

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: C12/01-02(IB)

Starred Decision No: 149/01

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*Ms Kimberli Jones,
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5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

so as to arrive by 6th March 2002

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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 28 June 2000

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal, leave having been granted by myself, by the claimant against a decision dated 28th June 2000 of an Appeal Tribunal sitting at Omagh. That Tribunal had disallowed the claimant's appeal in relation to Incapacity Benefit and disallowed the benefit from and including 28th February 2000. The Tribunal decided that the Department had grounds to supersede an earlier decision that the claimant was incapable of work.
2. I held a hearing of the appeal which the claimant did not attend but which was attended by his representative Miss Loughrey of the Law Centre and by Mr Toner representing the Decision Making and Appeals Unit (DMAU) of the Department. I am obliged to both representatives for their considerable assistance in this case.
3. Miss Loughrey's main ground of appeal was that the Tribunal had failed in the exercise of its inquisitorial role. In support of this, both in written submissions and at hearing, Miss Loughrey submitted that there was evidence before the Tribunal which pointed to the relevance of mental health as an issue. She submitted therefore that despite the claimant's representative having stated at hearing that mental health was not an issue the Tribunal should have explored this matter. She referred in this connection to the IB50 questionnaire completed on 6th July 1999 which indicated that the claimant was suffering from depression and anxiety. She further referred to the IB85 medical report (by the MSS doctor for the Department) indicating that descriptor 18(d) of the relevant capacity test was applicable to the claimant. This descriptor was that the claimant "gets irritated by things which would not have bothered him before he became ill".
4. Miss Loughrey also submitted that, on perusal of the papers, it was apparent that 5 descriptors stood out in that the MSS doctor's responses and comments on descriptors 16(a), 16(b), 17(b), 18(d) (which was accepted by the doctor) and 18(f) required more exploration as they were somewhat ambiguous. She submitted that the Tribunal should have further investigated this matter and that this was an indication of a failure of the inquisitorial role.

5. In this connection Miss Loughrey referred to decision *CIB/15693/1996* (a decision of Mr Commissioner Lloyd-Davies in Great Britain) where, at paragraph 5(b), the Commissioner stated:-

“It is therefore, in my judgement, incumbent on a tribunal where it is satisfied that there is medical evidence of mental disease or disability - as appears to have been the case with the present tribunal - to dissatisfy itself that all the descriptors relating to mental incapacity are considered and that the claimant has had the opportunity of dealing with those descriptors.”
6. Mr Toner opposed the appeal. He stated that the issue in the case was whether or not the Tribunal was entitled to cut short its inquisitorial function by not extending it to mental activities. As regards the four descriptors mentioned by Miss Loughrey (and not accepted by the doctor) Mr Toner stated that those would have attracted only four more points and would have had to be disregarded under the Regulations on scoring. He referred to the statement by the claimant’s representative at the outset of the hearing that “Mental health is not an issue”.
7. Mr Toner stated that the representative did not pursue any of the mental health activities at the hearing and the only written evidence of mental health problems was from the claimant himself. When the claimant was examined by the MSS doctor he was considered to only satisfy the descriptor relating to irritability. On this basis the decision maker awarded one point. Mr Toner referred to box 57 of the above mentioned report of the MSS doctor and stated that, taking box 54 thereof with box 57, the Decision Maker should not have awarded any points.
8. Mr Toner further referred to an IB113(DLS) form dated 24th September 1999 from the claimant’s General Practitioner which was handed in to the Tribunal and the absence of any diagnosis of depression thereon. In addition, in the medical certificate from the GP the sole diagnosis was given as acute arthritis. In the Department’s submission to the Tribunal at section 4 there was no reference to depression.
9. As regards decision *CIB/15693/96*, Mr Toner submitted that in the context of that case, Mr Commissioner Lloyd-Davies was correct but that the case did not create a general rule. He referred to decision *CSIB/160/2000*, a decision of Mr Commissioner May in Great Britain as authority for the proposition that no general rule was created by the former decision.
10. In Mr Toner’s submission the Tribunal was entitled to accept the concession but it would have been good practice for the Tribunal to have stated that it was so doing. However, in Mr Toner’s submission, there was nothing in the overall way the appeal was presented and the evidence as a whole which should have led the Tribunal to pursue the mental health activities despite the concession made by the claimant’s representative.
11. In response to this Miss Loughrey referred to the claimant’s letter of appeal to the Tribunal dated 6th March 2000 as indicating that the claimant had multiple problems relating to alcohol, depression and severe arthritis. She submitted that this must be balanced against the concession at hearing by the representative. Miss Loughrey was of the view that it looked as if this concession was made on the Tribunal’s invitation to

the claimant's representative to comment on the application of the mental health descriptors. However, the letter of appeal disputed both the physical and mental health descriptors. Miss Loughrey stated that the claimant was entitled to an explanation as to why the concession was accepted.

12. I afforded to both parties an opportunity to comment on two decisions of Commissioners in Northern Ireland - *C11/99(IS)* and *C15/99-00(IS)(T)* and in particular paragraph 26 of the latter decision.

13. Miss Loughrey's further comments were contained in a letter dated 30th November 2001 and Mr Toner's in a letter dated 27th November 2001. Mr Toner submitted that the facts of the present case were clearly distinguishable from those in decision *C15/99-00(IS)(T)*. In the latter case the Tribunal was held to have erred in law because it did not pursue an issue that, although not raised by the representative, had been raised in the grounds of appeal and alluded to in the evidence given to the Tribunal. In the present case, in Mr Toner's submission, the claimant's representative, with the claimant present, raised the issue of the claimant's mental health and conceded that mental health was not in issue. He submitted that in the circumstances of the present case the Tribunal was entitled to conclude that the issue of the claimant's mental health had been dropped and not to pursue that issue.

14. As regards decision *C11/99(IS)*, Mr Toner submitted that the Commissioner had held that the question which had to be asked was whether or not there was any situation which would indicate that a trust may have been created. The Tribunal in that case had found as a fact that the claimant's mother had transferred money which had been in her sole name to the joint name of herself and the claimant thereby raising the issue (paragraph 23) and the Commissioner had set aside the decision on the basis that the Tribunal had not considered the question of beneficial entitlement (paragraph 24).

15. Mr Toner further submitted that that case was distinguishable from the present one in that in *C11/99(IS)* the Tribunal had failed to pursue the issue of beneficial entitlement "having found as fact that that issue had been raised", whereas in this appeal the representative, with the claimant present, raised the issue of the claimant's mental health and conceded that mental health was not in issue.

16. Miss Loughrey referred to paragraph 8 of decision *C11/99(IS)* where I stated:-

"The Tribunal has an inquisitorial role. It has to pronounce on proper benefit entitlement and therefore has to deal with issues which are apparent from the papers before it."

17. In Miss Loughrey's submission, the Tribunal in the present case had clearly failed to deal with the issue of mental health which was clearly before it on the papers.

18. As regards *C15/99-00(IS)(T)*, Miss Loughrey referred to the statement in paragraph 26 of that decision that:-

"if an issue on the evidence, is explicitly or implicitly before a Tribunal, even though not raised by the professional representative, [there being legally

qualified representation in that case] it is the Tribunal's duty and responsibility to deal with such an issue."

19. She submitted that in the present case the relevance of mental health was explicitly in evidence before the Tribunal. The Tribunal adopted the concession offered by the representative that mental health was not in issue. Miss Loughrey submitted that by failing to record reasons for accepting that concession the Tribunal had failed to exercise its inquisitorial role.
20. Miss Loughrey made a further general submission to the effect that because representation to Tribunals tended to be from non-legally qualified professionals and from a variety of sources with a varying level of expertise, it was not possible for Tribunals or claimants to rely entirely on a representative's input. She submitted that a Tribunal, in the exercise of its inquisitorial role, must be satisfied that the claimant (and not the representative) had had an opportunity to raise all live issues and, where appropriate, to explain why a particular issue was being dropped.
21. Article 13(8)(a) of the Social Security (NI) Order 1998 provides that in deciding an appeal under that Article [which this Tribunal was doing] an Appeal Tribunal "need not consider any issue that is not raised by the appeal". The salient question appears to be – what issues are raised by the appeal. Issues raised by an appeal may, though not necessarily will, extend beyond those set out in an appeal letter e.g. they may include further issues raised at hearing. However, equally, at hearing, certain issues may be dropped and can justifiably be considered to be not raised by the appeal.
22. Miss Loughrey is correct that the appeal letter of 6th March 2000 and the IB50 form did raise the possible application of other mental health descriptors. Mr Toner is correct in that the MSS IB50 form gave only 1 descriptor point on mental health and that other evidence militated against any mental health problem existing.
23. It appears the Tribunal did endeavour to ascertain from the representative what descriptors were in issue. In reply to this it was specifically told that areas of dispute were as in the papers and that mental health was not in issue. The Tribunal has correctly approached the appeal in that it has tried to ascertain the specific areas of dispute.
24. The claimant's mental health becomes relevant in this case only in relation to the application of the capacity test. If he was found to have a specific mental illness or disablement the relevant mental health activities could be looked at and he might or might not score some points in relation to the mental health activities. If he was not found to have a specific mental illness or disablement, none of the mental health activities descriptors could be considered.
25. What then was the representative telling the Tribunal? At its lowest he was stating on behalf of the claimant that he was content with the award of 1 point only on the mental health descriptors, at its highest he was stating that the claimant had no mental health problems. It may have been preferable had the Tribunal clarified which was applicable but it was not a matter of great importance in the circumstances of this case.

26. Was the representative making a concession? The representative was stating the issues which he wanted the Tribunal to explore. It was a concession only in the sense that the representative was stating that the mental health activities and descriptors need not be considered further or at all.
27. Was the Tribunal entitled to limit its enquiries then to the physical health activities? I consider that in terms of ascertaining what issues it had to explore the Tribunal was entitled to place reliance on what the representative put forward. Equally the Tribunal was not bound by what the representative said.
28. If other issues were so clearly apparent that they had to be explored the Tribunal had to explore those issues. It was also entitled but not bound to explore other relevant issues at its own discretion. The question arises as to whether the issue of the application of the mental health descriptors was so apparent that the Tribunal should have explored it.
29. What was the evidence before the Tribunal relevant to the claimant's mental health? It consisted of the claimant's own mention in the IB50(NI) form and appeal letters of him having mental health problems and some detail of the effects thereof, of his own GP not diagnosing any mental health problem as a significant condition, of the IB85 medical report dated 26 January 2000 from the MSS doctor. This report *inter alia* gave the claimant 1 point for mental health descriptors, opined that for future claims a report from a psychiatrist might be helpful and gave as the medical evidence for the assessment that:-
- "He presents as a normal, rational, calm man. No evidence of any depression. The gentleman accompanying him says he drinks too much but he denies this. No evidence of any alcohol-related disease."
30. The Tribunal also had the firm statement by the claimant's representative, in the claimant's presence that there was no dispute on the mental health descriptors.
31. Against that background I consider that the Tribunal was quite entitled to confine its considerations at hearing to the physical health descriptors. The medical evidence including the MSS doctor's report did not in my view indicate any further descriptors as being obviously relevant and indeed was indicative of there perhaps being no mental health problem at all. In correspondence the claimant had indicated additional mental health problems but he was at the hearing, with his representative, who was saying on his behalf that there was no dispute on the mental health descriptors and he gave no evidence at hearing to indicate that this was incorrect. Against the overall background I do not consider that it was so apparent that there was anything further to be explored that the Tribunal erred in not exploring it.
32. I agree with Mr Toher that this case is distinguishable from *C11/99(IS)* in that in that case the Tribunal having made certain findings of fact did not deal with the legal issues raised by those facts (paragraph 23 of that decision refers). That was where its error lay. In this case the Tribunal was effectively dealing with a factual concession i.e. that the claimant's functional limitations on the mental health test were either as already assessed or nil.

33. I agree also with Mr Toner that the case of *C15/99-00(IS)(T)* is distinguishable on its facts. At paragraph 26 thereof the Tribunal of Commissioners stated:-

“We take the view that a Tribunal must have a reasonable expectation that the important and fundamental issues in a case will be brought to its attention in any proceedings where there is professional representation on behalf of a claimant. However, somewhat reluctantly we conclude that if an issue on the evidence, is explicitly or implicitly before a Tribunal, even though not raised by the professional representative, it is the Tribunal’s duty and responsibility to deal with such an issue. We therefore conclude in the circumstances of this case that the Tribunal erred in law by not dealing with the issue of beneficial ownership of the public house. Had the matter not been so clearly apparent from the deceased’s daughter’s evidence both before and at the hearing, our conclusion might have been otherwise [my underlining] as, in the exercise of its inquisitorial role, a Tribunal is entitled to expect all live issues to be raised at hearing by professional representatives. A Tribunal may also be entitled to conclude that, if a professional representative does not raise an issue that issue has been dropped. It is only because the deceased’s daughter herself again alluded to the matter at hearing that we consider the issue remained “live” in this case.”

34. In this present case the claimant was present at the Tribunal hearing and gave no evidence as to other or indeed any mental health descriptors being applicable. It is correct that in this case, unlike *C15/99-00(IS)(T)*, the claimant was not professionally represented. In circumstances where there is no professional representation Tribunals need to be more wary of accepting concessions as regards legal situations. However, in this case what the Tribunal ascertained was that there was no contention on a factual matter i.e. the factual matter of whether or not the claimant suffered any of (or any more of) the functional limitations set out in the mental health test.
35. I can see no reason why the Tribunal should not have accepted what the representative said and I do not consider that any failure of the inquisitorial role has been established on the basis of the authorities of *C11/99(IS)* and *C15/99(IS)(T)*.
36. As regards decision *CSIB160/2000*, I have some reservations concerning the reasoning at paragraph 5(a) and (b) thereof – but in any event, in this case, it appears to me that the Tribunal did “dissatisfy” itself that all the descriptors were considered and that the claimant had the opportunity of dealing with those descriptors. The Tribunal was informed by the claimant’s representative in what appears to be a response to its enquiry and in the claimant’s presence that no issue was being taken on the mental health aspect of the relevant test. Most certainly the opportunity was there for the claimant to deal with any descriptor he wished to put in dispute. The Tribunal, it appears gave him this opportunity and was informed by his representative that he did not wish to put in issue any of those mental health descriptors. I can see no breach here by the Tribunal.
37. In any event I am also in agreement with Mr Commissioner May when he states in *CSIB/160/00* that he does not accept the above extract from *CIB/15693/1996* as a rule of general application. The extent of the exploration needed will all depend on the circumstances of the case.

38. I consider that the matter of the mental health descriptors was not an issue raised expressly by the appeal nor raised implicitly by the appeal in the sense that the evidence was such that the issue had to be explored.
39. Miss Loughrey has also raised, though somewhat obliquely, the possibility that the Tribunal may have erred by not giving reasons for accepting the concession made by the claimant's representative. It is undoubtedly correct that there will be times when a Tribunal's reasoning may be inadequate if it does not record why it accepts a concession. However, in this case I am not of the view that that is so. What the representative said in this case was essentially that he was not disputing the assessment on the mental health descriptors. He was not therefore disputing that the functional limitations were anything other than set out in the assessment. This is not so much a concession as a statement that a particular finding of fact (the decision maker's findings on the functional limitations across the mental health descriptors) is correct.
40. The Tribunal was not of course, bound to accept this statement by the representative but it was entitled to do so. The statement was not so much in the nature of the yielding of a point as in the nature of a more positive acceptance that a particular fact situation prevailed and that the Tribunal's inquiry need not cover certain matters. I can see no reason why express reasoning for the acceptance of such a statement (when no other party is contending differently) should be required. I consider the Tribunal's reasoning was adequate to explain its decision to any reasonable party.
41. For the above reasons I dismiss this appeal.

(Signed):

**MOYA F BROWN
COMMISSIONER**

(Dated):

12 DECEMBER 2001