SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: C32/00-01(IB)

Starred Decision No: 108/01

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

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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 16 May 2000

DECISION OF THE TRIBUNAL OF COMMISSIONERS

1. This is an appeal, leave having been granted by a Commissioner, by the claimant against a decision dated 16 May 2000 of a Tribunal sitting at Londonderry. That Tribunal had disallowed the claimant's appeal against a decision of a decision maker in relation to his claim for Incapacity Benefit. The decision maker had decided that the claimant was not entitled to the benefit from 17 January 2000 on the basis that he did not satisfy the All Work Test from and including that date and that the Department had grounds to supersede an earlier decision that he was incapable of work. The claimant was aged 46 at the time of the decision maker's decision and had claimed Incapacity Benefit from 23 April 1999. He and his representative attended the Tribunal hearing and at hearing the representative referred to the letter of appeal to the Tribunal dated 3 March 2000 but did not deal with it in detail. Numerous other matters were raised to the Tribunal which raised the score on the All Work Test but not to the necessary 15 points and disallowed the appeal.

2. The claimant completed an OSSC1 form dated 14 August 2000 wherein he set out grounds of appeal to a Commissioner. This form set out several grounds of appeal but in the event only the grounds set out below were contended. These grounds were: -

    1. That the Tribunal's reasoning did not meet the criteria laid down in *CSIB/324/97* (a decision of Mr Commissioner Walker QC in Great Britain). In particular it did not meet the criteria of explaining why a particular activity had been held not to be adversely affected where there was a contention that it was so affected. Nor did it explain why a particular descriptor had been preferred to any other contended for. It was submitted on the claimant's behalf that he was left wondering why his evidence had not been accepted in its entirety given the fact that it was implicit in the Tribunal's decision that it did not accept the Examining Medical Practitioner's report in its entirety.

2. By Article 13(8)(b) of the Social Security (Northern Ireland) Order the Tribunal was forbidden to take into account any circumstances not obtaining at the time when the decision appealed against was made. The claimant contended that by taking into consideration observations made on 16th May 2000 the Tribunal was in breach of that article.

3. While it was relatively clear that the Tribunal had not considered the claimant to be a reliable or credible witness, the Tribunal erred in failing to give reasons why it came to the conclusion that his complaints were overstated. The reason given which referred to the observations of the Tribunal and the letter from the claimant's General Practitioner were not adequate. The observations were not detailed and the General Practitioner's letter was not destructive of the claimant's case. In this connection the claimant referred to CSIB/459/97, paragraph 12 (a decision of Mr Commissioner Henty in Great Britain). The relevant part of that paragraph stated "a finding that the claimant was not a reliable or credible witness per se is not sufficient. If they [the Tribunal] were of that view and rejected his evidence for that reason they should also have given reasons why they did not find him a reliable or credible witness."

3. The Chief Commissioner considered that the appeal raised issues of special difficulty and directed that it be dealt with by a Tribunal of three Commissioners. At the hearing the claimant attended and was represented by Mr O'Farrell of the Churches' Advice Centre. The Department was represented by Mr Fletcher of the Decision Making and Appeals Unit. We are obliged to both gentlemen for their considerable assistance.

4. As will be apparent later the claimant's grounds of appeal to the Tribunal are considered of relevance. They were contained in a letter dated 3 March 2000 and made detailed complaints concerning the quality of the medical examination and the accuracy of observations recorded by the Examining Doctor. In particular the claimant referred to his earlier letter of 9 February 2000 (a revision request). He stated in that letter that the doctor had commented on the state of his feet when in fact he had kept his socks on through out the examination. He also stated that the doctor claimed to have observed him walk a distance of 200 metres when in actual fact the distance had been measured at 88 metres. The letter of 9 February 2000 ran to some two and half typed foolscap pages.

5. At hearing before us Mr O'Farrell amplified his arguments stating that it was unfair for the Tribunal to reach its conclusion that the claimant had exaggerated on the basis of the claimant's General Practitioner's letter. He submitted that this letter did not detract from the claimant's case though he agreed that it did not advance the case. He stated also that the Tribunal had reached the conclusion that the claimant was overstating his case on the basis of its observations but had not set out what those observations were. Furthermore it was not clear whether the observations were of specific actions by the claimant or of his general demeanour. If the Tribunal was referring to the activities observed by the Tribunal then the said Article 13(8)(b) might mean that there was an error of law.

6. Mr O'Farrell conceded that it was not necessary for a Tribunal in every case to explain why it had reached its assessment of credibility but referring to decisions *C6/98(DLA)* – paragraph 7, *C58/98(IB)* – paragraph 14 and Great Britain decision *CSIB/459/97* – paragraph 12, he considered that the Tribunal in this case had erred in not setting out its reasons for not finding the claimant's evidence to be entirely credible. He submitted that such an explanation was necessary in this case. The Tribunal had not completely accepted the Examining Medical Practitioner's evidence and its allusion to the observations and General Practitioner letter were inadequate.

7. As regards the matters raised in the appeal letter to the Tribunal Mr O'Farrell submitted that the Tribunal stated that it had taken into account all the evidence and it had referred specifically to the appeal letter. However it had in no way dealt with the very specific complaints made by the claimant in relation to the medical examination. Mr O'Farrell considered that there was an inadequacy in the Tribunal's reasoning in this respect.

8. He submitted further that it was not clear why the Tribunal had scored the All Work Test as it did. He conceded that the Tribunal was entitled to exercise its own judgment as to what was the correct fact situation as regards the various descriptors. He conceded further that the Tribunal was not bound by either the claimant's evidence or that of the Examining Medical Practitioner. Its reasoning did however, have to explain the reason for the scoring and in his view it did not do so.

9. Mr Fletcher agreed with Mr O'Farrell that it was not always necessary for a Tribunal to give reasons for its assessment of credibility. He referred to decision *C28/00-01(IB)* paragraph 37 which stated that "what constitutes adequate reasoning may vary from case to case". He also referred to decision *C11/00-01(IB)* paragraph 7 as authority for the proposition that where a Tribunal makes it clear that it does not believe evidence, it does not in every case have to explain why this is so.

10. Referring to decision *C1/96(IB)* Mr Fletcher submitted that there was no rule that the Tribunal had to give reasons for its choice of descriptors but it did have to give reasons for its decision.

11. Commenting on Great Britain decision *CSIB/324/97* Mr Fletcher referred to decision *R5/99(IB)*. This decision had stated that the practice recommended in *CSIB/324/97* was the "best and safest practice" but that a Tribunal would not necessarily be in error of law if it did not follow that practice.

12. Mr Fletcher submitted that the decision of the Tribunal could not be read in a vacuum divorced from the evidence. In many cases reasons did not have to be detailed. In this case the evidence from the Examining Doctor was that on formal testing the claimant presented as very disabled but informally was much less restricted. As regards the evidence from the General Practitioner Mr Fletcher submitted that, as this evidence was prepared for Disability Living Allowance purposes, he would have expected it to be much stronger than it was. The Tribunal was obviously aware of the content of the letter and was justified in considering it as fairly unsupportive of the claimant's case though not destructive of it. The letter was probably one of the reasons why the Tribunal found there to be some limitations in the claimant's abilities on the All Work Test though not to the level claimed.

13. Mr Fletcher agreed with Mr O'Farrell that the Tribunal should have addressed the claimant's complaints in relation to the Examining Medical Practitioner's report. He accepted as an inadequacy in the reasons for decision that they did not deal in some manner with the claimant's very detailed complaints in relation to the Examining Doctor's report.

14. Referring to *C17/99(IB)* paragraph 13 Mr Fletcher considered that case dealt with a similar situation to this present case. The relevant paragraph stated: -

> "In a situation such as the present one where the Tribunal is of the view that the claimant's own evidence was unreliable it is placed in a difficult situation. It has no alternative but to use its own judgment on the matter and it is perfectly entitled so to do. While the Tribunal in this case did not specifically state that it was so doing it is quite apparent and would I think be apparent to any reasonable person reading the decision that the Tribunal was using its own judgment. Its assessment and decision was certainly one which was open to it on the evidence available and I do not consider that there is any error in the decision."

15. Mr Fletcher further stated that there was no heavier burden on the Tribunal in terms of reasoning when 12 points on the All Work Test had been awarded as opposed to any lower number of points on the All Work Test.

16. Mr Fletcher considered that if the reasoning was inadequate on the grounds of not having dealt with the claimant's submission on the Medical Examiner's report then the decision should be set aside.

17. We are in agreement with both representatives that the reasoning is inadequate in this case. The claimant set out a very detailed submission in the appeal letter which was referred to again at the Tribunal hearing as to claimed inaccuracies in the Examining Doctor's report. This was obviously a live issue in the case. It was equally obvious that the Tribunal did not accept the Examining Doctor's report in full. However, it was a substantial and particularised part of the claimant's argument that the observations of the Examining Doctor and indeed his clinical findings were inaccurate. The Tribunal has not commented in any way on these contentions made by the claimant and, in a situation where it may well be (though the reasoning is not clear in that respect) that the Tribunal relied to some extent at least on the Examining Doctor's observations and report, it has not adequately addressed the claimant's contentions.

18. We consider that in this particular decision a reasonable person reading the decision would not find the reasons sufficient to explain it. A very substantial part of the claimant's submission was not addressed.

19. In general terms we would recommend to Tribunals the practice of identifying the issues which are specifically and expressly or by clear implication raised by the appeal letter. Often there will be no specific issues raised other than that the claimant disagrees with the decision or considers it to be wrong with no reasons given. In other cases grounds of complaint will be put forward but will be worded in vague or very

general terms. For example, that the time allowed was insufficient or that the doctor concerned lacked competence. In all such cases the Tribunal by hearing the case will adequately deal with the appeal. That was not so in this case. Here very specific issues were raised.

20. Whether or not a Tribunal accepts a claimant's representations on an Examining Doctor's report, whether it considers that any further information is necessary or whether an Examining Doctor should be asked for comment are all matters within a Tribunal's province and a Tribunal has considerable discretion in this matter. However, here it appears that issues raised expressly by the claimant were ignored. It may be that in this case the Tribunal did not place any reliance whatsoever on the Examining Doctor's report. It may be that it rejected the claimant's contentions. We have no means of knowing. We consider that in this case, when such very specific issues in relation to the report have been raised, the Tribunal should have commented on them in some manner. We set the decision aside for the reason that it did not deal with this issue and the decision was not therefore understandable.

21. As regards the other contentions put forward in the course of this appeal, we deal with them below for sake of completeness.

22. Firstly, we do not consider that there is any universal obligation on a Tribunal to explain its assessment of credibility. We disagree with *CSIB/459/97* in that respect. There may of course be occasions when this is necessary but it is not an absolute rule that this must always be done. If a Tribunal makes clear that it does not believe a claimant's evidence or that it considers him to be exaggerating this will usually be sufficient. The Tribunal is not required to give reasons for its reasons. There may be situations when a further explanation will be required but the only standard is that the reasons should explain the decision. It will, however, normally be a sufficient explanation for rejecting an item of evidence, including evidence of a party to an appeal, to say that the witness is not believed or is exaggerating.

23. A court is not usually required to enter into detailed reasoning as to why it believes or disbelieves evidence. There are sound reasons why not and why courts frequently use anodyne expressions such as that a witness's testimony is "coloured by hindsight" or that his memory has "become selective with the passage of time". Detailed criticism may be regarded as abusive by those criticised and may provoke persons not connected with the appeal into taking steps adverse to the witness or provide them with ammunition to do so. Tribunals are in the same situation. A Tribunal is entitled to exercise its judgment on the veracity of evidence put before it. In many instances it must do so to ascertain the facts. There is no rule that it must explain its assessment of credibility. The only rule is that the reasons for the decision must make the decision comprehensible to a reasonable person reading it. In many instances it would be pointless for a Tribunal to enter into a detailed explanation. A Tribunal might, for example, state that it considered that a claimant was shifty in his demeanour and therefore did not believe him. The claimant would then wish to know why the Tribunal considered him shifty and the matter could continue almost indefinitely. There seems little point in a tribunal entering into such situation and it is certainly not required to do so as a general rule. That is not to say that there may not be times when a further explanation may be needed. It will all depend on the circumstances of the case.

24. Secondly, as regards the findings which will now be included in the reasons, we consider that it is necessary for a Tribunal to indicate its findings of fact on every contended descriptor in the All Work Test (now known as the personal capability assessment) and those which are raised by clear implication or which a Tribunal is required to investigate. This is part of the Tribunal's duty of isolating the issues in the case and dealing with them.

25. Thirdly, once a Tribunal has selected the descriptor which it considers correctly reflects the true fact situation, there is no universal rule that a Tribunal has to give individual reasons for the selection of a particular descriptor. The usual standard of understandability of the decision applies. Similarly there is no universal rule that a Tribunal has to give reasons for not choosing any of the other descriptors which lie between that selected by the claimant and that selected by the Tribunal. The reasons relate to why the Tribunal made the particular decision it did, not to why it did not reach any different decision. As has already been indicated in decision *R5/99(IB)* the practice recommended in *CSIB/324/97* is the "best and safest practice". It is not an error of law to fail to follow that practice though it is unlikely that a Tribunal will err if it does follow it.

26. Fourthly, we would state that, where a claimant's score on the All Work Test (now known as the personal capability assessment) is close to the necessary 15 points, there is no heavier burden imposed on a Tribunal than the general standard that the reasons are to make the decision comprehensible.

27. Fifthly, we would state that a Tribunal can use its own observations in reaching an assessment of credibility. It is, however, strongly desirable that a Tribunal seek a comment from the parties on specific observations of activity as opposed to a more generalised impression of the witness. Comment on observations can be sought in an uncontroversial manner and it is up to the Tribunal whether or not its accepts any explanation which is given. A Tribunal will not necessarily be in error if it does not seek such an explanation but it is much less likely to err if it does so. It may, of course be in error if the observations raise a fresh issue not already in contention and the Tribunal does not seek comment on them. For example if an Examining Medical Doctor opines that a claimant always has to hold on when rising from a chair and the decision maker so accepts and awards points accordingly and the Tribunal observes the claimant to rise without holding on, it must mention its observations and seek comment. Whether or not it accepts the explanation given is a matter for the Tribunal.

28. Where, however, a Tribunal makes an observation which is merely confirmatory of existing evidence it can use that observation as an aid to assessment of the evidence before it without necessarily having to seek comment. Much will depend on whether or not a new issue is raised by the observations made.

29. As regards observations made after the date of the decision under appeal, these may or may not fairly reflect the situation at the time of that decision. It is an easy matter for a Tribunal to ask a claimant at the hearing if his situation has improved, worsened or remains the same as at the time of the said decision. If he still has the same complaints or if he states that his situation has worsened, then obviously possibly contradicting observations on the day of the hearing may well still be relevant to the situation at the time of the said decision.

30. The Tribunal decision is set aside as in error of law for not having dealt adequately with the issues raised by the appeal. Accordingly we remit the matter for re-hearing before a differently constituted Appeal Tribunal which should deal specifically with the claimant's contentions as to the Examining Doctor's report.

(Signed):

JOHN A H MARTIN QC
CHIEF COMMISSIONER

(Signed): **MOYA F BROWN**
COMMISSIONER

(Signed): **J.P. POWELL**
DEPUTY COMMISSIONER

(Dated): **2 AUGUST 2001**

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