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CIB/664/1998

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THE SOCIAL SECURITY COMMISSIONERS

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16 DEC 1998

Commissioner's Case No: CIB/664/1998

LCC WELFARE RIGHTS SERVICE  
White Cross, Lancaster

SOCIAL SECURITY ADMINISTRATION ACT 1992  
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE DEPUTY SOCIAL SECURITY COMMISSIONER

Deputy Commissioner: Mrs M.F. Street

NAME: ~~XXXXXXXXXX~~

SOCIAL SECURITY APPEAL TRIBUNAL: LANCASTER

CASE NO: 6/05/97/16186

- Tribunal observations of claimant
  - Must be put in context of other evidence
  - People try to hide pain from others
- Fluctuating condition
  - Test is what can normally do as and when required.

WMS (50?)

14/12/98  
FAO: Jim - HQ  
This is an interesting  
decision I've recently  
received on inquiry  
for work. Nigel

## Decision

1. The claimant's appeal is allowed. The decision of the Lancaster Social Security Appeal Tribunal sitting on 17 November 1997 is erroneous in point of law for the reasons given below and I set it aside. It is not expedient for me to give a decision on the claimant's appeal. The appeal is referred to a differently constituted social security appeal tribunal for determination. I give the following directions for the determination of the appeal under section 23(7)(b) of the Social Security Administration Act 1992.

i) The tribunal shall conduct a complete rehearing;

ii) The tribunal shall determine the period over which it has jurisdiction, starting with the date of disallowance, here 13 June 1997, and ending with the date of hearing or the date before any day affected by any subsequent determination.

iii) In considering the all work test, the tribunal shall have regard to the specific findings as to the extent of the claimant's incapacity throughout the whole of the period within its jurisdiction by reason of disease or bodily disablement.

iv) Finally, the tribunal will consider whether there are grounds for review and if so shall conduct the review.

## History

2. This is an appeal to the Commissioner against the decision of the Lancaster Social Security Appeal Tribunal sitting on 17 November 1997, in respect of a decision by an adjudication officer given on 13 June 1997 that the claimant did not satisfy the all work test and was not incapable of work from and including that date. The claimant appeals with leave of the chairman of the tribunal.

3. The claimant submitted evidence of incapacity for work from 25 November 1996, initially on the basis of knee pain but later with certificates also showing back pain. Incapacity benefit was not awarded, but the adjudication officer treated the claimant as satisfying the all work test and as incapable of work, pending assessment of the extent of his incapacity.

4. The claimant completed a questionnaire relating to the All Work test on 17 February 1997. In the form he mentions lower back pain, pain to the right knee and numbness and tingling in the leg and foot. The form is completed to indicate that he has difficulty sitting, rising from sitting, standing, walking up and down stairs, bending and kneeling and hearing, perhaps intermittently.

5. The claimant was examined by a doctor for the Benefits Agency on 11 April 1997. On examination, the clinical findings were within normal limits save for a finding of some loss of power at the right knee of about 20%. The doctor has recorded in the clinical history that the back is very much improved and is symptom free.

6. The adjudication officer awarded 3 points in respect of each of sitting and standing. The officer held that from and including 13 June 1997 the claimant was capable of work. No exempt conditions or exceptional circumstances were found to apply or have been put at issue at any time, nor were the mental health descriptors at issue.

7. The tribunal had a detailed written submission on behalf of the claimant referring to intermittent low back pain and pain in the right knee, and referring to the same descriptors as identified on the claimant's questionnaire, with the addition of lifting and carrying on a regularly repeated basis and walking with bearable pain in the knee but giving rise to back pain afterwards. The submission expressly challenges the record by the doctor that at the time of the examination the back was improved and symptom free.

#### The Tribunal's Decision

8. The tribunal held that the claimant did not satisfy the all work test from and including 13 June 1997, awarding 3 points in respect of each of standing and bending and kneeling. No points were awarded for sitting.

9. In the statement of material facts and reasons for the tribunal's decision, independent findings of fact are scant. The tribunal adopt the findings of the Benefits Agency doctor in respect of standing and sitting. The tribunal took into account the appellant's apparent lack of discomfort at the tribunal hearing 'after having sat in the waiting room for some considerable time before the hearing commenced, and sitting during the hearing.' The claimant's description of his difficulty with bending or kneeling as if to retrieve is accepted, although what the difficulty was is not stated. The tribunal were not satisfied that points applied in respect of the other descriptors contended for, but without findings or reasons. It is found that there was no deterioration down to the date of hearing.

## The Grounds for the Appeal

10. The claimant appeals with the help of Lancashire County Council Welfare Rights Service on the grounds that:

i) the tribunal relied on observation and made assumptions about the claimant's activity immediately before the hearing without enquiry;

ii) the tribunal withdrew points awarded for sitting without warning and so deprived the appellant and representative of the opportunity to address them in respect of that;

iii) the tribunal failed to deal adequately with walking up and down stairs, rising from a chair, lifting and carrying, and hearing and in so failing, failed to deal with the points raised in the written submission before the tribunal.

## The Adjudication Officer's Submission to the Commissioner

11. The adjudication officer supports the appeal, identifying the following:

i) the tribunal failed to deal with the claimant's evidence in relation to sitting, including the improvement achieved through physiotherapy that day; their reliance on their observation that no discomfort in sitting was apparent to support their decision without addressing that evidence is an error of law;

ii) the tribunal's failure to give reasons for rejecting the claimant's evidence in the functional areas of walking up and down stairs, sitting, rising from sitting, lifting and carrying and of hearing is an error of law;

## The Commissioner's Decision

12. I accept the submissions at paras 10 (i) and (iii) above and 11. The statement of reasons and of findings of facts material to those reasons is inadequate. The tribunal is in error of law because they have made no findings of fact on many of the descriptors at issue before them, have failed to explain on what basis they considered the issues nor why they rejected the claimant's evidence. That alone is sufficient to require that the decision is set aside. The question of the tribunal's reliance on observation and the reasons for rejecting the ground set out at paragraph 10(ii) are discussed below.

## Observation of the claimant

13. The tribunal here have placed reliance on their observation of the claimant, without placing it in the context of the information about variation and the effect of recent treatment. The tribunal cannot disregard what they see, but there are dangers in relying on observation. Many people who suffer pain find it difficult to let that be

seen. The day of the hearing may be untypical, and here that is expressly said to relate to treatment. The reference made in the statement of the tribunal's findings is supplementary to an acceptance of the doctor's report in relation to sitting, so that the overall assessment made might be sufficiently justified. But the failure to address the claimant's evidence as to the effect of treatment on that day, and the failure in general to place their observation in the context required, means that the tribunal are in error of law. It is not clear either what evidence the tribunal relied on in finding that the appellant had sat in the waiting room for some considerable time before the hearing commenced.

#### The Points Already Awarded.

14. The tribunal were at liberty to consider the whole of the evidence before them and reach their own conclusions entirely. Nothing limits the tribunal's consideration to the areas contended for by the appellant. That the tribunal were taking that approach is plain from the record of proceedings, in which the areas at issue are shown to be identified at the outset. That the representative was aware that all areas would be reconsidered is apparent from the submission which addresses descriptors already accepted as applying by the adjudication officer. The questions recorded in a full and clear record of proceedings indicate an unfettered exploration. No error of law or procedure can be identified here.

#### Guidance to the Tribunal Re-hearing the Appeal

15. The tribunal is commended to follow the guidance in paragraph 11 of CSIB/324/97, set out in the adjudication officer's submission at paragraph 11.

16. Here, one of the principal problems described by the claimant involves the lower back. The extent of lower back discomfort and limitation is directly at issue, and there is conflict over the claimant's own account of it to the examining doctor. That must be resolved before it can be established which activities should be considered.

17. Documentary evidence here, including the claimant's questionnaire and the representative's submission, indicates variable or intermittent difficulties, both in connection with the back pain and in connection with hearing. The doctor found that neither were limiting within the range of the descriptors, so that variation was not further commented on. If the tribunal accept some level of functional limitation, they must address the extent to which it varies. Sufficient findings of fact are required to establish the claimant's functional ability over a period of time, such that the effect of variation including during periods of exacerbation or improvement can be seen to have been determined. The question is whether the claimant can normally perform the functions as defined as and when called upon to do so, taking into account the need for some reliability of performance with a reasonable regularity and the overall test of what it is reasonable to expect the claimant to do and to cope with.

18. I commend to the tribunal re-hearing the appeal the approach of Mr Deputy Commissioner Newsome:

'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.' (Referred to with approval in CSIB/597/1997 \*50/98).

If the limitation is infrequent enough to count as intermittent, so that many days are unaffected, it may be right to determine that it does not form part of the claimant's general condition and have regard only to those days when it is shown to be critical in impairing capacity. At that point the day by day basis described in CIB 13161/96 and CIB 13508/96 must apply.

The meaning of the descriptors.

19. Somewhat tentatively, the representative put at issue lifting and carrying, in the context of sustained effort, and walking in the context of pain and discomfort suffered afterwards rather than during. The test in relation to walking is for activity 1(b) to (g) of walking 'without' severe discomfort. Can severe discomfort properly be considered even if arising later, if caused by the walking? Nothing in the regulation precludes such discomfort from being considered. The issue is partly evidential: usually someone at risk of severe discomfort would stop walking before that point was reached: usually, a lower level of discomfort would signal the risk of severe discomfort and the individual would stop to avoid it. If the activities of which the individual is capable cause discomfort cumulatively, the assessment must take into account the extent of functional limitation so introduced. This is also the test that must apply in relation to lifting and carrying, although the assessment will not be done in the context of full time work, or of any specific working situation and all that is measured is reasonable regularity and reliability, not sustained or repeated performance.

Review

20. Neither the adjudication officer nor the appeal tribunal made any reference to the need for a review. The attention of the appeal tribunal is drawn to the common appendix of CIB /16092/1996, CIB/90/1997 and CIB 2073/1997, starred together as CIB \*45/98. Where the claimant has been treated as satisfying the All Work test under regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995, the later decision must take the form of a review. That is because regulation 28 only deals with the application of the all work test, not with incapacity for work

generally: there are other elements to the decision that the claimant is not incapable of work, in relation to regulation 10 (exempt conditions), regulation 27 (exceptional circumstances). Incapacity as a whole must be dealt with. The review grounds set out in section 25 of the Social Security Administration Act 1992 apply and must be satisfied. The assessment under the all work test may amount to a relevant change of circumstances under section 25(1)(b). If so found, the tribunal has the jurisdiction to conduct the review, recording that they have done so and the grounds for it.

22. The claimant has been successful in his appeal. He must not think that he will therefore necessarily be successful at the rehearing. That will depend on how the new tribunal weigh the evidence. It is open to the appellant to submit further evidence, preferably before rather than at the re-hearing.

Martha Street  
Deputy Commissioner  
27 November 1998