SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *14/00

(Northern Ireland Commissioner's File No.: C72/99(IB))

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Decision No: C72/98(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 a Tribunal's decision
dated 10 June 1998

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, leave having been granted by the Chairman, against a decision of 10 June 1998 of a Social Security Appeal Tribunal (hereinafter called "the Tribunal") sitting at Belfast. That Tribunal had disallowed the claimant's appeal against a decision of an Adjudication Officer which was made with respect to credits for Incapacity Benefit. The Adjudication Officer decided that claimant, being subject to the All Work Test from 28 January 1997, had not satisfied that test and could not be treated as incapable of work from and including 15 September 1997.

2. I held a hearing of the appeal which was attended by Ms Slevin of the Law Centre (NI) representing the claimant and by Mr Fletcher of Central Adjudication Services representing the Adjudication Officer. I am obliged to both for their assistance. My decision is given in the final two paragraphs.

3. Both in the papers and at hearing the grounds of appeal were as follows:-

(1) The Tribunal had erred in its interpretation and application of activity 13 in the All Work Test. This is the activity of "Continence". In Ms Slevin's submission the effect of medication should be ignored in determining the extent of voluntary control over the bowels for the purpose of activity 13(b) within that descriptor. In support of this contention Ms Slevin cited decision CSIB/38/96, a decision of Commissioner Walker in Great Britain. Ms Slevin submitted that the Tribunal had not discounted the effect of medication and had therefore erred in law.

(2) Ms Slevin submitted that regulation 24 of the Incapacity for Work (General) Regulations (Northern Ireland) 1995 provided that the All Work Test was a test of the extent of a person's incapacity by reason of some specific disease or bodily or mental disablement to perform the activities prescribed in the Schedule. She said that regulation 24 must be read subject to regulation 25(2) which provided that in determining the extent of a person's incapacity to perform the relevant activities, he was to be assessed as if wearing any prothesis with which he was fitted or (as the case may be) any aid or appliance which he normally wore or used. This did not require consideration of the effects of medication in assessing the extent of the person's incapacity and she agreed with Mr Fletcher that the words "prosthesis, aid or appliance" could not cover medication.

(3) Ms Slevin further submitted that the Collins English Dictionary defined "voluntary" as "done or undertaken by free choice ... having their actions controlled by the will" and that descriptor (a) within activity 13 must be read accordingly. She submitted that consideration of regulation 18(1)(b)was irrelevant as it was dealing with disqualification for misconduct rather than disallowance under the All Work Test.

(4) Ms Slevin said that Collins English Dictionary defined "voluntary" in relation to muscles as having their action controlled by the will. Ms Slevin said that the question of voluntary control rose only in connection with activity 13 and was obviously specifically included therein for a reason. Ms Slevin referred me to CSIB/12/96 paragraphs 4 and 9 as authority for the proposition that there was need to focus on the precise wording of the descriptors. She said that the medication could be discounted only in respect of activity 13 where the word "voluntary" was included. In response to my question in relation to its not being included in many of the other descriptors within that activity, Ms Slevin submitted that voluntary must be applied to them. This she said was implicit in Commissioner Walker's approach.

(5) The Tribunal had failed to make adequate findings of fact in relation to claimant's actual loss of control over her bowels. It was the claimant's evidence that she had suffered incidents of actual bowel incontinence and the Tribunal should have made a finding of fact on claimant's actual control over her bowel in order to allow for the proper application of activity 13.

(6) Ms Slevin further submitted that the Tribunal's finding that "[*The claimant*] takes 8 - 16 Immodium tablets per day - which would appear to manage her problem although she appears to be dependent on the tablets" along with the Tribunal's statement in the reasons for decision "...taking into account that she is taking double the prescribed dose of Immodium, the Tribunal felt that her condition could be or should be under control" did not amount to an adequate finding in relation to the incidence of actual urgency incontinence experienced by claimant.

(7) Ms Slevin was of the view that the evidence to the Tribunal did indicate problems of accidents or extreme urgency, though she did acknowledge that she could not recall whether or not any specific incidents of accidents or extreme urgency had been mentioned to the Tribunal other than the one noted in the record of evidence.

(8) The Tribunal's decision indicated that it had failed to give proper consideration to decision CIB/14332/96 in reaching its own decision. CIB/14332/96 is a decision of Commissioner Goodman in Great Britain and, Ms Slevin submitted, is authority for the proposition that the phrase "loses control of the bowels" can cover a situation where a person does not in fact have a bowel accident provided he or she is able to rush to a nearby lavatory. Ms Slevin submitted that the Tribunal made no findings of fact as to how often the claimant would experience such urgency although it was her evidence that she suffered daily problems with the control of her bowels to such an extent that she rarely went out of the house. Ms Slevin also submitted that the Tribunal gave undue weight to one example given by the claimant where she had to exercise some degree of bowel control and that it failed to give proper and due consideration to several incidents set out by the claimant as examples of loss of control or urgency in the week preceding the hearing.

4. Mr Fletcher in his observations contained in his letter of 3 February 1999 and at hearing opposed the appeal. As regards taking into account medication which the claimant used, Mr Fletcher submitted that it was a general and long standing practice amongst Adjudication Officers and Tribunals when dealing with incapacity questions to measure a claimant's abilities after taking account of any medication habitually and reasonably used. In support of this he cited decision CSIB/16182/96 paragraph 4. Mr Fletcher submitted that there was no reason why this general rule should not apply to all the descriptors in the All Work Test including those relating to activity 13. Mr Fletcher submitted that Commissioner Walker in CSIB/38/96 took the view that the inclusion of the word "voluntary" in descriptor 13(b) meant that it was only control by the exercise of willpower alone which was legitimate for consideration. Mr Fletcher disagreed with this approach and submitted that it was proper to consider the degree of control taking account of both willpower and medication provided of course that it was reasonable in the claimant's circumstances to take the medication. In the present case, the claimant suffering with a severe irritable bowel condition, it was open to the Tribunal to conclude that the dosage of "Immodium" which the claimant said she took was reasonable.

5. Mr Fletcher stated that a very narrow construction was being given to the word "voluntary". He referred me to the Oxford English Dictionary and said that in his view the construction set out therein of "Brought about by one's own choice or deliberate action: self-inflicted, self-induced. Entered into of free choice. Done of deliberate intent or purpose: designed, intentional" should be used. Mr Fletcher submitted that the Regulations had to be read as a piece and that there was nothing saying the effects of medication should not be considered and regulation 18(1)(b) must be read in conjunction with the other regulations. He submitted that were Commissioner Walker's approach to be adopted the word "voluntary" would have to be imported into the remaining descriptors. He referred me to decision CIB/3889/97, a decision of Commissioner Goodman in Great Britain indicating that "voluntary", was merely an expression not adding meaning.

6. Mr Fletcher also drew my attention to regulation 25(2) of the said Regulations which provide:-

> "In determining the extent of a person's incapacity to perform any activity listed on Part I [*of the All Work Test*] he shall be assessed as if he were wearing any prothesis with which he is fitted or, as the case may be, any aid or appliance which he normally wears or uses."

Mr Fletcher felt that it would be straining the meaning of the word "aid" to suggest that it might reasonably include medication but he did submit that the import of the provisions was clear and tended to support his submission that the effects of medication or any other treatment (such as physiotherapy) should always be considered when deciding a question of incapacity for work. He said that the activity of "consciousness" in the All Work Test used the word "involuntary" and submitted that it would be unreasonable for a diabetic to forego medication or an epileptic to do so or to be considered only as they would be in the absence of medication.

7. Mr Fletcher submitted that the assertion was brought into sharper focus by regulation 18(1)(b) and (2) of the said Regulations which provided that any person who failed without good cause to submit himself to medical or any other treatment (excluding vaccination, innoculation or major surgery) recommended by a Doctor or a hospital in which he was undergoing medical treatment and so as to be likely to render him capable of work should be disqualified for receipt of Incapacity Benefit or Severe Disablement Allowance. In Mr Fletcher's submission it would be incongruous to contemplate ignoring the effects of medical treatment (which clearly included medication) in relation to the All Work Test, whilst at the same time entertaining a prospect of disqualification for failing to submit to same.

8. With regard to the grounds of appeal relating to incidents of incontinence, Mr Fletcher submitted that the document headed "Summary of the decision of the Tribunal" indicated that the Tribunal's finding on continence was 13(h) which was "No problem with continence". He submitted that even if it was accepted that the "Record of Proceedings" was not a verbatim record of all that transpired at the

hearing, it seemed that the claimant gave evidence at hearing of only one isolated occasion when she did have an accident. The question then arose as to whether it was necessary for the Tribunal to make a specific finding as to whether that incident occurred or not. In this connection Mr Fletcher referred me to decision C18/97(IB) (a decision of the Chief Commissioner in Northern Ireland) which held that one episode of loss of control was not "occasional loss of control". Mr Fletcher submitted that the failure to record a specific finding on that incident was not necessarily fatal to the validity of the Tribunal's decision and he opposed those grounds.

9. In Mr Fletcher's submission there was no error of law in the grounds indicated nor any other matter.

10. In reply to my question as to what the situation would be if medication gave the person the ability to control by will or conscious choice the emptying of bowel and bladder, Ms Slevin said that the descriptor must be read as if voluntary meant by exercise of will alone, not by use of will having taken medication. Mr Fletcher said that voluntary meant brought about by choice or deliberate action and if medication was taken of a person's own free will and this effected control over continence then the person had achieved control.

11. To deal first with what constitutes losing control of bowel or bladder it appears to me that a distinction between two types of fact situation must be made. That distinction is between a claimant who has a sensation of extreme urgency perhaps overlaid by anxiety but would not be likely to suffer an "accident" if he or she did not immediately rush to use the lavatory and one where the actual physical urgency is such that the claimant could be said to have lost control of the bowel or bladder. It appears to me that it is only the latter situation of actual physical extreme and immediate urgency which is covered by the decision of Commissioner Goodman in CIB/14332/96. At paragraph 14 thereof the Commissioner indicates what can be comprehended by the phrase "loses control of bowels". He states:-

> "... I consider that the expression "loses control of bowels" is apt (as indeed the Handbook indicates) 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 was not able to "hold himself", as the normal person can do even when faced with a considerable urge to defecate. If the claimant did not immediately rush to the lavatory, he would indeed "mess himself"."

It is quite evident from this paragraph that the Commissioner was contemplating situations where there actually is an uncontrollable physical need as being covered by the expression "loses control" of the bowels. The situation in CIB/14332/96 was one of actual potential immediate physical loss of control. To come within the situation of losing control of bowels, an "accident" must take place or must be so imminent that an immediate rush to the lavatory is needed to avert it. A subjective sensation

of urgency and/or extreme anxiety not likely to lead to such a situation as was set out in the said paragraph 14 would not in my view be covered by CIB/14332/96 nor by the phrase "loses control" in descriptors 13(c) to (g).

12. I can see no error in the Tribunal's decision with relation to this matter and it was one which was sustainable on the evidence. Only one incident of actual loss of control was elicited in questioning and another incident of considerable control despite a sensation of urgency was mentioned. It appears to me that the tenor of the evidence was that despite a sensation of urgency and anxiety the claimant was able to exercise considerable control. CIB/14332/96 does not cover such a situation as was found to exist in the present case.

13. In connection with the construction of descriptors 13(a) and (b) I think it must be noted that the descriptors exist as measures of the disruption of the function within a particular activity. Regulation 24 of the Social Security (Incapacity For Work) (General) Regulations (Northern Ireland) 1995 provides:-

> "The all work test is a test of the extent of a person's incapacity by reason of some specific disease or bodily or mental disablement, to perform the activities prescribed in the Schedule."

It is therefore in connection with activity 13 "Continence (other than enuresis (bedwetting))" that the person's functional ability must be considered. The descriptors are degrees of incapacity within that activity. Continence is defined in Blakiston's Pocket Medical Dictionary as "control of bladder or bowel function." It is defined in the New Collins Concise Dictionary as the ability "to control urination and defecation".

14. The Penguin Medical Encyclopedia describes how the bladder functions. It states:-

> "The bladder is a flexible muscular bag. It receives a continuous dribble of urine from the kidneys, which gradually stretches its walls. But this is not like inflating a rubber bladder in which the pressure steadily increases. The muscle fibres of the bladder remain at rest through a considerable range of distension. They simply adapt themselves to the volume of stored urine, and show signs of stretch only when this volume is considerable. They then begin to resist, and the sensation of needing to pass urine is felt. In an infant, this sets off reflex emptying of the bladder. After training the reflex can be suppressed: the muscle relaxes and the bladder can be further distended before giving a further signal. The cycle can be repeated several times before reflex emptying supersedes voluntary control."

It further describes incontinence as the "Inability to control reflex emptying of rectum or bladder, sometimes because of a disorder of the organ itself but more often from loss of co-ordination in the nervous system". Continence is therefore the ability to control this reflex emptying.

15. I agree with Ms Slevin that close attention to the wording of the descriptors must be given. The descriptor in question is "no voluntary control". The word "voluntary" describes the control. It delineates the nature of the control. It does not limit how voluntary control is to be brought about. The phrase "no voluntary control" appears to me to contemplate, though not necessarily exclusively, situations where a person either has no mental awareness of a need to empty bladder or bowel and thus no control over it by will or choice or has such awareness but has no ability to control that need by exercise of the will.

Medication may work in several ways. It may give the person the relevant mental awareness and enable that person to exercise control by will. It may remedy a defect in the relevant organ or in the central nervous system and enable the person to exercise control by will. It may work in other ways, the above is not on exhaustive list. What the medication may do is not per se provide voluntary control (that is done by the person himself), rather it may enable the person to exercise such control.

If the person acquires control by will over the emptying of bladder or bowel then it seems to me that that person cannot be said to have no voluntary control. For example a child in normal health becomes continent because training gives the child the ability to exercise voluntary control over the emptying of bladder and bowel. Either an organ or the child's nervous system may become defective and control by will or choice may be lost. Medication may remedy the defect in the organ or nervous system and enable that control to be restored. The control is by choice or will. The medication has remedied the defect in the organ or central nervous system and enabled the control to be regained or acquired for the first time. The control itself is still voluntary. Its nature has not altered. The person is aware of a need to go to the toilet but by exercise of will can refrain from doing so. Reflex emptying does not take place.

As regards Commissioner Walker's decision in CSIB/38/96, if he meant that all medication must be disregarded in determining whether or not a claimant has voluntary control, I do not share his views. Medication can enable a person to exercise control by will where previously he could not have done so. If a person acquires or regains control by will over the emptying of bladder or bowel, however the ability to exercise that control was brought about, he cannot, in my view be said to have "no voluntary control". Even, therefore, adopting Ms Slevin's contention of "voluntary" as meaning "having the action controlled by will" the use of medication need not be excluded. I do not therefore consider that the Tribunal erred in taking account of medication in this case.

16. I also consider that the Tribunal did not err in relation to the evidence of one incidence of actual loss of control. One incident only was mentioned, and Mr Fletcher is right that this does not amount to "occasional". The Chief Commissioner decided this in C18/97(IB). In addition other evidence was of considerable control despite a sensation of urgency. Before the Tribunal Ms Slevin had put forward that descriptor 13(a) " no voluntary control over bowels" was the appropriate one for consideration. The claimant, however, gave evidence of considerable control of over one hour and only one incident of actual loss of control was related. This was, of course, against the background of the claimant taking "Immodium" as she did.

I consider that the Tribunal was entitled to assess the claimant as taking this medication and that it was also correct to conclude that having done so, she could not be said to have "no voluntary control" over her bowels. On her own evidence she had been aware of a need to visit the lavatory but was able to hold on for one hour. I do not consider that a person in that situation could be fairly said to have "no voluntary control".

I do consider, however, that the Tribunal did err in that it gave no reasons for its rejection of Ms Slevin's contentions in relation to the Mental Health descriptors. The claimant had been awarded 6 points for these by the Adjudication Officer. Ms Slevin had contended and indeed was given points in relation to other descriptors being applicable. The Tribunal raised the award to a deemed 9 points. It gave no reason for rejecting the evidence in relation to the claimant's remaining contentions. The Tribunal was, of course entitled to reject the evidence or to consider that the claimant's limitations did not come from a mental disablement or were matters of choice . It did, however in this case have to give reasons for considering that no further mental health descriptors applied. It did not do so. While it was perhaps obvious from the evidence that certain of the descriptors contended for were not relevant, others remained in contention and dependent on the Tribunal's assessment of the evidence and application of the law. The Tribunal's reasons did not explain why the Tribunal had awarded no further points for these and in this particular case such explanation, which could have been in general terms, was necessary to explain the decision. The reasons did not therefore adequately explain the decision in this case.

I set the decision aside for that reason. I do not consider it appropriate that I give the decision which the Tribunal should have given. I therefore remit the matter for re-hearing before a differently constituted Tribunal. That Tribunal should take into account the views set out above.

(Signed): Mary F Brown
COMMISSIONER

(Date): 21 January 2000

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