

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, since I consider it expedient to make the findings of fact which are necessary to decide whether the claimant was entitled to incapacity benefit from and including 7 January 2003, I make the decision which I consider the tribunal should have given, namely, that the claimant was entitled to incapacity benefit from and including that date.
2. This is an appeal, brought with the leave of a district chairman, against the decision of the tribunal dismissing the claimant's appeal against a decision made on 7 January 2003 superseding a decision awarding the claimant incapacity benefit from and including 26 June 2000, on the ground that the claimant was to be treated as capable of work because he did not satisfy the personal capability assessment test of incapacity. The appeal has been opposed by the Secretary of State in a submission dated 10 October 2003.
3. The claimant sustained multiple injuries in his left leg as a result of separate road traffic accidents and now suffers from back pain because one leg is shorter than the other. He has also developed a depressive illness following the deaths of his three stepsons and other close family members within a short period. He became incapable of work on 26 June 2000 on the basis that he was suffering from back pain.
4. On 13 August 2001 the claimant returned a completed IB50 incapacity benefit questionnaire asserting a number of disabilities, including back pain, depression, irritable bowel syndrome and hearing loss. He claimed impairment of the physical activities of sitting, rising from sitting, bending and kneeling, standing, walking, walking up and down stairs, manual dexterity, reaching, lifting and carrying, and hearing. In relation to continence, the claimant ticked the box indicating that he had no problems controlling his bladder. He did not tick any of the boxes relating to control of the bowels, but stated that he had very bad irritable bowel syndrome and had had accidents due to stress. The claimant also stated that he had been treated for depression.
5. On 5 September 2001 the claimant's general practitioner stated on form IB 113 that the claimant suffered from a compound fracture of the left tibia and fibia, chronic back pain, insomnia and irritable bowel. On 10 September 2001 the claimant was assessed 'on scrutiny' as satisfying the personal capability assessment, on the basis that the back pain following the claimant's surgery was causing restrictions in his agility and mobility. However, the medical adviser considered that some improvement in the claimant's condition was still possible within 12 months.
6. On 24 October 2002 the claimant returned a further IB 50 incapacity benefit questionnaire in which he claimed impairment of the same activities as previously, except for manual dexterity. He ticked the boxes relating to continence in the same way as on the previous questionnaire and made a similar statement with regard to control of his bowels. The claimant also again stated that he had received treatment for depression.
7. It appears that the claimant's general practitioner was unable to contact the claimant to complete medical report form IB 113, and on 9 December 2002 the claimant was examined by an examining medical practitioner. He recorded the claimant's diagnoses as back pain, shortened left leg, insomnia, depression and irritable bowel syndrome, but awarded the claimant no points for physical descriptors. In respect of mental descriptors, the medical examiner awarded the claimant one point each in respect of descriptors 16(c), 16(e), 17(c),

17(e) 17(f) 18(d), resulting in a total score of 7 points. The decision maker agreed with that choice of descriptors and, accordingly, a decision was made on 7 January 2003 that the claimant was not incapable of work from and including that date.

8. The claimant appealed on 13 January 2003, setting out in detail his physical and mental complaints, including irritable bowel syndrome. On the same date his general practitioner wrote a letter supporting the appeal, stating that the claimant had commenced anti-depressant medication and had been referred to an orthopaedic consultant in December 2001 for long standing back pain. The decision was reconsidered on 27 January 2003, but was not revised, and the appeal therefore proceeded to hearing on 19 March 2003.

9. The tribunal dismissed the appeal, following a hearing which the claimant unfortunately did not attend. The statement of reasons gives the following reasons for the tribunal's decision:

"It was the view of the tribunal that the examining doctor had carried out a full and thorough examination, both physical and mental, and found that the claims made by the Appellant were outweighed by the findings of the examining doctor as set out in his report. The Tribunal preferred this report because it is a detailed report which is based on discussion with, observation of and clinical examination of the Appellant and which focuses on the descriptors for Incapacity Benefit. It had taken into account the difficulties described by the Appellant in his letter of appeal.

The Tribunal noted the letter from the Appellant's GP dated 13 January 2003. The letter was written following the date of the decision when the Appellant had decided to consult his GP regarding the problems and to request medication for his depression. However, at the date of the decision he was not on medication and had not consulted his GP about his condition. As the examining doctor had carried out a mental health assessment, the Tribunal preferred this as the GP's letter did not state in what way his depression affected him in respect of the descriptors. Similarly, while it referred to the Appellant's back pain, this had already been taken into account by the examining doctor who had carried out a full physical examination and applied the physical descriptors."

10. The claimant consulted a welfare rights adviser, who applied on the claimant's behalf for leave to appeal against the tribunal's decision on the grounds that the medical examiner had not carried out a proper assessment of hearing loss, that neither the medical examiner nor the tribunal had considered the issue of continence in the light of the evidence of the claimant's irritable bowel syndrome, and that there was evidence that the claimant had been suffering from depression before the decision under appeal was made. In my observations on the appeal I expressed the view that each of the grounds of appeal was arguable. However, in a submission dated 10 October 2003 the Secretary of State's representative opposed the appeal, submitting that:

"...the hearing was a paper one which the claimant did not attend. I submit that by nature a tribunal will not be able to make as comprehensive findings as a hearing where a claimant attends. In the present case the claimant provided no further medical evidence to refute the findings of the examining medical doctor. Therefore I submit that it was difficult for the tribunal not to accept these. The tribunal considered that the doctor had carried out a full and thorough examination. Additionally, the claimant did not point out any perceived inconsistencies in the report in his letter of appeal.

In CIB/15663/1996, the Commissioner held that the findings of the examining medical officer should not be under-estimated and the tribunal are entitled to give them full

weight, “based as they are on skilled observation and clinical examination as well as on the history the claimant gives”.

The Secretary of State’s representative has also submitted that the tribunal’s possible misconception about the date when the claimant first sought treatment for his depression was immaterial because the medical examiner did in fact carry out a mental health assessment which took the claimant’s depression into account.

11. Section 19(1) of the Social Security Act 1998 empowers the Secretary of State to refer a claimant to a medical practitioner for such examination and report as appears to the Secretary of State to be necessary for the purpose of providing the Secretary of State with information for use in making a decision on entitlement to benefit. It would have been open to the legislature to provide that the findings on such an examination should be conclusive, or enjoy some other special status in the determination of a claimant’s entitlement to benefit. However, Parliament did not do so and provided instead for a right of appeal to an independent tribunal against decisions based on the findings and assessment of an examining medical practitioner. In incapacity benefit and disability living allowance cases, an appeal against a decision maker’s decision will often in effect be a challenge by the claimant to the examining medical officer’s evidence, and in such a case it is inconsistent with the impartiality of the tribunal for it to approach the case on the basis that the evidence of the examining medical practitioner is generally to be preferred to other evidence.

12. As Mr Commissioner May QC made clear in *R(DLA) 3/99*, the task of the tribunal in assessing the evidence in any case, including evidence in the form of an examining medical practitioner’s report, is to determine what evidence they accept and what evidence they reject, so as to form the factual basis for their decision. The Commissioner acknowledged that the evidence of an examining medical practitioner might prevail in the majority of cases once the tribunal had carried out the weighing exercise that they are required to carry out, but as the Commissioner observed, it would fly in the face of the tribunal’s obligation to consider the whole evidence in the particular case before them if they were to accept one body of evidence on the basis that it must normally prevail over other evidence. The statement of reasons must show that the weighing exercise has been properly carried out, so that the decision of a tribunal will be erroneous in law if the statement does not disclose valid reasons for preferring the evidence of the examining medical practitioner to other evidence in the circumstances of the actual case with which the tribunal is concerned.

13. In *CIB/15663/96* deputy Commissioner Fellner (as she then was) stated that a tribunal was entitled to give full weight to an examining medical practitioner’s findings. A tribunal should of course give full weight to all the evidence, but may often be justified in regarding the clinical findings of an examining medical officer as reliable, although even clinical findings should not be regarded as conclusive and may in some cases be displaced by other evidence. However, the impact of any given degree of loss of function will vary from claimant to claimant. In some cases (such as incontinence) a clinical examination will often give very little indication of the extent of impairment of the activities which need to be considered in carrying out the personal capability assessment, although in such cases the examining medical practitioner will often be able to make an informed assessment of the degree of impairment on the basis of the claimant’s medical history and other evidence of functional ability. The examining medical officer’s choice of a descriptor will therefore generally require the exercise of judgment to a greater or lesser degree, and a tribunal may therefore not necessarily give the same weight to an examining medical officer’s choice of descriptors as it does to clinical findings on examination.

14. The Secretary of State's representative seeks to support the tribunal's decision on the basis that the tribunal found that the examining doctor carried out a full and thorough physical and mental examination of the claimant. Although the examining medical practitioner's report is extremely difficult to read, the only findings on physical examination which I can see recorded are "left leg 2 cm shorter than right" and "full mobility in both knees and hips", which appear in the "Relevant features of clinical examination" box relating to the activities of sitting, rising from sitting and bending and kneeling. Although the examining medical practitioner referred to features of the claimant's functional ability and behaviour which he observed during the assessment, I can find no evidence of any attempt to investigate whether the claimant's back pain interfered with physical activities, which was the basis on which the claimant had been found to satisfy the personal capability assessment 'on scrutiny' by the previous medical adviser.

15. The claimant did not tick any of the boxes on either questionnaire relating to control of the bowels, but made a statement on both forms stating that he had very bad irritable bowel syndrome and indicating that he had on occasions lost control of his bowels. That clearly raised the issue of whether the claimant satisfied descriptors 13(c)(loses control of bowels at least once a week), 13(d)(loses control of bowels once a month), or 13(e)(loses control of bowels occasionally). However, the examining medical practitioner simply ticked the box indicating that he agreed with the claimant's choice of descriptor, and although the claimant specifically raised the examining medical practitioner's failure to deal with the issue as one of the grounds of appeal, the tribunal made no reference to it in the statement of reasons for the decision.

16. In his reply to the Secretary of State's submission, the claimant's representative asserts that the tribunal "failed to weigh the evidence before it, preferring uncritically the Examining Medical Practitioner's report, and that adequate reasons were not given for this preferment." I agree. The examining medical practitioner's report was in my view perfunctory and did not address the crucial issues of impairment of physical activities caused by backache and incontinence of the bowels. I can find nothing in the report to justify the tribunal's characterisation of the medical examination of the claimant as "full and thorough". Even though he did not attend the appeal hearing, the claimant was entitled to a proper evaluation of the evidence. For the reasons I have given, the tribunal was not entitled to dismiss the appeal on the basis of a formulaic endorsement of the examining medical practitioner's report. I therefore hold that the tribunal's decision was erroneous in point of law and accordingly allow the appeal.

17. In those circumstances, it is not necessary to consider the other points raised by the claimant's representative. However, it is necessary to decide how to dispose of the appeal.

18. Claims of incontinence of the bowel which are attributed to 'irritable bowel syndrome' need to be treated with caution, and I must bear in mind that the claimant did not tick the boxes indicating problems controlling his bowels on either of the two incapacity benefit questionnaires which he completed. On the other hand, the claimant did give a detailed account in both questionnaires of 'accidents', and other circumstantial details indicating genuine loss of control of bowel function, rather than mere urgency of defecation. Since the claimant did tick the box indicating no problems controlling his bladder, I think it likely that the claimant did not tick the boxes relating to bowel control because he considered that he had given all the information which was needed in relation to control of his bowels in the 'additional information' section of the form. The diagnosis of irritable bowel syndrome has been corroborated by the claimant's general practitioner and the symptoms described by the claimant are entirely consistent with those which were described by the consultant physician who provided an expert report on the condition in *CIB/14322/1996*. I can find no reason to

doubt the claimant's account and, on that basis, I am satisfied that the claimant does lose bowel control at least occasionally, attracting an award of 9 points in respect of descriptor 13(e). I can also see no reason to doubt that the claimant was correctly awarded 7 points in respect of mental descriptors. The claimant therefore scores 16 points on the personal capability assessment, and accordingly is to be regarded as incapable of work. On the basis of that finding, I can substitute my own decision for that of the tribunal and it is unnecessary for me to refer the case for re-hearing.

18. For those reasons, my decision is as set out in paragraph 1.

(Signed) E A L BANO
Commissioner

(Dated) 7 July 2004