

CSIB/44/97

INCAPACITY BENEFIT - SLEEP AND LOST/ALTERED CONSCIOUSNESS

In the attached case (CSIB/44/97) the Commissioner accepts that involuntary or irresistible sleep can constitute lost consciousness.

(Paragraph 11)

There has to be a cause or connection to ill-health or disability but it does not have to be a direct connection it might arise for instance through the medication or as in this case through tiredness resulting from the medically recommended exercise programme.

The Commissioner did not consider the January 1997 amendments to this descriptor.

Any questions or suggestions contact Chris Orr, Welfare Rights Officer, Social Work Department, 117 Brook Street, Glasgow, G40 3NP.

Sue Low County Voice
December 14(6) Commissioner's Case No: CSIB/44/97

(See - Jan 97)

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This adjudication officer's appeal succeeds. I hold the decision of the appeal tribunal dated 31 July 1996 to be erroneous in point of law and accordingly I set it aside. I remit the case to the tribunal for determination afresh in light of the directions below.
2. The claimant's representative sought and obtained a hearing of this case. At that hearing the appellant adjudication officer was represented by Mr William Neilson of the Office of the Solicitor in Scotland to the Department of Social Security. The claimant was represented by Mr Chris Orr, a Welfare Rights Officer, now with Glasgow City Council. I am grateful for their assistance.
3. The issue in the case was, up to a point, a simple one. In March 1996 the claimant's incapacity benefit award was terminated. That was because, following the usual procedure in that regard, an adjudication officer had reviewed and revised the awarding decision holding that the claimant did not satisfy the all work test. Only the physical and not the mental disabilities were in question. The material before the adjudication officer indicated that each of the claimant and the medical service doctor had assessed no points as falling to the claimant under the all work test. It is perhaps hardly surprising that the adjudication officer then came to the same conclusion. Nonetheless the claimant appealed to the tribunal.
4. The tribunal found that the claimant merited an award of 15 points under activity 14, descriptor (b). They therefore allowed the appeal. The adjudication officer now appeals, with my leave.

5. The all work test, as defined in regulation 42 of the Social Security (Incapacity for Work) (General) Regulations 1995 is described by these words:-

"The all work test is a test of the extent of a persons incapacity, by reason of some specific disease or bodily or mental disablement, to perform the activities described in the schedule."

There then follow regulations dealing with the method of assessment which means counting the points in respect of activity descriptors which fit an individual claimant. If, in respect of physical disabilities alone, the total is 15 or more then the claimant falls to be held unfit for all work and so entitled to benefit. Activity 14 is in these words:-

"Remaining conscious other than for normal periods of sleep."

Descriptor (b) for that activity is in these words:-

"Has an involuntary episode of lost or altered consciousness at least once a week."

The tribunal reasons explain how that was satisfied:-

"We accepted his account that usually after these walks he falls asleep despite efforts to resist this and we accepted the notion that this amounts to an involuntary altered or lost consciousness on at least a once weekly basis. We had regard to the definition of

sleep as being a state of reduced consciousness and the doctor attending the tribunal [advised us] this was an accurate description of what the activity of sleep is and accordingly the claimant reached the required number of points on category 14(b)."

The factual foundation for the decision, so far as now relevant, was this:-

"Claimant suffers from ischaemic heart disease and bad circulation.

Claimant's doctor has advised him to take daily walks to maintain his circulation levels.

When claimant returns from walking every other day he falls asleep for periods of approximately 30 minutes.

Claimant falls asleep despite his efforts to resist this.

Claimant accordingly has an involuntary episode of altered consciousness at least once per week."

6. The adjudication officer's written submission contended that the tribunal had not shown that the short sleep following most of the daily walks was an "involuntary episode of lost or altered consciousness". It was further submitted that the fact that a person falls asleep though preferring to stay awake is not sufficient to qualify as such an episode nor were the facts sufficient to warrant such a conclusion because there was nothing to indicate what efforts were made to stay awake. Finally it was submitted that these short sleeps were simply normal periods of sleep following exercise, and so did not fall within activity 14. In the course of his submissions Mr Neilson elaborated on that position.

7. Mr Neilson first submitted that the tribunal had wrongly interpreted the all work test and what was desiderated at activity 14. He contended that the normal period of sleep could vary and that while some might sleep only at night others could require to sleep after lunch or exercise. He accepted that his concept of "normal period of sleep" was essentially subjective and so in each case what was the individual's "normal period", or I would suppose "periods", would have had to be determined. The test, he submitted, concerned those engaged in work. In that context "altered consciousness" could not cover such situations as those who went into a dreamy, or even an abnormally bright, condition. He sought to distinguish sleep from altered consciousness by submitting that that latter involved some medical defect or something that was not healthy or natural. The distinction could be tested by the means of arousal so that whereas somebody asleep could be easily aroused. Their consciousness thus was not "altered". It was otherwise if medical intervention, or something like that was required or where, as in the case of epilepsy, the alteration had to run its course. In such cases there was an "altered consciousness". Mr Neilson then referred me to certain cases which, as he accepted, simply gave examples where judges had described certain conditions as amounting to altered consciousness. He accepted that the phrase, so far as he was aware, was a novelty in statutory law and so the cases did not seem to me to help very much. Nor did various dictionary definitions of "sleep", including in those medical dictionaries, help other than that the last rather confirmed what the tribunal's medical assessor had advised them, namely that sleep involved a degree of altered or lost consciousness. Nonetheless

Mr Neilson submitted that in the context of the regulations that was not the intention. Having regard to their purpose what was clearly intended was some non-natural, or outwith the natural course of events, loss or alteration of consciousness.

8. Mr Neilson also developed, what I took to be an alternative submission, that it would be enough if somewhere in the chain of causation which resulted in an individual falling asleep there was involved some abnormality. That then could be enough to distinguish the situation from "normal" sleep. There had to be something in the sleep or its cause which was unnatural or unhealthy. On that approach Mr Neilson contended that the case should go back for rehearing because the tribunal had made no finding as to how this claimant's post-exercise sleep incidents were related to any prior condition.

9. Mr Orr contended that the test envisaged was an objective test and that there did require to be something out of normal to cause the sleep but that in this case there was sufficient to demonstrate that the tribunal were holding that it was the claimant's poor health, about which they had made specific findings, which lay at the root of the problem. The link was, he maintained, clearly implied. I find myself able only to accept Mr Neilson's final submission and to be unable to accept Mr Orr's contention about an implied link. In that situation, as I understood him, he accepted that the case would have to go back.

10. In my view the description of the all work test in regulation 24 requires concentration upon the ability to perform the activities set out in the schedule and the particular ways of performing them for assessment purposes are set out in the descriptors. But if there is any incapacity to perform by reason of satisfaction of a descriptor then, in terms of the precise words of the regulation, that must be by reason of some specific disease or bodily or mental disablement. In short the satisfaction of the descriptor must be related to a particular medical condition. Accordingly, I view the activity numbered 14 as being concerned with the individual's ability to remain conscious. I note that, perhaps unfortunately, that has become translated in certain of the internal Department forms as "fits". I do not think that that is an apt paraphrase. The words "other than for normal periods of sleep" simply means that one ignores those periods, determined objectively. So approaching the activity, the questions then are whether, during the period when an individual would normally be expected to be conscious, he has an involuntary episode of lost or altered consciousness at such a rate as to satisfy any of the particular descriptors. That is rather emphasised by descriptor (g) which is:-

"... has no problems with consciousness."

The emphasis is upon whether an individual has a problem with remaining conscious during the usual, or I suppose working, day or whether he suffers from loss or alteration of consciousness which is involuntary.

11. In this case the tribunal would have been entitled, in my opinion, as a matter of proper interpretation of the provisions, to regard a period of irresistible sleep as an involuntary episode of lost, rather than altered, consciousness. I am inclined to agree that the findings of the old tribunal are barely enough to show that the loss here was truly irresistible or "involuntary". Had the evidence been recorded and made available that problem might have been solved without further ado. Mr Neilson gave as an example of the problem that the

claimant after his exercise might sit or lie down and that only then did he find that he fell asleep despite efforts to resist. I am satisfied that rather more detailed findings were required and I cannot supply them because the evidence is not available to me.

12. More importantly, I am satisfied that even if the tribunal had made findings more closely justifying a conclusion about the involuntary nature of the episodes - which would be of course, strictly, a finding of secondary fact and therefore would require to have been based upon appropriate findings of primary facts as indicated above, there is only an implication, and a tenuous one at that, that the incapacity, to borrow the words of the regulations, to perform the activity of remaining conscious other than for normal periods of sleep was by reason of some specific disease or bodily or mental disablement. I quite understand why Mr Orr submitted that there was an implied link to the ischaemic heart disease and bad circulation. But in my view there must be a specific finding to warrant satisfaction of regulation 24. The tribunal had the benefit of a medical assessor who seems to have guided them upon the definition of sleep, but he does not appear to have guided them, or perhaps he was not asked to guide them, as to whether these involuntary episodes were or could be causally connected to the disease, the circulation condition or, as it may have been for all that I know, any medication in that or any other regard. It is to explore that that the case primarily must go back. The absence of any record of the evidence received by the tribunal again makes it impossible for me to seek to determine the matter for myself.

13. I should note that when I referred to the absence of any evidence received by the tribunal other than what was contained in the papers formally lodged before them I am aware that the adjudication regulations in force at the time of this tribunal hearing provided, at regulation 23(4) of the Social Security (Adjudication) Regulations 1995 that within 18 months of the hearing a copy of the record of proceedings is to be made and supplied to the parties if requested. It was suggested at the hearing that that would cover the note of evidence. However the form AT3 has been wont to be headed as the tribunal's record of proceedings and the AT3 in this case must, I think, be taken to be that as opposed to the record of decision mentioned earlier in said regulation 23. I conclude that in the respects mentioned above this case has probably had to be returned to the tribunal simply because even in their record of proceedings there was no record of the verbal evidence led before the tribunal, or indeed the advice tendered by the assessor. I deprecate that practice which seems to have been growing prior to the amendment of the regulations in October 1996.

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

(signed)

W M WALKER QC
Commissioner
Date: 16 July 1997