

Considering different medical opinions
(BAMS + GP)

1/3/6

MJG/SK/LB/2

Commissioner's File: CIB/13036/96

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

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 10 November 1995 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to an entirely differently constituted social security appeal tribunal: Social Security Administration Act 1992, section 23.

2. This is an appeal (with the leave of the tribunal chairman) to the Commissioner by the claimant, a man born on 12 March 1939. The appeal is against the majority decision of a social security appeal tribunal dated 10 November 1995 which dismissed the claimant's appeal against a review decision of the adjudication officer issued on 30 June 1995. That officer decided that, in connection with the award of invalidity benefit made to the claimant as from 18 November 1991, the claimant ceased to satisfy the requirements for invalidity/incapacity benefit because he did not satisfy the "All Work Test" as from 28 June 1995 none of the exempt conditions applying and his not having reached 15 points from physical descriptors. He had in fact reached a total, according to the adjudication officer's decision, of 12 points calculated as follows,

"Reaching with arms	Cannot raise one arm above the head to put a hat on	6 points
Lifting and carrying	Cannot pick up a carton of milk with one arm	6 points
Using hands	No problem with manual dexterity	0 points

3. The majority made the following findings of fact,

"[The claimant] has no dexterity problems with the left hand. He can use a pen or pencil. He can tie a bow in laces or strings. He can turn a tap or control knobs on a cooker with his right hand. He can pick up a coin which is 2.5 centimetres or less in diameter with one hand."

4. They gave as their reasons for decision (among others),

"We accept Dr. Endbinder's [the BAMS doctor's] evidence. There is normal ability to dress and undress and fasten shirt buttons. There is full range of fingers in [the claimant's fingers] and no loss of fine manipulation. We did not accept Dr. Bennett's [the claimant's general practitioner's] evidence because she has only known [the claimant] for 6 months and she depends heavily on what [the claimant] tells her."

5. The dissenting member of the tribunal gave as reasons for dissent,

"I thought Dr. Endbinder's evidence contradictory. I accepted Dr. Bennett's evidence. I would have given points for lack of manual dexterity. I consider inability to use a pen or pencil implies an inability to use it for some time in a normal (i.e. not two-handed) way."

6. The claimant's representative (Citizens Advice Bureau) has put forward detailed grounds of appeal many of which are really factual or medical in nature, whereas appeal to the Commissioner in this jurisdiction lies only on questions of law.

7. However under the heading "Acceptance of medical evidence", the representative submits as follows,

"The majority accepted Dr. Endbinder's evidence which at a maximum took 25 minutes (including dressing and undressing) but [the claimant] has always contended that only 20 minutes was spent at the medical. They did not accept Dr. Bennett's evidence as she relied heavily on what [the claimant] had told her, only knowing him for 6 months, [the claimant's] previous doctor having recently retired. We contend that Dr. Bennett would have had all [the claimant's] medical record to hand at the time of his appointment with her: she relied on her own medical opinion, and not on a patient's observations. We would also note that Dr. Desai [the medical assessor who sat with the tribunal] was only asked if [the claimant's]

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condition was named. [Dr. Desai in fact replied that it was not named as such]. We believe that natural justice was not applied at this Tribunal by the acceptance of one medical opinion and the non-acceptance of the other and would again assert that a problem of manual dexterity is present and is not being correctly considered by the Tribunal."

8. In the majority of cases, of course, the mode in which the tribunal handles the medical evidence before it is not subject to appeal to the Commissioner because it does not raise questions of possible errors of law. The use of the expression "natural justice" by the claimant's representative is really misconceived in this context because that relates only to eg. not allowing a person to have a proper hearing. However I have ultimately concluded, despite the careful submission to the contrary of the adjudication officer now concerned (dated 14 August 1996), that there is force in the submission (quoted above) of the claimant's representative.

9. The letter from Dr. Bennett referred to is dated 16 October 1995 and reads as follows,

"I am writing as a result of a request by [the claimant] who is a patient of mine. His Incapacity Benefit has been stopped on the grounds that he is no longer incapable of work. It seems the basis of his failure was due to the fact that it was thought he had no problems with manual dexterity. I have only recently known [the claimant] as he has only been a patient of mine for the past 6 months. However after a long chat with him recently he gives a history of having pins and needles continuously in his lower arms. If he does any work, he develops a severe pain in the right wrist and is unable to grip knives and forks or scissors for example. He saw Orthopaedic Surgeon, Mr Hayes and although I do not have the specific letter, he says he was told to retire on medical grounds. On the basis of this history therefore, it seems that he does indeed have problems with his manual dexterity if he attempts any form of work. I hope this letter will be helpful in his appeal against the decision."

10. That is clearly a detailed and considered letter from the claimant's general practitioner and in my view should not be discounted simply because the general practitioner in question had only known the claimant some six months. That was not the claimant's fault as it appears his previous GP had retired. Moreover, the letter is also clearly a detailed genuine attempt to assist the claimant in his appeal and should have been considered by the tribunal as such. They should not have discounted it by saying, as they did, that they did not accept the evidence because the GP, Dr. Bennett had only known the

claimant for six months and depended heavily on what the claimant told her.

11. Consequently I must set the decision of the social security appeal tribunal aside and remit the case for rehearing and redetermination in accordance with the normal formula in the 1992 Act, i.e. by an entirely differently constituted medical appeal tribunal. The new tribunal will need to consider anew all the matters including the question of manual dexterity and Dr. Bennett's evidence. They will also need to consider any further medical evidence that has come to light. In that context I would mention that the claimant's representative has sent to the Commissioner a copy of a written report dated 2 May 1996 (i.e. after the date of the original tribunal) from Mr A G Hayes, Consultant Orthopaedic Surgeon. That report should be placed before the new tribunal that hears this case. The report reads as follows,

"I saw [the claimant] for review today. He continues to have significant difficulties with his right arm as a result of longstanding problems with his shoulder which relate to a chronic subacromial bursitis associated with arthritis of the acromio-clavicular joint. This problem has resulted in him having an operation in September 1991 involving partial acromionectomy and repair of a completely ruptured rotator cuff. While he made a reasonable recovery from this procedure he has continued to be disabled and prevented from returning to his previous employment despite the fact that he has tried to do this, going from working for a firm where he was involved in keeping up with colleagues to support a collective bonus, to trying to work on his own. I understand that he was at one time receiving Disability Benefit [this presumably is a reference to invalidity/incapacity benefit] and without the stresses of work his arm was comfortable. However I understand that he has now been turned down for Disability Benefit on the grounds that he is capable of office work. In my view this is incorrect, since he is neither intellectually qualified to do office work, nor is he likely to be able to use his right arm in the sort of repetitive way for writing or operating a keyboard without putting a lot of strain on his shoulder and arms. I think this decision should be reviewed."

12. The new tribunal will naturally need to give weight to that letter from Mr Hayes because, although it was given after the date of the tribunal's hearing and after the date of the original adjudication officer's review decision, it does cast considerable light on the whole problem and does constitute strong support for the claimant's appeal. Nevertheless, ultimately of course, the decision must be that of the new tribunal. My having allowed the appeal on the grounds above

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stated is not in itself an indication of a view by me as to what the ultimate result of the new tribunal's hearing should be.

13. Lastly I should mention that in Observations dated 30 September 1996 the claimant, through his representative, asks for an oral hearing before the Commissioner of his appeal. However, as I have allowed the appeal on the documentation before me and the case will have to be remitted for rehearing to another social security appeal tribunal, there is in the circumstances no point in there being an oral hearing before the Commissioner as this is not case where it would be appropriate for the Commissioner to give a final decision himself on the substantive issue as to incapacity. Consequently, in accordance with the rules in regulation 15 of the Social Security Commissioners Regulations 1987, I must refuse the request for an oral hearing.

(Signed) M J Goodman
Commissioner

(Date) 27 NOV 1996