

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: C12/00-01 (IB)

Starred Decision No: 98/00

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*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 2nd March 2001

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

* 98/00
as corrected)

CIRCULATION NOTE

C12/00-01(IB - CASSIN

I circulate the attached decision for paragraphs 12-15 which endeavour to explain what is included in descriptor 12© of the All Work Test. I endorse and amplify N.W.'s comment in CIB/4998/1997 and interpret the descriptor in its context.

MOYA F BROWN
17/12/00

GC2813.DEC

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCAPACITY BENEFIT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 20 March 2000

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal, leave having been granted by the Legally Qualified Member, by the Decision Maker against a decision dated 20th March 2000 of a Tribunal sitting at Armagh. That Tribunal had allowed the claimant's appeal against a decision of a decision maker dated 5th January 2000. That decision was to the effect that an earlier decision awarding Incapacity Benefit to the claimant should be superseded on the basis that the claimant no longer satisfied the All Work Test. Allowing the appeal, the Tribunal considered that the claimant had scored 24 points in that test and therefore satisfied the test.
2. On appeal to me the only issue raised related to activity 12 in that test. That activity is prescribed as follows: -

"Vision in normal daylight or bright electric light with glasses or other aid to vision if such aid is normally worn."
3. Within that activity are various descriptors which are levels of impairment of the activity. The issues raised by the Department in its grounds of appeal related to the descriptor 12(c) which is as follows:-

"Cannot see well enough to read 16 point print at a distance greater than 20 centimetres."
4. The other descriptors within the activity also have various points attributed to them and it is worthy of note that the descriptors (a), (b) and (c) all have 15 points. I set out below the descriptors as prescribed. Descriptor (a) is "Cannot tell light from dark", descriptor (b) is "Cannot see the shape of furniture in the room". Descriptor (d) has 12 points attributed to it and is "Cannot see well enough to recognise a friend across the room at a distance of at least 5 metres." Descriptor (e) is "Cannot

see well enough to recognise a friend across the road at distance of at least 15 metres." Descriptor (f) is "No problem with vision" and has no points attributed to it.

5. My decision is that the Tribunal erred in law in its interpretation of descriptor 12(c). I consider that this is a case where I can substitute my own decision for that reached by the Tribunal and I now do so. I consider that the claimant satisfied descriptor 12(e). As this gives him eight points, when it is added to the nine points which the claimant scored on unrelated activities he satisfies the All Work Test. My decision therefore is the same as that of the Tribunal, that the claimant is entitled to Incapacity Benefit from 5th January 2000 and that any Jobseekers Allowance or Invalid Care Allowance paid from that date is to be offset against the Incapacity Benefit payable from that date.

6. I held a hearing of the appeal which was attended by Mr Fletcher of the Decision Making and Appeals Unit representing the Decision Maker and by Mr Druse of the Citizens Advice Bureau, Armagh, representing the claimant. I am grateful to both for their considerable assistance in this case. Mr Fletcher both in correspondence and at hearing essentially had the following grounds of appeal:-

(1) That the Tribunal imported into the descriptor 12(c) the ability to sustain reading over several paragraphs of 16 point print. This, Mr Fletcher submitted, was an error of law in that the said descriptor did not prescribe that it was the ability to read several paragraphs of text that must be considered and the Tribunal therefore erred in law in applying an incorrect test. In support of this Mr Fletcher cited decision *CIB/4998/1997*, a decision of Deputy Commissioner Warren in Great Britain. In particular he mentioned paragraph three thereof where the Deputy Commissioner stated "I pause to observe that the descriptor refers to a capacity to see, rather than a capacity to read." Mr Fletcher also mentioned decision *CIB/333/1998*, a decision of Deputy Commissioner Street in Great Britain where, at paragraph nine, referring to the relevant descriptor the Deputy Commissioner stated "The test is seeing to read, not simply being able to see."

(2) Alternatively Mr Fletcher submitted that if the required reading ability could be achieved by the occasional shaking of the head and the use of a guide to mark his place the claimant could not reasonably be found to satisfy the descriptors. He stated that this behaviour was not so extreme as to make it unreasonable to countenance. This was unlike the situation in *C12/96(IB)* alluded to by the Tribunal in which the claimant took half an hour to write one or two lines of text. In support of his argument he referred to decision *C76/98(IB)*, a decision of my own. In that decision I expressed the view that with regard to the descriptor 11(c) some reasonable adjustment of position could be included within the descriptor. The descriptor is "Cannot hear well enough to understand someone talking in a normal voice on a busy street".

(3) Mr Fletcher submitted that the gradations of points within each descriptor of the activity of vision reflected the severity of the impairment. He further submitted that the fact that the Tribunal had considered that the claimant could pick out his wife from a crowd of people at a distance of 15 metres (which had

he been unable to do this would have afforded him eight points) but yet considered that he satisfied the descriptor 12(c) which would have given him 15 points was further indicative of an incorrect construction being put on the descriptor i.e. that it imported reading for a sustained period of time.

7. Mr Druse opposed the appeal. He stated that the Tribunal had not, as alleged by Mr Fletcher, imported the requirement of sustained reading ability into its interpretation of descriptor 12(c). Mr Druse submitted that when the Tribunal's reasons were read as a whole the Tribunal was not suggesting that several paragraphs was the prescribed criteria under descriptor 12(c).

8. Mr Druse also submitted that shaking of the head to clear floaters which the claimant had to do every ten seconds when reading meant that the action was not a reasonable adjustment of position as suggested in *C76/98(IB)*. Instead Mr Druse submitted that a more appropriate analogy could be found in Great Britain decision *CIB/590/1998* where the Commissioner stated: -

"It is not reasonable to say that a claimant can understand someone talking in a normal voice in a busy street if he can gain that understanding only by making frequent requests for repetition of what has been said."

9. At hearing I asked that both parties address me on the question of reasonable regularity as it did appear from the Tribunal's findings that the claimant suffered from frequent floaters in his eyes. Mr Druse considered that the requirement of reasonable regularity could not be sustained as the claimant had to shake his head so frequently to clear the floaters and the frequency of interruption and perhaps the duration of each interruption in reading ability meant that the claimant satisfied the descriptor. He could not carry out the activity to this level with sufficient regularity.

10. Mr Fletcher considered that the claimant would be able to repeat the activity of seeing well enough to read with sufficient regularity even though he was shaking his head every ten seconds to clear floaters.

11. In this case there was no dispute that the claimant had clear vision and could read 16 point print at a distance greater than 20 centimetres. He could only read for 10 seconds at a time and then had to shake his head to clear floaters.

12. I consider that the Tribunal did err in law as alleged by Mr Fletcher in the first ground of his appeal. I consider that Deputy Commissioner Warren was correct in stating that what was being tested was an ability to see not an ability to read. The activity, which governs the descriptor, is the activity of vision. As Deputy Commissioner Street stated it is vision good enough to read which is contemplated in descriptor 12(c). It is nonetheless the activity of vision which is being tested and no sustained reading ability is to be imported into it. I do consider that the Tribunal did import the requirement of sustained reading ability and reading the decision as a whole, and despite Mr Druse's very able argument in this respect, I can see no other conclusion which can be reached. The Tribunal has said specifically:-

"We felt that the claimant could reasonably recognise a friend at a distance. We viewed this as an activity performed by 'visual snatches'. We felt the reading descriptor imported more sustained activity. Whilst as has been said the claimant could read a line or look at a number in a phone book by shaking his head and marking his place we felt overall he could not reasonably satisfy the reading descriptor. This activity (c) carries 15 points. In terms of duration we are contemplating several paragraphs rather than chapters as the criteria for performance of the activity."

13. I think it is clear that the Tribunal was importing sustained reading into this descriptor. As I mentioned above it is the vision which is to be tested and the entire structure of the descriptors within the activity are all, as Mr Fletcher stated, related to distinguishing visual features beginning with light from dark and proceeding through other impairments. The same points are attributed to descriptors (a), (b), (c) and lesser points to the other descriptors. While I would not necessarily go so far as to say that the points attributed mean that the impairments must therefore be of the same degree of severity, nonetheless the descriptors must be construed in their context and if construing a descriptor in a particular manner gives it an illogical interpretation in context then that interpretation should, if possible, be avoided.
14. In my view the descriptor in this case relates to the visual ability to distinguish 16 point print characters so as to be able to decipher and distinguish individual words. It does not import any sustained reading ability. One reads whether one reads a word or a paragraph. It is the visual ability which is the salient factor. The ability to read is not being tested just whether or not the vision is good enough to read 16 point print characters at the relevant distance.
15. In light of my decision on the interpretation of the descriptor the other arguments relating to reasonableness and reasonable regularity are not relevant. The descriptor does not require the claimant to read for any particular length of time so the recurrence of floaters after ten seconds of reading is not relevant. It is vision which is tested not any sustained reading ability.
16. I am strengthened in this view by the fact that in another descriptor within the All Work Test i.e. descriptor 15(c) the ability to concentrate to read a magazine article is referred to. Had the legislature in this particular descriptor wished to provide for sustained reading ability it could quite easily have done so. The absence of such provision indicates to me that it was only the visual ability mentioned above which was being referred to.
17. I therefore set the decision of the Tribunal aside as in error of law for the reason that it misinterpreted descriptor 12(c) by importing into it a requirement of sustained reading.
18. As I mentioned above the Tribunal considered that the claimant failed to satisfy descriptor 12(e) which was a less serious impairment of vision. However, the Tribunal accepted the claimant's evidence of his vision impairment and part of that evidence was that he could not effectively see the football when watching a

football match on television. The Tribunal asked itself a question as to whether the claimant could pick out his wife from a crowd of people across a road of 15 metres if he had arranged to meet her. I am not certain that the Tribunal was asking itself the correct question in that respect. If the claimant had arranged to meet his wife he would have some expectation of her coming and could therefore more readily distinguish her from other people. Had he not expected to see his wife, it appears to me, in light of the accepted evidence as to the problem with vision that he could not have recognised her or indeed any other friend. I therefore accept that the claimant satisfied descriptor 12(e).

19. In essence therefore, though I am setting the Tribunal's decision aside as in error of law I am substituting my own decision to the effect that the claimant's appeal against the Adjudication Officer's decision is allowed and he is entitled to Incapacity Benefit from 5th January 2000.

(Signed):



**MOYA F BROWN
COMMISSIONER**

(Dated):

27 November 2000