

SOCIAL SECURITY ADMINISTRATION ACT 1992**APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW****DECISION OF SOCIAL SECURITY COMMISSIONER****Name:****Social Security Appeal Tribunal: Greenock****Case No: 560/95/19276****[ORAL HEARING]**

1. This claimant's appeal succeeds. I hold the decision of the social security appeal tribunal dated 14 November 1995 to be erroneous in point of law and accordingly set it aside. I remit the case to the tribunal for determination afresh in light of the directions and guidance which follow.

2. This case came before me at a hearing, which I had granted at the request of the claimant. At it the claimant was represented by Mr Leigh Oliver, a Welfare Rights Officer with the Welfare Rights and Representation Unit, Greenock. The adjudication officer was represented by Mr William Neilson, of the Office of the Solicitor in Scotland to the Department of Social Security. I am grateful for the careful and detailed submissions made to me upon the issues.

3. The factual background to the case is relatively straightforward. In 1984 the claimant had been awarded invalidity benefit. The Social Security (Incapacity for Work) Act 1994 then replaced sickness benefit and invalidity benefit by incapacity benefit. It did so in part by inserting a new Part XIIA to the Social Security Contributions and Benefits Act 1992. The Social Security (Incapacity Benefit) (Transitional) Regulations 1995 then provided for the changeover and, so far as this case is concerned, regulation 17(1) read together with regulation 1(1) provided that a person entitled to invalidity benefit immediately before 13 April 1995 was, after that date, to be treated as if in possession of an award of long-term incapacity benefit otherwise to be called "a transitional award of long-term incapacity benefit". It was then provided, by regulation 17(2) that subject to the provisions in Part VI that:-

"...a person's entitlement to a transitional award of long-term incapacity benefit shall be subject to him being incapable of work as determined in accordance with Part XIIA of the 1992 [Contributions and Benefits] Act".

That, then, was the claimant's position from and after April 1995.

4. On 26 July 1995 an adjudication officer reviewed the awarding decision and for the period from and including the date of review revised the decision so as to hold thereafter the claimant not to be entitled to incapacity benefit. The adjudication officer first held him no longer to satisfy the test for incapacity for work under section 171A of the 1992 Act - part of the new Part X11A. What the adjudication officer appears to have decided was that there had been a relevant change of circumstances entitling a review under section 25(1)(b) of the Social Security Administration Act 1992. The adjudication officer did not properly refer thereto and founded upon regulation 17(4) of the Social Security Claims and Payments Regulations 1987. However, for the reasons explained in CSIS/137/94 by a Tribunal of Commissioners, that regulation did not of itself provide power to review but merely was the doorway to a proper exercise of the power conferred by said section 25. The adjudication officer then, correctly, accepted that the onus for establishing that the claimant as at July 1995 no longer satisfied what were the then relevant statutory provisions for entitlement to incapacity benefit fell upon him, following the reasoning in R(S)3/90 and the effect of said regulation 17 as therein determined and set out in paragraph 6 thereof. The claimant appealed to the tribunal.

5. When the case came before the tribunal the material put before them by the adjudication officer consisted of a written submission including a summary of facts, now at documents E and F of the bundle, an incapacity for work questionnaire completed by the claimant which indicated that because of Dupuytren's contracture in each hand he had had an operation on the left and was awaiting one for the right hand. In the latter document he indicated that with neither hand could he turn on a tap or the knobs on a cooker or pick up something small like a 2p coin nor could he tie a bow in shoelaces or a piece of string. He explained that he had difficulty in tying his laces tight and that his hands were in cramp every morning but he had been advised to apply a particular cream every 2 hours and sit on his hands in cold weather and to wear thermal gloves. That he suffered from Dupuytren's contractures was confirmed by the claimant's general practitioner. Upon a referral a medical assessment was prepared and a clinical history recorded. There was also recorded what the claimant found on a typical day, noting first, and again, the massaging of his hands to get some feeling back in the morning. There was also this passage:-

"can lift a cup of tea, but finds some difficulty with a hot kettle, although he can manage it. He thinks it is just lack of confidence with a hot kettle."

The medical assessor recorded no problem with lifting and carrying - document 43 - nor any problem with manual dexterity - document 44. He gave observations as to why he so recorded. Thus it came about that both the claimant and the medical assessor were in agreement about lifting and carrying but in disagreement about manual dexterity. The adjudication officer at document 60 recorded the claimant's assessment, the doctor's assessment and then gave his own assessment, which coincided with the latter. In the panel for notes he repeated what the doctor had observed as the claimant's behaviour during assessment. The tribunal also heard a considerable amount of verbal evidence from the claimant himself with the assistance of his representative. The doctor who had visited the claimant had pronounced him to have a good grip and the tribunal's medical assessor explained that that would generally imply that he should be able to carry things. On the particular issue of manual dexterity the tribunal recorded evidence that the claimant had completed the questionnaire himself with a pen but that it had taken "a while". The appellant

also said that he felt unable to turn a tap or control knobs on a cooker with one hand. The other descriptors he could manage "but with some difficulty". On lifting and carrying the claimant said that he would be unable to lift and carry a 2.5kg bag of potatoes with one hand but felt he could do all descriptors with some difficulty (presumably the descriptors other than the one about the bag of potatoes.) It was explained to the tribunal that the claimant had a especially adapted kettle which he could pour without lifting.

6. Arising from that evidence the tribunal made these findings of fact, so far as now relevant and not so far recorded in the preceding history:-

- "(f) The appellant suffers from cramp and stiffness in both hands first thing in morning. These symptoms are alleviated after massage with cream for rest [of?] day.
- (g) Appellant completed and signed questionnaire using a pen.
- (h) Appellant has good grip in both hands, no obvious loss of sensation in either hand and in spite of mild deformity in both hands still has good function.
- (i) Manual dexterity in lifting and carrying were one physical activity which appellant claimed he had difficulty in doing."

The tribunal refused the appeal giving as their reasons this:-

- "(a) taking into account all facts found in box 2 paras (f) to (k) [(j) in the manuscript version] above. Tribunal considered following physical activities were only ones applicable in this case viz:
 - (i) lifting and carrying: appellant is unable to pick and carry a 2.5kg bag of potatoes with one hand.
 - (ii) manual dexterity: appellant cannot turn a tap or control knobs on a cooker with one hand.
- (b) appellant has not satisfied all work test as total points reached for physical activities are 14."

In a table, document 88 of the bundle, they indicated that on lifting and carrying they awarded 8 points because the claimant could not pick up and carry 2.5kg bag of potatoes with either hand and 6 points because he could not turn a tap or control knobs on a cooker with one hand.

7. In presenting the claimant's case to me, Mr Oliver pointed first to the state of the evidence before the adjudication officer, in particular the medical officer's assessment provided for his assistance and then to certain passages in the medical advisor's guide to incapacity benefit. His concern appeared to be to make a case that the medical officer in this case had not provided the material required by the guide for the benefit of the adjudication officer and, indeed, he went on to submit that the adjudication officer had not considered matters sufficiently widely when reaching his decision.

8. I pause at this stage to remind myself that my jurisdiction is limited to the sufficiency as matter of law of the decision of the tribunal and not that of any other adjudicating or advisory authority. Nonetheless, in this case I am satisfied that the tribunal decision is in error of law in part at least because what should have been provided for their consideration was not sufficiently provided and so it may be legitimate if I first observe, albeit necessarily somewhat tentatively, on the matters referred to by Mr Oliver. As a preliminary, I accept that it is desirable on the part of any of the adjudicating authorities, and in particular appeal tribunals, to identify the activities which are in issue - that is, of course, "activities" as set out in the left hand column of the schedule to the Social Security (Incapacity for Work) (General) Regulations 1995. Here, as the tribunal acknowledged, the only relevant activities were "lifting and carrying" and "manual dexterity". The same schedule sets out the descriptors ranked according to their incapacitating effect. The guide, at paragraph 903, says that:-

"It is important to remember that the clinical evidence gained from medical assessment must be weighed up in conjunction with the rest of the information gained from the process. Any conflicts within this evidence should be addressed and explained."

Paragraph 906 states:-

"Always justify the descriptor except where the client has stated there is absolutely no disability and you agree with them."

And then paragraph 909 says that:-

"Remember that the adjudication officer will choose the descriptor that in their view, on the balance of probabilities, is correct given the evidence before them to support that choice. The assessing doctor must therefore ensure that, if the clients and the assessing doctors choice of descriptor differ, the evidence before the adjudication officer clearly allows them to choose the assessing doctor's descriptor and if necessary support that decision at appeal."

There is also some general guidance about what should be recorded about symptoms and during the assessment. I do not think that there is anything further in the guide that I need to quote for the purposes of this decision. At the stage of the adjudication officer's decision nothing about lifting and carrying was in issue and in respect of manual dexterity the medical examiner had rejected the claimant's case about inability to turn a tap or the knobs on a cooker without explanation. The claimant's contention that he could not pick up something small like a 2p coin was negated and the negation was explained. The claimant's contention that he could not tie a bow does not appear to have been fully answered. The examining doctor only recorded that the claimant tied:-

"...shoe laces and does up buttons, though has some difficulty."

The adjudication officer should have appreciated the extent of the dispute before him. Whilst he adequately answered, in the passage in the "notes" box, the point about ability to pick up something small, the other contentions by the claimant were not adequately dealt with in my

judgment. That may have been because the doctor had not provided the necessary information. But in the result it matters little because the tribunal overturned his decision. Their findings of fact were inadequate, their only direct findings being in the reasons. That is enough to warrant my decision. But I enlarge below.

9. The tribunal, in dealing with the tap/cooker control knob descriptor, failed to specify with which hand the appellant was found not to be able to turn them. Nor have they explained why they rejected the claimant's evidence about the other hand. The matter is important because if the true finding had been that he could not turn a tap or control knobs with *either* hand he would have got, on that descriptor alone, the 15 points necessary for an award.

10. There was submission before me on either side about the proper approach, at least by the tribunal, to such issues. Mr Oliver submitted that the matter ought to be considered in a reasonable way. Thus, for example, it should be upon the basis of normal use of taps and cooker knobs, that is to say a use involving some repetition. In that regard he referred to what the Chief Commissioner in Northern Ireland said in decision CI/95(IB), at paragraph 7, namely:-

"The real issue is whether, taking an overall view of the individual's capacity to perform the activity in question, he should reasonably be considered to be incapable of performing it. The fact that he might occasionally manage to accomplish it would be of no consequence if, for most of the time, and in most circumstances, he could not do so."

He went on later to say that:-

"Accordingly, as I see it, there must be an overall requirement of "reasonableness" in the approach of the tribunal to the question of what a person is or is not capable of doing, and this may include consideration of his ability to perform the various specified activities most of the time. To that extent "reasonable regularity" may properly be considered."

I did not understand Mr Neilson strongly to dissent from that. I rather agree with that approach. The new tribunal will have to consider manual dexterity in light of that guidance and will have to deal with each of the descriptors raised before them. As I have already indicated neither the adjudication officer nor the tribunal have dealt properly, or at all respectively, with the coin descriptor nor with the tying of a bow descriptor. On the question of use of a pen I regard the tribunal's approach as faulty. That an individual managed to complete a form does not necessarily and simply mean, as the tribunal seemed to have concluded, that a pen or pencil could be used. Applying the Northern Ireland Chief Commissioner's approach, that has to be determined in light of reasonableness and some regularity. The evidence before the tribunal was that the claimant did complete the form using a pen - "but it took a while". That qualification should have been explored. It may be that even so the claimant was in a general way able to use a pen or pencil. But if the "while" was sufficiently long or if there were breaks or rests it may be that the answer should be otherwise. The tribunal decision is further defective in law because they have not dealt as fully as they should with these matters.

11. Before turning to the lifting and carrying activity I should observe that there were submissions upon the relevance of the claimant's ability to use his specially adapted kettle. Both Mr Oliver and Mr Neilson were at one that it was a normal kettle and not a specially adapted one that should be considered. Accordingly, in respect of lifting and carrying, there was an issue about descriptor 8(c) which reads:-

"Cannot pick up and pour from a full saucepan or kettle of 1.7 litre capacity with either hand."

Satisfaction of that could again gain the necessary 15 points to qualify for benefit. The tribunal decision is in error of law because they have made no finding upon that descriptor which was in issue before them, nor they have given any reasons to explain upon what basis they considered the matter nor why they rejected the claimant's evidence so far as directed towards that descriptor.

12. The only descriptor under lifting and carrying which the tribunal dealt with was another matter upon which they made no relevant finding of fact but from their reasons it is clear that they were satisfied that the claimant make descriptor 8(f) - inability to pick and carry a 2.5kg bag of potatoes with one hand. In the table attached they indicated satisfaction of descriptor 8(d) - inability to pick up and carry the bag of potatoes with *either* hand. There was thus an inherent contradiction between their findings and their award. That is another error of law. But in any event, even if "one hand" was the true finding the tribunal have again failed to determine which hand. That is important in order that the claimant may properly understand their decision. The new tribunal will require to consider matters with rather more care and bearing in mind the directions and guidance contained herein.

13. Finally I should record that Mr Oliver sought to persuade me that the proper context within which to determine the descriptors was that of a working situation. Thus, he submitted that kettle pouring or saucepan pouring should be considered in the context of a commercial kitchen. Mr Neilson resisted that and, although this is described as the "all work test", I have no doubt that the Chief Commissioner in Northern Ireland was correct when he determined in the case cited that an appeal tribunal should not have regard to such a factor but confine their considerations to ability to perform the everyday activities specified in the descriptor. That, as it seems to me, is so because the range of descriptors taken as a whole designed to give an overall picture of an individual's general ability or inability to undertake activities which may bear upon a general working situation. It seems to me that the purpose of the scheme is sufficiently obvious, namely that if sufficient descriptors are satisfied there is probably little useful work or employment which an individual could either do or obtain. I therefore direct the new tribunal to apply the descriptors generally in line with the foregoing guidance, but not in a working situation.

14. In respect that some of the foregoing reasons demonstrate that the adjudication officer's decision itself was bad in law I must direct the new tribunal to set aside that decision as having been based upon an inadequate assessment and with inadequate reasons. Whether that results in an entitlement to benefit continuing until the date of the tribunal decision, which may then not be recoverable, are matters which were touched upon before me but upon which I offer no view at this stage it being in my view premature to do so. The new tribunal

will then also have to give the decision which they determine the adjudication officer should have given.

15. For the foregoing reasons this appeal must be allowed and the case remitted accordingly.

(Signed)
W M WALKER QC
Commissioner
Date: 12 December 1996