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MR RUDIGER SOPP
7 Main Street
Camlough
NEWRY

Decision No: C25/01-02(IB)

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 18 December 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 18 December 2000 of an Appeal Tribunal sitting at Newry. The claimant's grounds of appeal were contained in an OSSC1 form dated 22 May 2001 and the documents attached thereto. He referred in that document to his letters to the Tribunal and his letter dated 3 January 2001 and application dated 21 March 2001 have also been considered by me in relation to the grounds of appeal to me.

2. Observations on the appeal were made by letter dated 10 January 2002 from Mr Fletcher of the Decision Making and Appeals Unit of the Department for Social Development. Further observations on the Department's observations were made by the claimant by letter dated 24 January 2002.

3. Essentially the claimant's grounds of appeal were as follows: -

   (1) That adequate reasons for the Tribunal's decision had not been given and that he could not understand the decision.

   (2) That the Tribunal did not realise the extent of his problems.

   (3) That the Tribunal did not send him to a hospital specialist and so had insufficient evidence upon which to reach its decision

(4) That the Tribunal ignored his eye problems and mental health problems.

(5) That the IB85 medical report dated 27 March 2000 was wrong in that it ignored the fact that he was blind in one eye and it also ignored other medical conditions from which he suffered.

(6) That the Tribunal had accepted that he had genuine back complaints and should therefore have accepted that he had a limited ability to stand.

(7) That his condition was deteriorating.

4. As regards the claimant's comment contained in his letter of 24 January 2002 that his condition was deteriorating and mentioning an incident on 19 January 2002, I would comment that the Tribunal could not take into account changes of circumstances which took place after the date of the Decision Maker's decision which was appealed to the Tribunal. That Decision Maker's decision was dated 15 May 2000. It is not an error of law for the Tribunal not to take into consideration any changes in circumstances after that date and indeed it was prevented from so doing by Article 13(8)(b) of the Social Security (Northern Ireland) Order 1998. I can therefore find no error of law in relation to this 7th ground of appeal.

5. The Decision Maker had decided that the test of incapacity for work in respect of the claimant from and including 19 October 1999 was the Personal Capability Assessment and that the claimant could not satisfy that assessment from and including 15 May 2000 because he had not reached the relevant number of points. No issue has been taken and none is apparent to me that the test of incapacity for work should be other than the Personal Capability Assessment. This also appears to have been the situation before the Tribunal and the Tribunal has applied that test.

6. The Department opposed the appeal, stating that it was apparent from the reasons for its decision that the Tribunal had weighed the claimant's evidence against the IB85 report of the Department's Medical Officer dated 27 March 2000 and had considered the Medical Officer's report to be the more reliable indication of the claimant's functional ability at 15 May 2000. In Mr Fletcher's submission this preference was adequately explained in that the Tribunal pointed out that the Department's Medical Officer's report was comparatively recent compared to the medical evidence provided by the claimant which was several years old.

7. Having read the reasons for the Tribunal's decision which set out very clearly the Tribunal's assessment of the evidence I am not of the view that there is any inadequacy in the reasoning. The Tribunal has set out clearly its view of the claimant's own evidence, of the medical evidence which he supplied and of the Department's medical evidence and of the evidence from the claimant's wife. The Tribunal has also set out clearly its reasons for the score which it

reached on the Personal Capability Assessment. I am not of the view that there is any inadequacy in the Tribunal's reasoning.

8. The claimant submits that the Tribunal did not realise the extent of his medical problems. I do not consider that there is any merit in this ground of appeal. The Tribunal did not consider and expressly stated that it did not consider that the claimant's physical condition was as serious as he had indicated in his evidence. It has clearly set out its reasons for this view, being the activities which the claimant undertook and the medical evidence including the report of the examining doctor. The Tribunal did accept that the claimant had a genuine back problem which appeared to flare up from time to time but it did not accept that this problem limited the claimant to the extent which he stated. It is quite apparent that the Tribunal took into consideration all the evidence, reached its own assessment of the evidence and that its award of points on the Personal Capability Assessment (with the possible exception of the award of points for descriptors 16(a) and 16(e)) was sustainable on the accepted evidence. The claimant may have misunderstood the Tribunal's role in this case. The Tribunal has to reach its own assessment on the Personal Capability Assessment. In this case it has done so. It has not considered itself bound by the examining doctor's view nor that of the Decision Maker, nor has it considered itself bound by the claimant's view. It has reached what it considers to be the true fact situation. In so doing it has approached the matter in the correct legal manner.

9. The claimant has also submitted that the Tribunal erred in law in that it did not send him to a hospital specialist and therefore had insufficient evidence upon which to reach its decision. There is no obligation on a Tribunal, even if requested to do so, to obtain a specialist report. If the Tribunal reasonably considers, that it can make its decision on the basis of the information before it, it is entitled to so do. In this case the Tribunal quite obviously did consider that it could make its decision in that manner and it has done so. I consider that it was reasonable for the Tribunal to reach the view that it could make its decision on the evidence before it and its decision is sustainable on the accepted evidence. The duty in any case where a party wishes to produce particular evidence is on that party to obtain that evidence. It is not for the Tribunal to act as the party's agent in so doing.

10. The claimant has further submitted that the Tribunal ignored his eye problems and his mental health problems and that the medical examination was wrong, in that it ignored the fact that he was blind in one eye and also that the doctor had written down incorrect matters in his report, recording answers which the claimant had not given. In this connection Mr Fletcher submits that the record of proceedings makes mention of the claimant's eye problem and on the claimant's own evidence (in the questionnaire dated 14th February 2000) the condition did not raise limitations in connection with activity 12 in the Personal Capability Assessment. This activity is: "Vision in normal daylight or bright electric light with glasses or other aid to vision if such aid is normally worn".

11. In that questionnaire the claimant had ticked that he had no problem in connection with the activity of vision. The Tribunal's Record of Proceedings shows that the matter of the medical report not containing the record of the claimant's mentioning that he was blind in one eye was raised at hearing. It is impossible to tell whether or not the claimant mentioned this matter to the doctor. However, it is mentioned in his questionnaire which the doctor obviously read as he has recorded that he agreed with the claimant's choice of descriptor in relation to the vision activity. The claimant had ticked that he had no problem with vision and the doctor agreed with that. While, like Mr Fletcher, I would have preferred the Tribunal to have mentioned the claimant's being blind in one eye it was not an error of law for it to omit to do so. There was no evidence that this monocular blindness affected the claimant in the activity of vision as comprised in the Personal Capability Assessment. The claimant watched television and used a computer and fished and he himself stated that he was not affected in the activity of vision. I can therefore see no error of law in this respect on the part of the Tribunal.

12. As regards the claimant's other contentions as to the medical report the Tribunal has clearly taken the medical report into account but has not considered itself to be bound by it. It has taken on board that evidence from the claimant which it considered reliable and has in fact awarded considerably more points than would have been awarded on foot of the Departmental medical report. I can ascertain no error of law in this report.

13. The other complaints which the claimant made appear to be that he had told the Examining Doctor that he could not cope with any pressure (this is the complaint that was made to the Tribunal). The Tribunal has again reached its own conclusions on this matter and the Examining Doctor has recorded that the claimant told him that because of the fact that he was house bound the claimant was depressed. He also recorded that the claimant stated that if his pain was not severe his mood was good and that he took no medication for depression. The Tribunal has obviously taken account of and assessed all the evidence and the contentions and reached what it considers to be an accurate view on the Personal Capability Assessment. This is within the function of the Tribunal and I can find no error of law in its approach in this matter.

14. I come now to the reason why I granted leave in the case; this was the application of descriptor 16(c). I considered that there appeared to be an issue as to whether or not this descriptor was adequately dealt with in the mental health test. My reason for granting leave was conveyed to the parties and Mr Fletcher made observations thereon in his letter dated 10 January 2002. As Mr Fletcher has stated the descriptor is part of the activity of Daily Living. It is contained in Part II of the Personal Capability Assessment and is subject to the condition set out in regulation 25(3) of the Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995 which provides as follows:

> "In determining the extent of a person's incapacity to perform any activity listed in Part I or Part II, it shall be a condition that the person's incapacity arises -

(a) in respect of a disability listed in Part I, from a specific bodily disease or disablement; or

(b) in respect of a disability listed in Part II from some specific mental illness or disablement."

15. It is not therefore enough that the person is incapable of performing an activity listed in Part II. Such an incapacity can only be taken into account if the incapacity arises from a specific mental illness or disablement.

16. Mr Fletcher further submitted relying on *CSIB2/96* (a decision of Mr Commissioner Walker in Great Britain) that the term "frequent" as used within the descriptor denotes a substantial or significant number of times during the day. Commissioner Walker decided that the descriptor looks to the frequency of the mood change rather than its significance or quality and that a change of mood once per day did not suffice to satisfy the descriptor.

17. Mr Fletcher detailed the medical evidence before the Tribunal which could be of relevance to this descriptor. He referred to reports dated 4 August 1994, 14 October 1994 and 10 October 1996 from Dr O'Donnell detailing the claimant's mental health problems at that time. As Mr Fletcher stated, the Tribunal considered that evidence to be rather out of date. He also referred to the report by the Departmental Medical Officer dated 27 March 2000 which gave a specific opinion as to the relevance of descriptor 16(c) at that date. The Medical Officer indicated that the descriptor would not apply as back pain, rather than a specific mental illness or a disablement, was the cause of the claimant's low mood.

18. Mr Fletcher further submitted that the Tribunal's reason for decision indicated that 5 points were awarded on the mental health descriptors on the basis of the evidence given to the Tribunal by the claimant's wife. That evidence appeared to consist of a letter date stamped 22 May 2000 and oral evidence to the hearing as recorded in the Record of Proceedings. The claimant's wife gave evidence that her husband suffered what she described as "mood swings". The manifestation of those mood swings appeared to be that the claimant went quiet and locked himself into his room for 3-4 hours/5-6 hours. Mr Fletcher submitted that the Tribunal did consider and indeed accepted this evidence and decided that the most appropriate descriptor was 18(e) "prefers to be left alone for 6 hours or more each day." Mr Fletcher submitted that this was not an unreasonable conclusion given that the behaviour appeared to lack the pattern required by *CSIB2/96*. The claimant's wife had also given examples of more extreme behaviour but these appeared to relate to incidents in 1994/1995 and in 1997.

19. With a minor exception it appears to me that Mr Fletcher's review of the evidence is correct. The Tribunal has however recorded that either the claimant or his wife (it is not clear which) stated that the claimant was "not really teary." It is correct that the claimant's wife gave evidence that his

moods swung up and down and that he would go quiet and withdrawn and lock himself into the room

> "a lot – a couple of times. Hours – 3-4 hours/5 or 6 hours. Fed up with pain – mood swings get worse – wrecked house in 1994/1995 – because of this. Improved for a while.
>
> Got a lot worse in the past few months - rather than better... He can be fine when pain-free".

20. This evidence was given to the Tribunal on 18 December 2000 but the Tribunal was unable to take into consideration any evidence which did not relate to the situation as at 15 May 2000.

21. Mr Fletcher is correct as to the medical evidence.

22. In its Reasons for Decision the Tribunal has recorded: -

> "With reference to the mental health descriptors the Tribunal noted that [*the claimant*] had had a period of bad depression in the past but that appeared to have improved markedly. The reports from Dr O'Donnell were at least 4-6 years old and *[the claimant's wife]* gave evidence that her husband had much improved. The Tribunal noted that [the *claimant*] was again suffering from some depressive symptoms but this had occurred in recent months and was therefore outside the jurisdiction of the Tribunal. Taking into account [*the claimant's wife's*] evidence the Tribunal awarded descriptors 16(a) and 16(e) and also 18(d) and (e). The Tribunal noted that [*the claimant*] had wrecked the house but that this incident occurred some years previously since then he had much improved. The Tribunal did not feel any other descriptors were appropriate ...".
>
> It is important to note that the descriptor 16(2) necessitates frequent distress due to fluctuation of mood. It is not enough that mood should fluctuate. there must be distress as a result. Collin's English dictionary defines distress as "much troubled; upset; afflicted."

23. The claimant must therefore suffer from a mental disability and that disability must be the origin of the incapacity set out in Part II of the Personal Capability Assessment. It is only incapacity arising from some specific mental illness or disablement that can be taken into consideration. Incapacity arising from back pain and not arising from mental illness or disablement cannot be taken into consideration under Part II.

24. The question which I have to address is whether the Tribunal was entitled to its conclusion that descriptor 16(c) was not applicable to the claimant. I consider that Mr Fletcher is correct in that the Tribunal did appear to rely particularly on evidence of the claimant's wife in relation to the mental health descriptors and I do not fault it for so doing. I also do not fault the Tribunal for its conclusion that the claimant appeared to have worsened after the date of the decision under appeal and that it could not take this worsening into

consideration. I further agree with Mr Fletcher that the descriptor puts a focus on the frequency with which the mood swings occur. I do not, however, agree that distress taking place once a day cannot as a matter of law be said to be frequent distress. I think distress once per day could or could not be frequent depending on other circumstances e.g. duration. The word "frequently" is an ordinary English word and is for the Tribunal to apply. It would be reasonable to conclude depending on the context and the surrounding circumstances that distress once per day either was or was not frequent. I do not think it can be said as a matter of law that distress taking place at least once a day either can or cannot be said to be frequent. Had the legislature wished to say that distress had to take place more than once a day it could quite easily have done so by some phrase such as "frequently and more than once per day". It did not do so.

25. The claimant's wife gave evidence, which appears to have been accepted, that the claimant did suffer from mood swings in the course of which he went quiet and withdrawn and locked himself into his room. The number of times and the frequency of incidence of this is somewhat uncertain from the record but that does not mean that the record is not accurate. The descriptor necessitates not just mood swings but distress as a result of those mood swings. While distress can include someone going quiet and withdrawn and withdrawing from company, the mere going quiet and withdrawn and wishing to avoid company does not of itself mean that someone is distressed. A person could do this to avoid distress or from pure preference and that does appear to me to be included in another descriptor, i.e. descriptor 18(e) for which points were awarded. I have not gone into Descriptor 18(e) as it is unnecessary to my decision but the award of points for it may be questionable.

26. While the descriptors in the mental health test are not mutually exclusive it is reasonable to construe them as not being meant to cover exactly the same situations. Otherwise there would be little point in their existing separately. There must be some separate manifestations of mental disability meant by each descriptor. Thus for descriptor 16(c) there must be distress. The mere preference of being left alone for 6 hours or more each day does not necessarily indicate distress though it may indicate withdrawal. I therefore consider that the Tribunal's conclusion in relation to descriptor 16(c) was open to it on the evidence.

27. The Tribunal has not given detailed reasons for its conclusion on descriptor 16(c) but has said that it has relied on the claimant's wife's evidence and on the fact of improvement having taken place in the claimant's condition and remaining at the time of decision under appeal. It's conclusion on the evidence being reasonable and it having mentioned that it had relied on that evidence, I do consider is adequate reasoning. In general it appears to me that the decision was a reasonable one sustainable on the evidence and was adequately explained.

28. For the above reasons I dismiss the appeal.

(Signed):

MOYA F BROWN
COMMISSIONER

(Date): **22 MARCH 2002**

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