31st October 2000. Unfortunately, the decision was a paper determination. In our view, the absence of the claimant placed the Appeal Tribunal in a difficult situation but it was the claimant's decision not to seek a hearing.
15. The members of the Appeal Tribunal were unanimous in dismissing the appeal. The Decision Notice is as follows: -

“Appeal disallowed. There are grounds to supersede the decision awarding Incapacity Benefit being relevant change of circumstances as the claimant scores only 10 points on the personal capability assessment and she is therefore not entitled to Incapacity Benefit from and including 17.7.00.”

Reasons

We have carefully considered the medical evidence supplied by Dr O'Loan, the claimant's General Practitioner in the Med 4 dated 6.12.1999 and report dated 1.2.2000. We have accepted the findings on examination of the examining doctor in his report of 2.5.2000 at Boxes 9, 10 and taking account of statements made to him by the claimant, as well as Dr O'Loan's reports, we consider the assessment made by the examining doctor in relation to walking, stairs and standing, to be fair and reasonable. In relation to walking, there is clearly a 3 week cycle regarding the condition of the claimant's feet, ranging from walking ability in excess of 800 yards, and a gradual deterioration to very limited walking ability for a very few days. We consider that for most of the time the claimant could be expected to walk in excess of 200 metres before stopping or severe discomfort. The assessment in relation to stairs accords with the claimant's own, and we consider the conclusion that on most days she could stand for up to 30 minutes is reasonable. The medical evidence does not indicate that any significant limitation in the activities of sitting, rising from sitting and bending and kneeling, would be expected.

With regard to mental health descriptors, the medical evidence indicates that the claimant suffers from stress and anxiety, with mild depression which is reasonably controlled, and that she can attend to the activities of daily living. There is no evidence to suggest that the assessment made by the examining doctor is not an accurate one.”

16. The Appeal Tribunal awarded her 10 points in respect of the physical descriptors, calculated in accordance with the relevant Regulations, and 4 points in respect of the mental health descriptors. The Regulations provide that a score of 4 points in respect of the latter descriptors counts as no points when added to the score for the physical descriptors. Hence the Appeal Tribunal’s decision that she only scored a total of 10 points.

17. We base our decision on a matter that arises out of the claimant’s grounds of appeal though not directly on the grounds asserted. It will be recalled that the Appeal Tribunal, when dealing with the claimant’s ability to walk, said this: -

“... In relation to walking, there is clearly a 3 week cycle regarding the condition of the claimant’s feet, ranging from walking ability in excess of 800 yards, and a gradual deterioration to very limited walking ability for a very few days. We consider that for most of the time the claimant could be expected to walk in excess of 200 metres before stopping or severe discomfort. ...”

That finding is of great importance to the decision. In her initial grounds of appeal, the claimant said that she was appealing because: -

“I feel there was not enough evidence to come to the conclusion that the tribunal did. Especially due to the cyclical nature of the condition. I feel that the decision made by the tribunal was not supported by the evidence given. I also feel that this decision was not reasonable given the evidence and feel this was against natural justice.”

Later, in a letter dated 14 August 2001, the claimant repeated and slightly expanded on those grounds. In particular, she referred to box 15 of the Examining Medical Officer’s report. That box is the section of the report which contains the mysterious comment “We appropriate average”.

18. Having perused the evidence it appears to us that that evidence raised questions which it failed to answer. The Appeal Tribunal accepted and relied on the medical report. That report raises issues which require further investigation. For example, at box 15 of the examining medical officer’s report it is said that there is a “3 week cycle for feet – 1 good week, then gradual deterioration until feet are treated again by chiropodist [*sic*]. However, at the beginning of his report the Examining Medical Officer says that the claimant’s feet “can be sore immediately after chiropody treatment, for a few days. Then she has a good week when she is less limited ...”. Clearly, what happens during the course of one of these three week cycles required further investigation.

19. The Appeal Tribunal did attempt to reach a conclusion based on the broad brush approach basis outlined in *R(IB)2 99*. A Tribunal is entitled to make a finding e.g. that on most days the claimant could walk in excess of 200 metres before stopping or severe discomfort without evidence expressly so stating. It must be permitted to exercise its judgment as to the true fact situation on the basis of the accepted evidence as a whole and may draw inferences from that accepted evidence. It is for the Tribunal, not for any witness, to make the necessary findings. However, we consider that the evidence in this case was so incomplete and raised such issues that the Tribunal should have adjourned to give the claimant a further opportunity to attend. Had she failed to do so it could have made an adverse inference from her non-attendance and made its findings of fact accordingly. It is because the Tribunal failed to consider an adjournment to explore the evidence and the issues raised by it that we set the decision aside.
20. Since the evidence available to us is no different from that before the Appeal Tribunal it follows that we are not in a position to give a final decision. We therefore remit the matter to the New Tribunal for a complete rehearing. It further follows that the claimant should, if possible, attend the rehearing. The claimant is, of course, not obliged to do so. She must, however, understand that if she does not attend, the New Tribunal may draw evidential inferences against her. We therefore hope that she will attend. Perhaps we should say that, at this late stage in the matter, further written evidence from the claimant is unlikely to carry much weight on its own.
21. The New Tribunal must also consider the anxiety and depression from which the claimant was stated to be suffering and whether any, and if so which, mental health descriptors applied at the relevant time. In particular whether, as the Examining Medical Officer thought, but the decision maker did not, she should be awarded 1 point in respect of descriptor DLc.
22. We consider it appropriate to give guidance to the New Tribunal as to the interpretation of descriptor DLc and as to the approach to be taken to the assessment of variable conditions.
23. As regards descriptor DLc, the descriptor is included in the Schedule to the Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995. It is worded as follows: -
- “Is frequently distressed at some time of the day due to fluctuation of mood.”
24. It does not appear to us that the claimant has to be so distressed every single day. She does, however, have to be “frequently” distressed. This is important because most of us, even those who do not suffer from the required mental condition, suffer fluctuations of mood from time to time and are sometimes distressed as a result. “Frequently” means more than occasionally, more than sometimes. Collins English Dictionary defines it as:-

“(1) recurring at short intervals, (2) habitual”.

We do not, of course, substitute any language of our own for that of the statutory provision which, we repeat, is "frequently distressed at some time of the day". However to be frequent in this particular context, it appears to us that, during the period under consideration, there must be habitual recurrence of distress at short intervals. The new Tribunal should bear this in mind in deciding whether or not descriptor DLc is applicable. Provided a Tribunal's conclusion on whether or not such distress occurs "frequently" is within reasonable bounds, it should not be disturbed.

25. As regards variable conditions such as the claimant's foot problem, we are largely in agreement with *R(IB)2/99*, a Great Britain Decision of a Tribunal of Commissioners, that the "broad approach" outlined therein is the only one which can sensibly be applied. We also, however, share the views expressed in that case decision at paragraph 15 thereof that "... the words of the legislation cannot be ignored". It follows that, in those cases where relevant descriptors are expressed in terms that the claimant "cannot", rather than "sometimes cannot", perform the activity, one should not stray too far from an arithmetical approach that considers what the claimant's abilities are "most of the time"...
26. We also consider that certain factors mentioned in that decision are likely to be relevant in applying that approach though this list is neither prescriptive nor conclusive i.e. the frequency with which the relevant limitation(s) arise, for how long they last, the duration of periods when the limitation(s) are not present. We are less certain, however of the meaning or relevance of the phrase "the unpredictability of "bad" days" used in that decision. Adjudicators will simply have to try to determine the likely patterns of functional limitation. Uncertainty as to the possibility of a future recurrence would not of itself usually be enough to satisfy the test which must be satisfied on the balance of probability at the time of the decision maker's decision.
27. Finally we refer to a matter which Mr Fletcher raised. As part of the decision which he gave on 17th July 2000, the decision maker expressly superseded the original decision given by the Adjudication Officer on 1st June 1999, that being the decision by which the claimant was awarded Incapacity Benefit. The Appeal Tribunal, in its decision notice, stated that grounds for supersession had been made out. Mr Fletcher referred us to regulation 28(1) of the Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995, and pointed out that if, as appears to be the case, this was the first occasion on which the claimant had undergone an All Work Test assessment, the Incapacity Benefit had been awarded on the basis that pending assessment, the Test was treated as satisfied. It was implicit in the original decision that (a) the claimant would undergo an All Work Test assessment and (b) that depending on the outcome of that assessment, Incapacity Benefit would either continue or else would cease to be payable. There was, so his reasoning goes, no need to supersede the original decision. It was inherent in that decision that failure to satisfy the All Work Test would result in a cessation of benefit. Reference was made to *R(P)3/84*, a decision of a Commissioner in Great Britain, and in particular to what was said there in paragraphs 16 and 17.
28. We see the force of those submissions. However, in this particular case we are unable to see that it makes any practical difference whether the original decision was superseded or whether a decision to that effect was unnecessary. In this case, the important and central matter is whether or not the claimant satisfies the All Work Test.

If she does not, then she is no longer entitled to benefit. In any event the Tribunal itself made a supersession decision. We do not therefore consider that this is an appropriate appeal in which to explore and rule on Mr Fletcher's point.

29. For the reason already explained, we allow the appeal and remit the matter to the New Tribunal for rehearing and redetermination.

(Signed):

**JOHN A H MARTIN QC
CHIEF COMMISSIONER**

(Signed):

**MOYA F BROWN
COMMISSIONER**

(Signed):

**J P POWELL
DEPUTY COMMISSIONER**

(Dated):

6 FEBRUARY 2002

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