MM-v-Department for Social Development (ESA) [2014] NICom 48

Decision No: C10/13-14(ESA)(T)

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**EMPLOYMENT AND SUPPORT ALLOWANCE**

Appeal to a Social Security Commissioner

on a question of law from a Tribunal's decision

dated 10 July 2012

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal of 10 July 2012 is in error of law. Pursuant to the powers given to us by Article 15(8)(b) of the Social Security (NI) Order 1998, we set aside the decision of the appeal tribunal and direct that the appeal shall be determined by a differently constituted tribunal. The reasons for finding that the appeal tribunal’s decision was in error of law are given below.

 **REASONS**

 **Background**

2. The appellant claimed incapacity benefit (IB) from the Department for Social Development (the Department) from 28 March 1996 by reason of depression and low back pain. On 19 August 2011 the appellant was notified by the Department that his existing IB claim was to be converted into a claim for employment and support allowance (ESA) under the regulations implementing the Welfare Reform Act (Northern Ireland) 2007. The appellant was issued with and completed a Departmental questionnaire (ESA50). He was examined by a health care professional (HCP) on 10 November 2011, who prepared a report for the Department (ESA85).

3. On 10 January 2012 the Department decided that the appellant did not satisfy the limited capability for work assessment (LCWA) and that his award of IB did not qualify for conversion into an award of ESA from 31 January 2012, resulting in the termination of his entitlement. He appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member. The tribunal decided that the appellant should be awarded no points under the LCWA and disallowed the appeal. The appellant requested a statement of reasons for the tribunal’s decision. This was issued on 29 January 2013. The appellant then requested leave to appeal to the Social Security Commissioner from the LQM. This was refused by a determination issued on 7 March 2013. On 28 March 2013 the appellant made his application for leave to appeal to a Social Security Commissioner.

 **Grounds**

5. The appellant submits that the tribunal has erred in law on the grounds that:

1. he disagreed with the tribunal’s approach to the medical evidence before it;
2. he disagreed with the clinical findings of the HCP;
3. he did not understand the tribunal’s findings of fact.

6. The Department was invited to make observations on the appellant’s grounds. Ms O’Connor responded on behalf of the Department. She submitted that the tribunal had not erred in law and indicated that the Department did not support the application.

 **The tribunal decision**

7. The tribunal heard evidence that the appellant had suffered psychological upset as the victim of religious discrimination and intimidation in the mid-1990s, leaving him with symptoms of anxiety and mild depression. Subsequently, when running an equestrian business in the late 1990s, he had suffered injury by falling from a horse on more than one occasion, including a crushing injury when a horse fell on him. He was subsequently injured in a road traffic accident. The various accidents had left him with low back pain and left leg sciatica. A letter from his general practitioner stated that he also experienced pain in his hip, knees, right hand and feet.

8. The appellant, in a letter dated 25 January 2012, had taken issue with aspects of the HCP report, including the findings that his spinal curves were normal and that there was no tenderness or muscle spasm. The appellant stated that he wore a lower back support at the examination covering various lumbar discs but that neither this nor any clothing was removed for the purpose of the HCP examination. The tribunal stated that it accepted the findings on examination by the HCP relating to low back and legs, “there being no other clinical examination findings in evidence before us and none provided by [the appellant’s general practitioner]”.

9. The tribunal considered the limitations of the appellant in the areas of “Mobilising” and “Standing and sitting”. The tribunal accepted that the appellant had back, hip and knee pains which restricted his walking. However, the tribunal found that he could walk in excess of 200 metres on level ground before having to stop. On “Standing and sitting”, the tribunal accepted that the appellant would experience numbness in his right leg after sitting for about 20 minutes, and that he could stand for 10 minutes before needing to sit. However, the tribunal found that the appellant could alternate standing and sitting for at least an hour before needing to move away to avoid significant discomfort or exhaustion, resulting in an award of no points for “Standing and sitting”.

10. The tribunal further found that the appellant did not qualify for an award of points for upper limb function, that he was not entitled to an award of points for mental health descriptors and that he did not fall within regulation 29 of the ESA Regulations.

 **Errors of law**

11. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?

12. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

“(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

 **Procedural determinations by the Commissioners**

13. It was evident from the tribunal’s decision that the interpretation given by the tribunal to certain descriptors within the activity of “Standing and sitting”, as it applied between 28 March 2011 and 27 January 2013 inclusive, was at odds with views expressed by Commissioner Stockman in the case of *MT v Department for Social Development* [2012] NI Com 53 (*MT v DSD*). It was, however, consistent with the views expressed by Upper Tribunal Judge Wikeley in *MC v Secretary of State for Work and Pensions* [2012] UKUT 324 AAC (*MC v SSWP*).

14. On the basis of the divergence of views between the Northern Ireland Social Security Commissioner and the Upper Tribunal Judge, it appeared that there was an arguable case that the tribunal had misdirected itself on a point of law. A Commissioner therefore granted leave to appeal and directed an oral hearing of the appeal.

15. Subsequently, under the provisions of Article 16(7) of the Social Security (Northern Ireland) Order 1998, as amended, the Chief Social Security Commissioner directed that the appeal involved a question of law of special difficulty and that it should, accordingly, be dealt with by a tribunal consisting of three Commissioners.

 **Relevant legislation**

16. The version of the LCWA which has to be interpreted and applied in the present appeal is that in operation from 28 March 2011 up to and including 27 January 2013. This was introduced by the Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-related Activity) (Amendment) Regulations (NI) 2011 (SR 2011, No.76) (the 2011 Regulations). During the period in issue in this appeal, the text of the “Standing and sitting” activity read as follows:

SCHEDULE 2

Regulation 19(2) and (3)

Assessment of whether a claimant has limited capability for work

PART 1

PHYSICAL DISABILITIES

 *(1) (2) (3)*

 *Activity Descriptors Points*

 2. Standing and sitting. (a) Cannot move between one 15

 seated position and another seated position located next to one another without receiving physical assistance from another person.

 (b) Cannot, for the majority of 9

 the time, remain at a work station, either—

 (i) standing unassisted by another person (even if free to move around), or

 (ii) sitting (even in an adjustable chair),

 for more than 30 minutes, before needing to move away in order to avoid significant discomfort or exhaustion.

 (c) Cannot, for the majority of 6

 of time, remain at a work station, either—

 (i) standing unassisted by another person (even if free to move around), or

 (ii) sitting (even in an adjustable chair),

 for more than an hour before needing to move away in order to avoid significant discomfort or exhaustion.

 (d) None of the above apply. 0

 The “Standing and sitting” activity was, from 28 January 2013, amended by regulation 5 of the Employment and Support Allowance (Amendment) Regulations (NI) 2013 (SR 2013, No.2) (the 2013 Regulations). The amendment introduced a new sub-paragraph (iii) and had the effect that the relevant descriptor now read:

 (b) Cannot, for the majority of the time, remain at a work station, either—

 (i) standing unassisted by another person (even if free to move around), or

 (ii) sitting (even in an adjustable chair); or

 (iii) a combination of (i) and (ii),

 for more than 30 minutes, before needing to move away in order to avoid significant discomfort or exhaustion.

 Paragraph (c) of the activity was similarly amended to introduce a new sub-paragraph (iii).

 **Hearing**

17. We held an oral hearing of the appeal. The appellant was present and was represented by Ms Loughrey of Law Centre (NI). The Department was represented by Mr McKendry of Decision Making Services. We are grateful to the representatives for their helpful submissions.

18. Ms Loughrey first submitted that the tribunal had erred in law by accepting the HCP evidence on the basis that it had no other conflicting evidence. However, the appellant’s own evidence challenged the HCP’s assessment and the tribunal did not address the conflict. In particular, the appellant had taken issue with the HCP’s assessment that his spinal curves were normal and that he had no tenderness or muscle spasms in his back. The appellant submitted that the HCP examination had not included any examination of his spine – he had been wearing a back support but had not been asked to remove it - and the tribunal had not dealt with the dispute. She submitted that it was required to do so under the guidance of the Tribunal of Commissioners in *R3/01(IB)* at paragraph 20. She further submitted that the statement of reasons of the tribunal was inadequate to explain its approach to the issues in dispute.

19. Mr McKendry submitted that the HCP’s role was not to make clinical findings but to assess functional limitations. Even if the HCP examined the appellant when wearing a back brace, this would not be an error as functional limitation was to be assessed as if the claimant was wearing or using an aid or appliance. He did not accept that the tribunal had erred on this issue.

20. Ms Loughrey further submitted that the tribunal had erred in law by finding that the appellant could remain at a workstation by a process of alternating standing and sitting. She submitted that the tribunal had erred in applying the relevant statutory test, relying on the reasons given by Commissioner Stockman for his *obiter* conclusions in *MT v DSD*. Despite finding that the appellant could not stand for 10 minutes and could not sit for more than 20 minutes, the tribunal had not awarded points under the “Standing and sitting” activity. She submitted that this was a material error of law. She submitted that the part of the decision of Upper Tribunal Judge Wikeley in *MC v SSWP,* which conflicted with *MT v DSD*, and which was also *obiter*, should not be followed.

21. Mr McKendry for the Department concurred with the analysis of Ms Loughrey. He submitted that the amending legislation from 28 January 2013 was not a mere clarification of existing law, but rather added a further dimension to the relevant descriptors. He also submitted that, on the basis of *MT v DSD*, the tribunal had erred in law. On the facts as found by the tribunal, he submitted, points should have been awarded for “Standing and sitting”.

 **Discussion**

22. The first question before us concerns what the appellant characterises as a conflict between the evidence of the HCP and his own evidence regarding aspects of his examination. We will return to that issue below.

23. The second question before us is whether the tribunal was correct in its interpretation of the activity of “Standing and sitting”. As indicated above, from 28 January 2013, the “Standing and sitting” activity was amended to make express provision within descriptors 2(b) and 2(c) for remaining at a workstation by a combination of standing and sitting. The impact of this change is that the interpretation given by the tribunal to the relevant descriptor would undoubtedly have been correct for the descriptor as it stood from that date. However, we have to determine whether that interpretation was correct for the period from 28 March 2011 to 27 January 2013.

24. In *MC v SSWP*, Judge Wikeley found that it was. In paragraph 4 and 5 of that decision he summarised his conclusions as follows:

“4. In summary, and again putting to one side some significant details, my conclusion is that a person who can stand at a work station for more than an hour before needing to move away does not score six points (even if she cannot sit for that length of time). Similarly, a person who can sit at a work station for more than an hour before needing to move away also fails to score six points (even if she cannot stand for that period). Furthermore, a person who can neither stand nor sit continuously but can remain at a work station by a combination of standing and sitting for more than an hour (before needing to move away) likewise does not meet the requirements of the descriptor. However, an individual who can manage none of these scenarios meets the test under descriptor 2(c) and so scores six points.

5. The same principles apply to the interpretation of standing and sitting descriptor 2(b), where the wording is identical save that the “statutory endurance test” is a maximum of 30 minutes rather than an hour”.

25. Judge Wikeley’s decision is a reported decision of the Upper Tribunal. This means that it commands the broad assent of the majority of the salaried Upper Tribunal judges of the Administrative Appeals Chamber who regularly determine appeals in the jurisdiction to which the decision relates. We are entirely in agreement with the *ratio* of his decision in *MC v SSWP*, namely that the terms “cannot … either …or …” are used in descriptors 2(b) and 2(c) within the activity of “Standing and sitting” in a conjunctive sense, rather than a disjunctive sense. In other words, to be awarded points under descriptor 2(b), a claimant must be unable to remain at a workstation by standing unassisted for more than 30 minutes before having to move away, and also be unable to remain at a workstation by sitting for more than 30 minutes before having to move away.

26. Judge Wikeley, however, goes further than this in his decision. Although it was not, strictly speaking, necessary for the determination of the issues before him, as noted above, he commented in paragraph 4:

“Furthermore, a person who can neither stand nor sit continuously but can remain at a work station by a combination of standing and sitting for more than an hour (before needing to move away) likewise does not meet the requirements of the descriptor”.

27. We will consider below whether the tribunal was correct to adopt this interpretation of the relevant activity.

28. In reaching his decision, Judge Wikeley engaged in a linguistic analysis, a consideration of the legislative history and a consideration of R(IB)3/02 – a decision of Commissioner Howell QC, as he then was. At paragraph 27 of *MC v SSWP*, he said:

“In the present version of ESA activity 2, in force since March 28 2011, the individual functions of standing and sitting have been combined into single descriptors. The fact that they have now been combined, and referenced in terms of an ability to remain at a work station for a set duration, results in the purposive reading summarised above at [4] and [5]”.

**Legislative history**

29. ESA was implemented on 27 October 2008 by the Employment and Support Allowance Regulations (NI) 2008 (SR 2008, No.280) (the ESA Regulations). Regulation 19 of the ESA Regulations made provision for the determination of limited capability for work. A claimant would have limited capability for work if he or she obtained a score of 15 points from a combination of descriptors from Schedule 2 to the ESA Regulations.

30. Schedule 2 was divided into Part 1, “Physical Disabilities”, and Part 2, “Mental, Cognitive and Intellectual Function Assessment”. Only the physical disabilities are relevant to this appeal. The Schedule set out three columns, headed “Activity”, “Descriptors” and “Points”. In the initial form of the ESA scheme there were 11 physical activities, with between 4 and 21 descriptors to each activity. The number of points which could be awarded for each descriptor varied, being 15, 9, 6 or 0. The total number of points was counted by adding points for each descriptor satisfied by the claimant, but only the highest score in respect of each activity would be counted.

31. This appeal is concerned with the activity of “Standing and sitting”. There have been a number of amendments to the particular descriptors within this activity since they were first set out in Part 1 of Schedule 2 to the ESA Regulations. In their original form, separate descriptors applied to the functions of standing and sitting, as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| 2. Standing and sitting. | (a) | Cannot stand for more than 10 minutes, unassisted by another person, even if free to move around, before needing to sit down. | 15 |
|  | (b) | Cannot sit in a chair with a high back and no arms for more than 10 minutes before needing to move from the chair because the degree of discomfort experienced makes it impossible to continue sitting. | 15 |
|  | (c) | …. (not relevant) |  |
|  | (d) | …. (not relevant) |  |
|  | (e) | Cannot stand for more than 30 minutes, even if free to move around, before needing to sit down. | 6 |
|  | (f) | Cannot sit in a chair with a high back and no arms for more than 30 minutes without needing to move from the chair because the degree of discomfort experienced makes it impossible to continue sitting. | 6 |
|  | (g) | None of the above apply. | 0 |

32. This meant that someone who could not stand for more than 10 minutes would attract a score of 15 points. Similarly, someone who could not sit for more than 10 minutes would attract a score of 15 points. This would have been enough to satisfy the LCWA at that time. In addition, someone who could not stand for more than 30 minutes would attract a score of 6 points. Equally, someone who could not sit for more than 30 minutes would attract a score of 6 points.

33. Significant changes were brought about by the 2011 Regulations. The relevant activity was amended, with effect from 28 March 2011, to remove all of the categories referred to in the above paragraph. It ceased to be possible to attract points for inability to stand in isolation from sitting, or for inability to sit in isolation from standing.

34. The 2011 Regulations replaced the separate standing and sitting descriptors with a conflated test of inability to stand or sit for 30 minutes (descriptor 2(b)), leading to a possible award of 9 points, and of inability to stand and inability to sit for an hour (descriptor 2(c)) leading to a possible award of 6 points. The context of the new test was expressed in terms of the concept of remaining at a workstation. Nevertheless, the discrete functions under assessment were still described as ability to stand and ability to sit.

35. Judge Wikeley (*MC v SSWP*, paragraph 9) heard argument on behalf of the Secretary of State for Work and Pensions that the policy intent behind the amendment of 28 March 2011 was that the standing and sitting descriptors “relate to the ability to remain at a work station and are intended to capture disruption of this activity, such that a person moves between sitting and standing while remaining at a work station”. He was told that the Department for Work and Pensions (DWP) guidance for health care professionals’ Training and Development Handbook (July 2012 Edition) reflected the policy intention. He further heard the submission from the DWP that, because the drafting of the descriptors was ambiguous, there was a “need to clarify the wording so that it more plainly achieves the intent had been identified and it is planned to do so at the earliest opportunity”.

36. Judge Wikeley did not rely on the DWP’s guidance to health care professionals. Nevertheless, he held that the “rolling up”of descriptors from 28 March 2011 into all-purpose omnibus descriptors must have been done for a purpose (*MC v SSWP*, paragraph 21). He decided that the purpose was to focus on the functional ability to remain at a work station by whatever means in terms of standing and sitting and that that purpose was reinforced by considering the legislative context and history.

37. We cannot disagree that the rolling up of the descriptors of standing and sitting must have been done for a purpose. The obvious consequence of making an award of points for remaining at a workstation contingent on functional disability in both standing and sitting was to remove the possibility of someone who could sit at a workstation for a particular duration, but not stand, or stand but not sit, being awarded points. In itself, this was a considerable shift from the previous form of the descriptors. Due to the fact that a claimant would, from 28 March 2011, be required to have restrictions in two distinct functional areas, the number of claimants entitled to points was likely to reduce because of the change. However, on an analysis of the language alone, we do not see any basis to conclude that the purpose of the changes made on 28 March 2011 was to focus on ability to remain at a workstation “by whatever means”.

38. From paragraph 9 of *MC v SSWP*, we can see that information had been placed before Judge Wikeley that the DWP intended to bring forward amending regulations to clarify the meaning to be attached to the relevant descriptors. At paragraph 33 of his decision, Judge Wikeley held that the fact that the Secretary of State had not yet taken that step did not detract from the meaning adopted above. We agree with Judge Wikeley that the fact that the legislation had not yet been amended did not detract from an interpretation based on simple linguistic analysis. However, in our view, in respectful disagreement with Judge Wikeley, such analysis did not support the construction that the descriptor, prior to amendment by the 2013 Regulations, would test the ability to remain at a workstation by a combination of standing and sitting.

 **Policy context**

39. By section 87 of the Northern Ireland Act 1998 the Northern Ireland Minister having responsibility for social security and the Secretary of State for Northern Ireland are obliged to consult each other with a view to securing that legislation provides a single system of social security for the United Kingdom and to co-ordinate the operation of legislation to this end. The Northern Ireland department with responsibility for social security is empowered to make regulations for giving effect to these arrangements. In the case of the 2011 Regulations, the Northern Ireland Regulations make provision exactly corresponding to provision contained in the equivalent Great Britain Regulations (the Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-related Activity) (Amendment) Regulations 2011 (SI 2011, No.228) (the GB 2011 Regulations)).

40. An Explanatory Memorandum was prepared for the purpose of the passage of the GB 2011 Regulations through Parliament. However, the 2011 Regulations did not pass through the same Parliamentary process and no equivalent Explanatory Memorandum was prepared. In such a context we consider that it is appropriate to have regard to the Explanatory Memorandum in respect of the GB 2011 Regulations when seeking to understand the policy context for the 2011 Regulations.

41. Explanatory Memoranda can be referred to when the content of legislation is ambiguous. This was most recently set out by Carnwath LJ (as he then was) in *R(D) & Others v SSWP* [2010] EWCA Civ 18. He said that:

1. “In relation to explanatory notes, the orthodox position is, in my view, as stated by Lord Hope (in a speech agreed by the other members of the House, including Lord Steyn):

“… an explanatory note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous” (*Coventry and Solihull Waste Disposal Co Ltd v Russell* [2000] 1 All ER 97, 107g)

1. It is to be noted that Lord Hope’s comments were directed to the explanatory notes to an amending Order made under a statute. If anything the case for using such assistance may be even stronger in relation to a statutory instrument than a statute, at least where the explanatory material emanates from the Secretary of State who is directly responsible for making the instrument. Thus, the explanatory memoranda in the present case represent formal statements of the Secretary of State’s intentions as the author of the relevant statutory instrument, given first to the main statutory consultee, and secondly to Parliament. Furthermore, unlike primary legislation, Parliament’s function was limited to approving or rejecting the instrument, rather than amending it.”

42. Accepting for the moment that the statutory instrument is ambiguous, the Explanatory Memorandum to the Great Britain Regulations includes the following relevant passages:

“…Some of the changes aim to make the activities and descriptors clearer and simpler. Others are made to ensure that the descriptors accurately reflect the requirements of a modern workplace” (7.4);

“In order to more accurately reflect the requirements of the modern work place, the amendments remove the descriptor relating to bending and kneeling and, instead of looking at someone’s ability to remain seated or remain standing, look at their ability to remain at a workstation” (7.9).

43. We do not consider that these passages help to clarify the intention behind the legislative form given to descriptors 2(b) and 2(c) from 28 March 2011.

44. Referring in *R(IB)3/02* to the former IB descriptor of bending and kneeling “as if to pick up a piece of paper from the floor and straighten up again”, Commissioner Howell observed that the example of picking up a piece of paper from the floor was not used because the Department is obsessed with the litter in people’s houses, but to characterise a minimum standard of ability to flex and extend.

45. From the Explanatory Memorandum we see that the concept of remaining at a workstation was introduced because the Department wished to reflect the requirements of a modern workplace. This led to changes such as the removal of sitting in an upright chair with no arms from the sitting descriptors. The example of remaining at a workstation was used to characterise a minimum standard of endurance in terms of the functions of standing and sitting. However, we do not consider that the Explanatory Memorandum clearly demonstrates a policy that remaining at a workstation achieved by alternating standing and sitting represented an end in itself.

46. An absence of clarification in the Explanatory Memorandum leads us back to an analysis of the text of the descriptors.

 **Linguistic analysis and Commissioner’s decision R(IB)3/02**

47. In *MT v DSD*, Commissioner Stockman disagreed with Judge Wikeley’s interpretation of the text of the descriptors as they stood between 28 March 2011 and 28 January 2013. In particular, he disagreed with the reliance placed by Judge Wikeley on *R(IB)3/02* in his reasoning at paragraphs 31 to 34 of his decision.

*48. R(IB)3/02* was concerned with interpretation of the activity of “Bending and kneeling” – which appeared within the legislation of incapacity benefit - the predecessor scheme to ESA. From 13 April 1995 to 5 January 1997 a particular descriptor had read:

“Cannot bend or kneel as if to pick up a piece of paper from the floor and straighten up again”.

49. However, Commissioner Howell had to address the issue on the basis of the legislation as amended from 6 January 1997 to read:

“Cannot either, bend or kneel, or bend and kneel, as if to pick up a piece of paper from the floor and straighten up again”.

50. A submission was advanced that someone who could kneel to pick up paper, but not bend to pick up paper, or vice versa, should attract an award of points. Commissioner Howell was therefore hearing that primary argument in the context that amended legislation expressly provided for the task of picking up a piece of paper from the floor by a combination of bending and kneeling.

51. Commissioner Howell had concluded that the amendment had the effect of confirming the interpretation that the tasks of bending or kneeling were to be interpreted conjunctively. However, *R(IB)3/02*, while supporting the ratio of *MC v SSWP* cannot in our view be relied on to support the *obiter* conclusion arrived at by Judge Wikeley in relation to what could be accomplished through a combination of sitting and standing. In particular, where at [32] of *MC v SSWP* Judge Wikeley says:

“In R(IB)3/02 it was held that a person who can kneel to pick a piece of paper off the floor, or can bend and kneel to do so, should not score points simply because he cannot bend to do so. By the same logic, a person who can sit at a work station for the required period, or remain there by a combination of sitting and standing, should not score points just because she cannot stand there for that duration. I do not need to consider the third reason cited in R(IB)3/02.”

52. That is in our view an argument for a conjunctive approach, and, we suspect, may have been intended by Judge Wikeley purely as such. Commissioner Howell used “bend and kneel” because that is what the legislation before him said (even if it was also his view that the unamended form of it had the same effect). It does not, in our view, provide a basis for applying the same approach to a combination of sitting and standing.

53. In *MT v DSD,* at paragraphs 42 -43*,* Commissioner Stockman further said:

“In the case of “Bending and kneeling” the descriptor involved the discrete action of picking up a piece of paper from the floor and straightening up again. Commissioner Lloyd Davies [in *R(IB)2/02*] addressed the manner in which picking up a piece of paper is normally done. The task was held by Commissioner Lloyd Davies to involve a combination of bending at the waist and bending at the knee. Therefore, the two actions required to be read as involving combined action.

In the present case, the descriptor is addressed to remaining at a work station. I consider that this must be envisaged as a hypothetical work station. Some workstations may normally involve sitting, such as a desk, whereas others may normally involve standing, such as a reception counter. Judge Wikeley has suggested a supermarket checkout as an example of a workstation involving both actions. However, it seems to me that a more obvious construction is to view the test as one of remaining at different hypothetical work stations by the different methods of standing and sitting.

It is well established that the tests involved in the LCWA involve assessment of functionality. The descriptors contain hypothetical situations aimed at assessing that functionality – such as picking up a piece of paper from the floor or remaining at a workstation. The activity considered by Commissioner Lloyd Davies and Commissioner Howell [in *R(IB)3/02*] required consideration of the potentially complementary functions of bending and kneeling to pick up paper. However, the functions of standing and sitting are mutually exclusive. I consider that the particular descriptors in issue before me test endurance in relation to those functions separately when carrying out the particular exercise of remaining at a work station. If a person both cannot stand for 30 minutes and cannot sit for 30 minutes that is enough to satisfy the test”.

54. At paragraph 27 of *MC v SSWP*, Judge Wikeley found that the fact that the individual functions of standing and sitting had been combined into single descriptors resulted in a purposive reading to the effect that “a person who can neither stand nor sit continuously but can remain at a workstation by a combination of standing or sitting … likewise does not meet the requirements of the descriptor”. In our view, a linguistic analysis alone does not support that conclusion. We respectfully prefer the reasoning of Commissioner Stockman to that of Judge Wikeley. We see no warrant for reading a test of remaining at a workstation by combining or alternating standing and sitting into the legislation as it was from 28 March 2011.

55. As indicated above, from 28 January 2011 the distinct element of remaining at a workstation by a combination of standing and sitting was added to the descriptor. The Explanatory Note to the Amendment Regulations at paragraph 3.14 indicates that the amendment “removes any perceived ambiguity and clarifies that this activity looks at the ability to remain at a workstation by sitting, standing or a combination of both, for specified periods of time”. This confirms that the policy intention behind the 28 March 2011 changes was consistent with the interpretation of Judge Wikeley.

56. We are not, however, concerned with interpreting and applying the amended legislation, but rather the legislation in force from 28 March 2011 to 27 January 2013. We are also not concerned with applying the policy intention of the Department but rather the legislation in force. We find that the words of the legislation do not support the interpretation placed on them by Judge Wikeley in *MC v SSWP*.

57. We note that in *EW v SSWP (ESA)* [2013] UKUT 0228 (AAC), Judge Williams adopted Judge Wikeley’s reasoning. Unlike in *MC v SSWP*, the point was not *obiter* in *EM v SSWP.*  It does not appear that any attempt was made in *EM v SSWP* to argue that *MC v SSWP* was wrong on the point and Judge Williams’ decision contains no further analysis of the issue, so we have not felt the need to invite the parties’ submissions upon it. That *MC v SSWP* was *obiter* on the point has not played any significant role in our decision. Rather, we are departing from it because we are taking a different view after analysing the provisions and it follows that we also respectfully disagree with *EM v SSWP* on this aspect.

 **Conclusions**

58. In seeking to interpret and apply the relevant descriptors to the facts of this case we have considered the relevant legislative history, the explanatory material placed before Parliament and conducted our own linguistic analysis of the relevant provisions. We conclude that the plain meaning of descriptors 2(b) and 2(c) from 28 March 2011 to 27 January 2013, is that a person who can neither remain standing at a workstation for the prescribed time nor remain sitting at a workstation for the prescribed time scores the prescribed number of points. We cannot support an interpretation of these descriptors which adds the further condition that the person cannot remain at a work station by combining or alternating standing and sitting for the prescribed period.

59. It follows that the tribunal has erred in law by basing its decision on the conclusion that the appellant, because he could remain at a workstation by alternating standing and sitting for at least an hour, was not entitled to any points for the activity of “Standing or sitting”.

60. We find that the decision of the appeal tribunal of 10 July 2012 is in error of law. Pursuant to the powers given to us by Article 15(8)(b) of the Social Security (NI) Order 1998, we set aside the decision of the appeal tribunal and direct that the appeal shall be determined by a differently constituted tribunal.

61. As far as Ms Loughrey’s first point is concerned, because of our decision on the second point, we consider that it is not necessary to decide the issue. The appellant will have every opportunity to make submissions on this issue when his appeal comes for redetermination before a new tribunal.

(signed) K Mullan

Chief Commissioner

O Stockman

Commissioner

C Ward

Deputy Commissioner (NI)

23 October 2014