

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *60/99

(Northern Ireland Commissioner's File No.: C70/98(IB))

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so as to arrive by 7 FEB 1999 1999

***60/99**

Decision No: C70/98(IB)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS
(NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (CONSEQUENTIAL PROVISIONS)
(NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCAPACITY BENEFIT

Appeal to the Social Security Commissioner

on a question of law from the decision

of Belfast Social Security Appeal Tribunal

dated 21 August 1997

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, with the leave of a Commissioner, against the decision of the Tribunal to the effect that the claimant has not passed the all work test from and including 10 March 1997.
2. Having considered the circumstances of the case I am satisfied that the appeal can properly be determined without a hearing, although I note that no application for such a hearing has been made.

3. The claimant claimed Incapacity Benefit from 19 April 1995. As she did not satisfy the contribution conditions for the receipt of benefit she was awarded a national insurance contribution credit. As she had not worked more than 8 weeks in the 21 weeks before her Incapacity the Adjudication Officer decided that the all work test was applicable and she was treated as having satisfied this test pending assessment. After the usual general practitioner's medical report and the completion of the usual questionnaire, the claimant was assessed on 4 January 1996 by a medical officer of the Department and, arising out of that assessment, she was accepted as passing the all work test. In order to re-assess the all work test the claimant completed a further questionnaire on 27 January 1997 and, after the completion of another report by the claimant's general practitioner, the claimant was examined again on 19 February 1997 by a departmental medical officer. An Adjudication Officer then considered all the available evidence, applied a descriptor to each relevant activity, decided the claimant scored 0 points and thus failed the all work test. In the circumstances the Adjudication Officer decided that the claimant was not incapable of work from and including 10 March 1997. The claimant then appealed to a Social Security Appeal Tribunal.
4. On appeal the Tribunal came to the following findings of fact material to its decision:-

"Claimant suffers from diverticulitis which can cause flare ups every month or so.

She suffers from stress incontinence which causes leakages but she is not incontinent of bladder in that she wets herself so completely that she needs to change clothes. Claimant has demonstrated no clinical findings which would substantiate a finding of arthritis. There is no evidence provided by the claimant to confirm a diagnosis of rheumatoid arthritis. There is no indication in any reports supplied by the claimant that she suffers from rheumatoid arthritis.

We incorporate into our findings of fact the clinical findings as noted by Dr R. in the IB85 of 19/2/97 and believe they accurately reflect the claimant's condition as regards her overall physical health.

Claimant is not incontinent of bowel."

5. The Tribunal gave the following reasons for its decision:-

"The Tribunal do not accept that the claimant is incontinent of bowel. Her evidence on this matter was vague and unconvincing and it was only after prolonged questioning that the claimant settled on the descriptor of once per month. We do not accept her evidence on this issue. We accept that after defecating three or four times in the morning she finds that her bottom may be messy and is in need of cleaning but we believe that this is a matter of hygiene and in no way equates to incontinence.

We note Dr K's evidence that faetal (*sic*) incontinence is not usually associated with diverticulitis. Significantly we also find that there is no mention of bowel incontinence in any of the medical reports obtained from the claimant's General Practitioner. There are reports from Dr McC, Dr H and Dr L and not one of the General Practitioners has made mention of bowel incontinence. Dr L in his report of August 21 mentions rectal bleeding but not bowel incontinence. This is consistent with the evidence given by Dr K that with flare ups of diverticulitis there can be an escape of mucus and rectal bleeding. When this occurs the Tribunal believe the problem could be alleviated with the use of incontinence or sanitary pads to relieve any residual discomfort.

We accept that the claimant does suffer from some stress incontinence but believe that the amounts of urine involved when this occurs would be small and absorbed by her incontinence pads. Again we are guided by Dr K's evidence on this issue - he confirms stress incontinence occurs when there is interabdominal pressure caused by laughing, coughing or sneezing which results in an involuntary leakage of urine. Other than this, there is usually bladder control and there not a complete avoiding of the bladder contents. We note that the claimant claims to have only occasionally wet herself, the last time being a couple of months ago.

As regards the claimant's arthritis or rheumatoid arthritis we are again not convinced that the claimant is suffering from any of these conditions. We note the lack of any significant clinical findings in the IB85 completed by Dr R. The claimant has not produced any evidence to substantiate a diagnosis of rheumatoid arthritis - it is not mentioned in any of the 3 reports provided by the 3 different General Practitioners from her local surgery. Claimant herself is unsure if she had any tests to confirm the diagnosis. Claimant herself states she is worse in cold weather which would suggest that her problems, whatever the cause, does not affect her adversely most of the time.

We cannot ignore Dr R's comment that he observed the claimant "walk briskly" down Queen Street. Whilst we believe that the claimant and her daughter may look the same the claimant herself stated that she was not dressed the same as her daughter on the day. There is therefore no reason, as we see it, for Dr R to mistake the claimant for her daughter.

Based on the lack of clinical findings and on Dr R's observation we believe that the claimant is not suffering from any significant joint problems or pain that would render her with any difficulties in walking, lifting and carrying or standing."

6. The unanimous decision of the Tribunal was in the following terms:-

"To disallow the appeal. The claimant has not passed the All Work Test from and including 10 March 1997 not having scored 15 points or more from physical health descriptors."

7. The summary of the decision of the Tribunal (perhaps more accurately described as the all work test assessment sheet in relation to physical health descriptors) established that the Tribunal specifically scored 0 points in relation to activity 1 (walking on level ground with a walking stick or other aid if such aid is normally used) under descriptor 1(g): 0 points in relation to activity 4 (standing without the support of another person or the use of an aid except a walking stick) under descriptor 4(g): 0 points in relation to activity 8 (lifting and carrying (for use of upper body and arms (excluding all other activities specified in Part 1))) under descriptor 8(g): 0 points in relation to activity 13 (continence (other than enuresis (bedwetting))) under descriptor 13(h).

8. The claimant sought leave to appeal this decision on the following grounds:-

"1 The decision contains an error of law on the face of the record.

The tribunal found that I was not incontinent of the bladder in that I wet myself so completely that I need to change clothes. The tribunal also found that I was not incontinent of the bowel. The tribunal have erred in law by taking "incontinent" to mean actual soiling or wetting. Commissioner Goodman in decision number CIB/14332/96 stated, "My decision is however a precedent for the ruling that the expression "loses control of the bowels" can comprehend a situation where a claimant does not in fact "mess himself", provided he is able to rush to a nearby lavatory". This decision has been *sic* by both Commissioners in Northern Ireland in cases C39/97(IB) and C18/97(IB)."

9. Leave to appeal was refused by the chairman. Leave was then sought directly from a Commissioner but leave was not sought within the statutory period of 42 days. However, on 28 August 1998 a Commissioner accepted the late application for leave to appeal for special reasons. Leave to appeal was then granted by a Commissioner on 12 January 1999.

10. The application of the all work test is in issue in this particular case. This test is designed to determine whether a person should be treated as being incapable of work. The test is detailed by the Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995 and in particular by part III of, and the Schedule to, the Regulations. In brief and for the purposes of this case, where only physical disabilities were in question, the scheme set out in part I of the Schedule provides a set of activities and descriptors related to each. In respect of each descriptor points are acquired and, if more than 15 points are achieved, then the claimant has satisfied the all work test. In light of a decision by the Adjudicating Authorities to that effect

a claimant can either be awarded Incapacity Benefit or can be considered by the Department for an award of credits if a claimant does not satisfy the contribution conditions for receipt of Incapacity Benefit.

11. Mr S T , by letter dated 19 October 1998 made the following submissions in relation to this appeal:-

"In her application Mrs B contends that the Tribunal "..... erred in law by taking 'incontinent' to mean actual soiling or wetting". She cites decision CIB/14332/96 of Great Britain Commissioner Goodman, as approved by the Northern Ireland Commissioners in decisions C39/97(IB) and C18/97(IB), to support her contention.

Bowel incontinence

The Tribunal found that Mrs B was not incontinent of the bowel. The Tribunal gave as one of their reasons for their decision that they found Mrs B evidence to be vague and unconvincing. The Tribunal also gave as a reason for their decision the absence of any mention of bowel incontinence in reports from 3 General Practitioners.

I submit that on the evidence the Tribunal were entitled to find as they did, and that the reasons given for so finding were adequate and in accordance with regulation 23 (3A) of the Social Security (Adjudication) Regulations (Northern Ireland) 1995.

Bladder incontinence

The tribunal found as fact that -

"..... suffers from stress incontinence which causes leakages but she is not incontinent of bladder in that she wets herself so completely that she needs to change clothes."

When dealing with a similar case, the Great Britain Commissioner in decision CSIB/625/97, paragraph 12 (copy attached), accepted a submission that dribbling and leaking do not constitute "no voluntary control of the bladder". I submit that on the evidence the Tribunal were entitled to find as they did and did not err in law."

12. In reply Mr D G made the following additional submission received at the Office of the Social Security Commissioners on 11 February 1999:-

"I would refer you back to my original grounds of appeal, that the Tribunal erred in law by taking "incontinent" to mean actual soiling or wetting. The Tribunal accepted a medical definition of "incontinence" rather than adopting the appropriate interpretation as laid out in Commissioners' decisions CIB/14332/96, C39/97(IB), and C18/97(IB). These decisions set precedents in relation to correctly interpreting "incontinence" with regard to the descriptors as laid out in the "All Work Test" for Incapacity Benefit."

13. It is noteworthy that the decision of Mr Commissioner Goodman in the Great Britain decision CIB/14332/96 was specifically brought to the Tribunal's attention by Mr G at the appeal hearing. In that decision the evidence found as a fact by the Tribunal was that: -

"...the claimant (was) suffering from Irritable Bowel Syndrome. This means he gets episodes of constipation for 3 or 4 days interspersed with days when he has 3 or 4 bowel evacuations in rapid succession, very urgently and with explosive diarrhoea... the claimant has always been able to find a toilet in time. He has not yet had an accident."

The majority of the Tribunal found that he had suffered loss of control of his bowels. The Adjudication Officer appealed to the Commissioner. Mr Commissioner Goodman upheld the decision of the Tribunal and gave reasons as follows:-

- "14. ... I consider that the expression "loses control of bowels" is apt to include a situation like this where the claimant suffers from severe Irritable Bowel Syndrome. He lost control of his bowels at least once a month (indeed it appears once a week probably) in the sense that he is not able to 'hold himself', as the normal person can do even when faced with a considerable urge to defaecate. If the claimant did not immediately rush to the lavatory, he would indeed "mess himself".

15. I therefore conclude on these facts the tribunal were entitled to come to the conclusion they did."

Mr Commissioner Goodman continued by stating as follows:-

"My decision is however a precedent for the ruling that the expression " loses control of bowels" can comprehend a situation where a claimant does not in fact "mess himself", provided he is able immediately to rush to a nearby lavatory."

14. In decision No C18/97(IB) I followed the approach of Mr Commissioner Goodman in CIB/14332/96.

15. However, in this particular case, the Tribunal, as Mr T has pointed out, has specifically found that the claimant was not incontinent of the bowel. This finding must be considered in light of decision CIB/14332/96. The Tribunal also gave reasons for coming to this conclusion, namely that the claimant's evidence was vague and unconvincing and that there was no mention of bowel incontinence in the reports from three General Practitioners. The Tribunal's reasons in relation to bowel incontinence are clear and relate to the unreliability of the claimant's evidence rather than to any issue of legal interpretation. In the circumstances, I conclude that, on the evidence, the Tribunal was entitled to conclude that the claimant did not lose control of her bowels.
16. The issue of bladder incontinence, in my view, is a more difficult point to decide. Mr , before the Tribunal, submitted that decision CIB/14332/96 had relevance to bladder control as well as control of bowels, and there is obviously force in this submission.
17. However, the Tribunal in the present case has decided that the claimant has suffered from stress incontinence which causes leakages but that this is not incontinence of the bladder in that, in substance, it is only a minor problem. Stress incontinence, in my view, must be distinguished from the situation where a person has an urgent need to urinate which would require an immediate rush to the lavatory if there was not to be loss of control. Therefore I do not consider that the principle set out in decision CIB/14332/96 in relation to incontinence has direct relevance to the present case.
18. I agree with Mr Commissioner May in the Scottish decision CSIB/625/97 where he made clear that there is a difference between having "no voluntary control" of the bladder or bowels and "losing control of" the bladder or bowels. I accept that in the present case that the claimant cannot establish that she had no voluntary control of her bladder at all. The evidence clearly demonstrates that her problem is one of dribbling and leaking and this does not constitute "no voluntary control of the bladder" - which, if established, would have awarded the claimant 15 points under descriptor 13(b).
19. Therefore the height of the claimant's case was that she was entitled to 3 points under descriptor 3(f) (loses control of bladder at least once a month) as under 13(g) (loses control of bladder occasionally) 0 points can only be awarded.
20. Mr C has submitted that the Tribunal erred in law by "taking "incontinent" to mean actual soiling or wetting." In my view the findings of fact material to the decision do not support this proposition. The Tribunal has specifically found that she has an incontinence problem which causes leakages and, in my view, this finding of fact is reasonable in the circumstances.
21. Perhaps the Tribunal, in light of its findings, should have considered specifically descriptor 13(g) (loses control of bladder occasionally) - which would have given the claimant 0 points, or should have considered descriptor 13(f) (loses control of bladder at least once a month) - which would have given the claimant 3 points, rather than merely coming to the conclusion that descriptor 13(h) (no problem with continence) which gave the claimant 0 points, was the only possible result in this case. However,

this is a minor error and no way vitiates the overall correctness of the Tribunal's decision, namely, that the claimant has failed the all work test. I am reinforced in coming to this conclusion by the decision of the Great Britain Commissioner, in CSDLA/257/96, where Mr Commissioner Mitchell QC, in an appeal, came to a similar conclusion in a case where any substituted decision which he might have made would, of necessity, have been to the same effect as the original decision of a Tribunal. Accordingly I conclude that the error, which is not an error of substance, cannot amount to an error in point of law.

22. For the reasons stated I conclude that the Tribunal has not erred in point of law in its decision and I therefore dismiss this appeal.

(Signed):

CHIEF COMMISSIONER

(Date):

17 August 1999