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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CI/499/2000

Starred Decision No: 24/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 4th June 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Decision:

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.
- 1.1 The decision of the Manchester appeal tribunal held on 20th September 1999 is erroneous in point of law: see paragraphs 12 to 25.
- 1.2 Accordingly, I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal to the tribunal, I refer the case to a differently constituted tribunal for determination.
- 1.3 I direct the tribunal that rehears this case to conduct a complete rehearing. In particular, the tribunal must determine:

whether the accident resulted in a loss of faculty;
what disabilities result from the loss of faculty;
whether there was another effective cause of any of those disabilities;
the extent of the disablement resulting from the loss of faculty, applying if necessary regulation 11 of the Social Security (General Benefit) Regulations 1982;
the period to be taken into account by the disablement;
whether the assessment is final or provisional.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with my leave. The Secretary of State supports the appeal on the ground that the tribunal did not make clear the basis of its assessment.

The history of the case

3. The claimant was injured at work on 8th December 1998. The best description of his injury is from the report at page 24: 'longitudinal laceration of his extensor tendon of his index finger (L) hand'. He is right-handed.
4. The laceration was stitched and the finger was encased in plaster for 2 to 3 weeks. After that, the claimant received wax treatment and physiotherapy and was prescribed pain killers.
5. The claimant claimed disablement benefit in respect of the accident on 2nd February 1999. He wrote that he could not bend the finger and that as a result of the accident he was 'depressed and upset'.
6. He was examined by an adjudicating medical authority on 18th March 1999. The doctor identified the claimant's disablement as soreness and an inability to make a complete grip. The resulting disablement was assessed at 5% from the first permissible date (23rd March 1999) for life.
7. The claimant appealed against that assessment, arguing that he had 'basically lost use of this hand.' He attended the hearing of his appeal and gave evidence through an interpreter. He was not represented. His evidence covered the injury and treatment. On disablement, he

said that he had pain in the finger that spread to the other fingers when he held something. He took medication for the pain, but it had side-effects. His everyday problem was coping because of the pain. He was no longer able to find work because of his condition.

8. The tribunal found that the claimant had a loss of faculty ('impaired manual dexterity') and was disabled as a result. It confirmed the period of the assessment, but increased the degree of assessment to 8%.

9. The full statement of the tribunal's decision reads:

A. 'We have considered the scheduled evidence, listened to the Appellant, and examined him. We have also viewed x-ray films, and considered the additional evidence submitted today. He spoke to us by means of ... the interpreter, describing the occurrence of his relevant injury and the ensuing treatment in hospital. His problem is predominantly pain in his injured finger, this spreading to other fingers of the same hand when the hand is used in certain ways. Everyday problems are caused by this condition, and he has been told that his disability will be life-long.

B. 'On examination there is no wasting of the shoulders, arms or forearms. Movement of shoulders, elbows and wrists are normal. The right hand looks and functions normally. The left hand looks normal except that there is an irregular, healed but tender scar on the dorsum of the left index finger. This is held in an extended position continually.

C. 'Movement of the joints was as follows:-

Distal I.P. - 25° flexion from full extension.
 Proximal I.P. - 45° flexion from full extension.
 M.P. joint - 90° flexion from full extension.

D. 'His apparent disability is in excess of the expected consequences of this particular injury.'

The errors of law

10. This statement is, unfortunately, typical of many decisions on the assessment of disablement. It illustrates a number of common deficiencies.

The personal injury

11. The full statement of the tribunal's decision does not refer to the injury. This was not necessary, because there was no dispute about the nature of the injury suffered in the accident.

The loss of faculty

12. The tribunal found that the loss of faculty was impaired manual dexterity. There are three deficiencies in this.

13. *Mental state* It made no findings on the claimant's mental state and did not investigate it during the hearing. It should have investigated and made findings on that issue. The

claimant had written in his claim that he was upset and depressed. The Secretary of State argues that it was not necessary to investigate that evidence, because the claimant did not mention it in his oral evidence. I reject that argument. In some cases, it may be appropriate for a tribunal to ignore something that the claimant does not mention at a hearing. In this case, the claimant was not represented and was speaking through an interpreter. In those circumstances, the tribunal should have followed up that evidence in order to find out whether the claimant was upset and depressed and, if he was, how that affected his ability to function.

14. *Pain* Another deficiency in the identification of the loss of faculty is pain. The claimant's evidence was that he was affected by pain. Pain is relevant if it prevents or hinders the performance of an activity. It is not clear whether the tribunal accepted the claimant's evidence of pain. Pain is not expressly mentioned in the decision notice as part of the loss of faculty, although 'impaired manual dexterity' is wide enough to include pain. The penultimate sentence in paragraph A in the statement reads like a finding of fact that the claimant's main problem was pain, but in its context that may merely be a record of the claimant's evidence.

15. The tribunal could have taken one of three views on the evidence of pain. First, the tribunal may have accepted in full the claimant's evidence of pain and its effects. Second, the tribunal may have accepted that the claimant was in pain, but not to the extent or in the way that he alleged. Third, the tribunal may not have accepted that the claimant was in pain at all. It is not clear which of those was the tribunal's view. I suspect it was the second, but it should have been made clear.

16. *Disfigurement* Disfigurement is a loss of faculty, even if it is not accompanied by a loss of physical faculty: see the definition in section 122(1) of the Social Security Contributions and Benefits Act 1992. The claimant's finger had a scar that should have been included in the loss of faculty. Of course, that does not mean that it would have led to an increase in the disablement.

Disablement

17. As there were deficiencies in the tribunal's investigation of, and findings of fact on, the claimant's loss of faculty, it did not have a proper basis for determining the extent of his disablement.

18. There is also another deficiency with disablement. Paragraph D of the statement is slightly euphemistic. What the tribunal is saying is that it did not accept that the claimant was as disabled as he claimed to be. This may have been because the clinical findings did not support his evidence or because his claimed disability did not make anatomical sense given his injury. The tribunal was entitled to reach that conclusion, but (a) it should have explained why and (b) it should have made clear on what basis it assessed disablement. Did it base its assessment solely on the clinical findings and the disablement likely to be associated with the type of injury and those findings? Or did it base its assessment on particular parts of the claimant's evidence?

Reasons

19. The tribunal's decision is also deficient in failing to give any indication of how and why it made an assessment of 8%.

20. There is a limit to which a tribunal is able to explain an assessment. I respectfully agree with these comments of Mr Commissioner Mesher in CI/7030/1999, paragraph 12:

‘The MAT went on to assess disablement at 10%. Often such assessments are a matter of impression in the light of the professional expertise of the medical members of the appeal tribunal. Therefore the reasoning behind the assessment often cannot be unpacked very much.’

But, as those comments recognise, there is scope for some unpacking of a tribunal's reasoning.

21. A tribunal cannot explain why it assessed disablement at 22% rather than at 23%. Nor can it explain why it changed an assessment by a few percent. However, there are some things that it can do.

22. First, it can give a general indication of why it made an assessment at around a particular level. For example, it might point out that (say) a single figure assessment is appropriate for disablement from prescribed disease A11 (vibration white finger), because it is intermittent, dependent on temperature and limited to the fingers. Or it might point out that an assessment of (say) 50% is appropriate for disablement from agoraphobia, because the claimant, although prevented from leaving home by the condition, nevertheless led a happy, fulfilling and active life within the confines of the home.

23. Second, it may be able to explain its assessment by reference to the scheduled assessments for particular amputations in Schedule 2 to the Social Security (General Benefit) Regulations 1982. Take the case of a claimant who has injured a finger. There is a scheduled assessment for the loss of the finger. A claimant who has injured a finger that is as a result painful and held in a fixed position may be more severely disabled than if the finger had been amputated. However, a claimant who has no pain and some remaining use of the finger would not merit an assessment as high as that scheduled for loss.

24. Third, the tribunal is able to explain the significance of its clinical findings in terms of function. For example, the detailed findings in this case on movements of the joints could be explained in terms of how much useful grip the claimant retained.

25. All of those explanations were possible in this case. They are not demanding and would require at most only an additional sentence or two. But the tribunal did none of them. This would have mattered less if the tribunal had made clear the extent of the disablement on which it based its assessment. The facts would then largely have spoken for themselves. But the tribunal did not do that.

The ‘rough guide’ to assessment

26. The Secretary of State's observations incorporate a memorandum from Dr Susan Reed. Her memorandums are a recent innovation in disablement benefit appeals. They contain

much information that is of general interest as background to the case and an analysis of the evidence. At the rehearing, the tribunal will no doubt find most of the memorandum very helpful. However, there is one part of it that requires comment.

27. Dr Reed gave the following as a 'rough guide' to assessment:

| | |
|---------------|--------------------------|
| 'Less than 1% | virtually no disablement |
| 1-5% | minimal |
| 6-10% | very mild |
| 11-20% | mild |
| 21-30% | mild/moderate |
| 31-50% | moderate |
| 51-80% | moderately severe |
| 81%+ | severe' |

28. This reproduces the rough guide set out in the 'Medical Assessment Framework' (MAF) that is used by examining doctors who carry out examinations for disablement benefit and severe disablement allowance. The MAF is much more detailed and gives guidance on the appropriate levels of assessment for different degrees of mental disablement and physical disablement of the spine or limbs. It is regularly cited by examining doctors as the reason for their assessments.

29. No doubt, the MAF was introduced in an attempt to improve the standards of assessments and to increase consistency between them. That is welcome. But guidance must not displace the legal test. The test, and the only test, to be applied is laid down by Schedule 6 to the Social Security Contributions and Benefits Act 1992. A claimant's disablement is assessed by comparison with 'a person of the same age and sex whose physical and mental condition is normal' and then expressed as a percentage.

30. I do not want to make too much of what is only presented as a 'rough guide'. Dr Reed knows what the legal test is, because she refers to it several times. However, the MAF has become a feature of assessments by examining doctors and will appear more and more often in the papers before tribunals. In general terms, there is no harm in thinking of disablement as becoming more severe as the percentage increases. However, there are dangers that must be avoided in making matters as precise as the rough guide.

31. First, the descriptions set out by Dr Reed must not be used in substitution for the legal test.

32. Second, they must be read not as absolute indications of disablement but as comparative only for persons of the same age and sex.

33. Third, the bands are not perhaps drawn in the most appropriate places. For a start, they do not match the assessment of disablement for severe disablement allowance. The same principles of assessment apply to disablement benefit and severe disablement allowance. A person is entitled to severe disablement allowance if 80% disabled, and an assessment between 75% and 79% is treated as 80%. But the 'rough guide' does not describe disablement as severe until 81%. Turning to disablement benefit, the important figures for a claimant are those that make a difference in payment of benefit. Assuming that there are no other assessments to be aggregated, the relevant figures are first 14%, then 25%, 35%, 45%

and so on. It is perhaps unfortunate that the rough guide does not reflect the legally relevant divisions.

34. Everything I have said applies to the more detailed MAF as it applies to the rough guide.

Summary

35. As the appeal tribunal's decision is erroneous in law, it must be set aside. I cannot give my own decision, because further investigation of the facts is required. There must, therefore, be a complete rehearing of this case before a differently constituted appeal tribunal. The appeal tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions. As my jurisdiction in this case has been limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the appeal tribunal on the law to apply.

Signed on original

**Edward Jacobs
Commissioner
6th February 2001**