

DGR/SH/smt/4

*An Under Test - Various Activities: Attached Max  
Accurate Score - Under  
Mention Human Activities  
Notes by Commissioner* ★ 2/97

Commissioner's File: CIB/14516/1996

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 SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: London North

Case No: 2/28/95/14566

1. My decision is that the decision of the social security appeal tribunal given on 1 February 1996 is erroneous in point of law, and accordingly I set it aside. As it is convenient that I give the decision the tribunal should have given, I further decide that the award of sickness benefit, subsequently converted into incapacity benefit, should be reviewed, and with effect from 27 July 1995 discontinued.

2. This is an appeal by the adjudication officer, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 1 February 1996.

3. On 3 October 1994 the claimant became incapable of work. He was still incapable on 12 April 1995, the day before "the appointed day" for the purposes of the Social Security (Incapacity Benefit) (Transitional) Regulations 1995 [S.I.1995 No 310]. Regulation 31(1) and (2) of those Regulations provides as follows:-

- "31. - (1) Where it has been determined that a person is incapable of work for any purpose of the 1992 Act immediately before the appointed day and on or after the appointed day the all work test applies to him, he shall not be required to satisfy or be treated as having satisfied the condition of entitlement that he is incapable of work in accordance with that test until he has been assessed as to

incapacity for work in accordance with regulations made under section 171C of the 1992 Act (the all work test)...., so long as he satisfies the condition in paragraph (2).

- (2) The condition referred to in paragraph (1) is that, in respect of each day, a person shall be required to provide evidence of his incapacity for work in accordance with the Social Security (Medical Evidence) Regulations 1976 (which prescribe the form of doctor's statement or other evidence in each case)."

4. By 17 April 1995 the claimant had been incapable of work for 196 days, and accordingly his incapacity for work fell to be assessed under the "all work test," and not the "own occupation test" (section 171B(3) of the Social Security Contributions and Benefits Act 1992). Section 171C(2) provides for regulations to be made defining the all work test. Accordingly, in the present case from 17 April 1995 onwards the claimant, when he came to be assessed, fell to be assessed under the all work test, and when once assessed, he could no longer rely on regulation 31(1) and (2) of the Social Security (Incapacity Benefit) (Transitional) Regulations 1995.

5. The relevant provisions governing the "all work test" are contained in the Social Security (Incapacity for Work) (General) Regulations 1995. Regulation 25(1) of those Regulations provides as follows:-

"25. - (1) A person satisfies the all work test when one or more of the descriptors in Part I or Part II apply to him if, by adding the points listed in column (3) of the Schedule against the descriptor, he obtains a total score of at least -

(a) 15 points in respect of descriptors specified in Part I; or

(b) 10 points in respect of descriptors specified in Part II; or

(c) 15 points in respect of descriptors specified in Parts I and II."

Part I deals with physical disabilities, Part II with mental disabilities.

6. In the present case, the claimant's doctor diagnosed that he suffered from unstable angina and hypertension (Med 4 dated 24.5.95). On form IB50 dated 9.5.95 the claimant gave his view of his difficulties, which included problems with walking. Under the heading "walking" the claimant said that he could walk, without having to stop or feeling severe discomfort, for not more than 400 metres. Under the heading "walking up and down stairs" he stated that, although he could walk up and down a flight of 12 stairs, he had to hold on to something and had to stop to take a rest. The medical adviser, who examined the claimant on 17 July 1995, agreed with the claimant's choice of descriptor, and the adjudication officer awarded the claimant 3 points under the heading "walking", and 7 points under the heading "walking up and down stairs". However only the higher of these two awards counted. For they both fell respectively under activities 1 and 2 in Part I, and regulation 26(2) provides as follows:-

"26. (2) In determining a person's score where descriptors specified for the activities 1 and 2 in Part I apply to him, only one descriptor shall be counted and that shall be the descriptor with the highest score in respect of either activity which applies to him."

Accordingly the claimant scored only 7 points, and this was not enough to satisfy the all work test.

7. The adjudication officer reviewed the original award of sickness/invalidity benefit which had commenced on 3 October 1994, and had been converted into incapacity benefit, and decided that from and including 27 July 1995 the claimant was not entitled to incapacity benefit, because his condition had not merited 15 points. In his original review decision, the adjudication officer included both the 3 points under activity 1 "walking" and the 7 points under activity 2 "walking up and down stairs" making 10 in all, when he should only have allowed the 7 points. However, nothing turned on the mistake, and at a later stage the adjudication officer corrected his review decision. Manifestly, the adjudication officer was entitled to carry out the review because the change in the legal requirements for entitlement to benefit at the date of assessment constituted a relevant change of circumstances (see regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987 [S.1.1987 No 1968] and section 25(1)(b) of the Social Security Administration Act 1992).

8. In due course, the claimant appealed to the tribunal, who in the event allowed the appeal. They increased the award under the heading "walking" to 7 points, because they took the view that the claimant could not walk for more than 200 metres without stopping or severe discomfort, and they made a further award of 7 points under activity 5 of Part I on the basis that

the claimant could not rise from sitting to standing without holding on to something. Moreover, instead of allowing only one of the two awards of 7 points made under activities 1 and 2 (i.e. for "walking", and "walking up and down stairs") they aggregated them, and added to the total the other 7 points under activity 5, making 21 in all. On that basis, they considered that the claimant had satisfied the all work test. However, had they, as they were required to do, disregarded one of the awards of 7 points in respect of activities 1 and 2, the total would only have been 14, and the claimant would have failed. Accordingly, the tribunal clearly erred in point of law in reaching the decision they did. It follows that I must set aside their decision, but it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently substitute my own decision, and dispose of the appeal finally. Accordingly, my decision is as set out in paragraph 1.

9. For completeness, I should mention that the adjudication officer now concerned has also suggested that the tribunal erred in failing to consider whether or not the claimant might be entitled to points under Part II. He submits as follows:-

"11. I further submit that the tribunal decision is erroneous because the decision was based on insufficient evidence. The claimant was diagnosed as suffering from hypertension and this is mentioned on page 2 of form IB85. The Medical Adviser did not go on to complete pages 19 to 26 of the form. I submit that the tribunal should have sought to establish if descriptors were applicable under mental health (if necessary by adjournment and reference to the Medical Adviser)."

I reject that submission. The condition of hypertension does not, in my judgment, suggest any mental disability whatsoever, and it must be borne in mind that, under the heading "mental health" to be found on page 19 of the form, there is stated as follows:-

"Only to be completed when a mental health problem has been diagnosed or when physical or sensory conditions produce significant psychological problems. Otherwise, go on to page 27."

In my judgment, there seems to have been no grounds for completion of pages 19 to 26. Accordingly, points for mental disability simply did not arise.

(Signed) D G Rice  
Commissioner

(Date)

84 JAN 1997