

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the appeal tribunal was erroneous in point of law. I set it aside and, in pursuance of the power in that behalf contained in section 14(8)(a)(i) SSA 1998 I give the decision which I consider the tribunal should have given. That decision is that the claimant satisfies descriptor 3(d). Accordingly, his score reaches the threshold of 15 points and he has, notwithstanding the purported supersession, at all times been entitled to incapacity benefit.

2. This is an appeal with leave granted by the chairman from the decision of an appeal tribunal dated 13.1.01. When granting leave to appeal, the chairman commented (84):

"In relation to CIB/0884/2003 what is the extent of the tribunal's obligation to consider the amendments to descriptors made by the Social Security (Incapacity for Work and Miscellaneous Amendments) regulation 1996 when they have not been put in issue before the tribunal."

I consider the effect of the decision in Howker v. Secretary of State for Work and Pensions R(IB) 3/03 later. But, if the effect of Howker is to remove the words from the descriptors involved, then clearly it is the duty of the tribunal to consider the legislation as interpreted on the basis of Howker – and CIB/0884/2003 – notwithstanding no point was expressly put to them on that basis. The Tribunal has to decide the case on the basis of the existing relevant law. I hope I have not misunderstood the point being made.

3. The claimant suffers from lumbar spondylosis, and has painful knees. According to what he told the EMP, he also suffers from piles, which might well have an influence of sorts on his ability to sit for any long period. He claimed, and was awarded, incapacity benefit on 18.10.01. He duly completed the usual PCA questionnaire, claiming benefit for sitting, saying that he could not sit comfortably for more than 30 minutes without having to move from the chair. He also claimed a variety of other points bringing a total score, on his estimation, of 13 points, 2 fewer than the required threshold for benefit. The EMP scored him no points at all. As for sitting, the EMP does not appear to have made any specific comment but, at p37, did comment that there was no clinical evidence of significant incapacity. The original award was therefore superseded by the DM.

4. The claimant appealed to an appeal tribunal, who heard the appeal on 13.1.04. They had before them a submission from the rep (64/6), which claimed total points well in excess of those put forward by the claimant. They also had a questionnaire from Doctor Bright, his GP. That took the form of questions viz "(the claimant says etc. Do you agree?" I, and my colleagues, have often deprecated the use of such questionnaires as they suggest the answer desired by the questioner and in that sense, the questions are leading. I pay no attention to that questionnaire nor is there any need to do so.

5. The appeal tribunal awarded 3 points each for walking; walking up and down stairs (which doubles up with walking); rising from sitting; standing; and bending and/or kneeling. That gave a net score of 12, still short of the threshold. However they, carefully looked at sitting, and decided that he only qualified under 3(e) – cannot sit comfortably for more than 2

