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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/4486/2000

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ACT 1998

**APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF
LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER BANO

Claimant: Mr Ian Paul GRANT

Tribunal: Cardiff

Tribunal Case No: CDLA 4486 2000

Date of hearing: 24 January 2000

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal given on 24 January 2000 is erroneous in point of law. I set aside the decision of the tribunal and, since it is not expedient for me to make the findings of fact which I consider to be necessary for the claimant's entitlement to benefit to be determined, I refer the case for rehearing by a differently constituted tribunal.
2. On 13 July 1999 the claimant, a man born on 5 May 1958, made a claim for the care and mobility components of disability living allowance on the basis that he was suffering from myalgic encephalomyelitis (ME), claiming that his condition was variable and asserting a range of attention and supervision needs. On 6 August 1999 the claimant was examined by a visiting medical practitioner, who found no significant abnormality and reported, in relation to the claimant's mobility and care needs, that "no demonstrable pathology exists to warrant these needs". On the basis of that report, the claim was disallowed on 16 August 1999.
3. The claimant asked for his claim to be looked at again and submitted a supporting letter from his general practitioner containing the following:

"(The claimant's) condition started with fatigue and tiredness which initially appeared to be occurring once every 3 weeks, however, over a several month period, he felt that he was exhausted every day. He currently feels "washed out" most of the time and any physical exertion leaves him with aching muscles. He becomes frustrated and angry at his condition and he can sometimes have good and bad periods although the bad periods obviously outweigh the good. Most recently, he gets quite disabling heavy sensation and everything is an effort and he suffers aching joints, muscles, tingling in his hands, blurred vision and dizziness. These symptoms are common in the condition of chronic fatigue syndrome. At present he is taking Amitriptyline 10 mgs tds and 20 mgs at night to help him limit his chronic fatigue, although there has really been very little change over the last couple of years in his condition."

However, the decision was not revised and the claimant appealed to the tribunal. On 24 January 2000 the tribunal dismissed his appeal and it is against that decision that the claimant, with my leave, now appeals.

4. The tribunal, in their Statement of Reasons, found that the claimant suffered from symptoms compatible with a diagnosis of chronic fatigue syndrome, but rejected the claim to either component of disability living allowance. In relation to mobility component, they held:

"...The EMP found no physical disablement and went so far as to say that in relation to physical factors there was no convincing evidence to show pathological illness. Whilst accepting that (the claimant) does experience periods of exhaustion-the EMP noted that the last attack had been two months before the examination-this would not prevent him walking normally most of the time. This was confirmed by the EMP's opinion that the claimant could walk 1-2 miles at a normal pace. Apart from the infrequent attacks of exhaustion, we were unable to determine what prevented (the claimant) from walking in view of the entirely normal clinical examination. We thought it reasonable to infer that if (the claimant) had the frequency and severity of the symptoms claimed, there would be some physical evidence or symptoms which would be evident on a clinical examination...

In balancing all the evidence we preferred the EMP's opinion that there was no physical disablement. We preferred the EMP's to (the claimant's evidence) as it was impartial

and based on a clinical examination by a practitioner practised in making assessments of disability. We found the evidence in (the claimant's) claim form was highly improbable and exaggerated given the absence of any demonstrable clinical pathology when clinically examined. We preferred the EMP's evidence to that contained in the (the general practitioner's) report because we concluded that the general practitioner had relied heavily in the history taken from (the claimant) in giving his opinion. It follows, therefore, that we prefer the EMP's expert assessment based on a clinical examination to the letter from the G.P."

In relation to the care component, the tribunal said:

"...we preferred the evidence of the EMP for the same reasons as stated above in relation to mobility. The EMP found no demonstrable pathology in relation to care needs, and said that (the claimant) was unable to impress him that he had any care needs at present."

5. The claimant appealed on the ground that the tribunal erred in the way in which it evaluated the medical evidence, in particular, with regard to the reasons given by the tribunal for preferring the evidence of the examining medical officer to that of the general practitioner. The appeal was not supported by the Secretary of State's representative, who submitted that the tribunal was entitled to prefer the evidence of the examining medical officer to that of the claimant and his general practitioner for the reasons which they gave.
6. I agree with the Secretary of State's representative that the tribunal was perfectly entitled to reject the claimant's account of the effect of his condition if they considered that that account was inconsistent with the visiting medical officer's clinical findings. Thus, for example, the visiting medical officer found that there was no muscle wasting of the upper and lower limbs on measurement (page 37), and the tribunal was fully entitled to regard that as evidence that the claimant was exaggerating the extent of his inactivity.
7. The tribunal appear to me, however, to have gone further, and to have regarded the lack of any physical indications of disability as being inconsistent with the existence of a physical disability. The tribunal found that there was no physical disablement, despite their finding that the claimant suffered from some symptoms compatible with a diagnosis of chronic fatigue syndrome. The term "demonstrable pathology" used by the visiting medical officer and adopted by the tribunal may have referred to the lack of muscle wasting, but it seems to me to be more likely that the term was used to mean physical findings which gave an explanation for the claimant's alleged symptoms, particularly since the tribunal said earlier in their decision that: "as far as physical factors are concerned there is no convincing evidence to show pathological illness". Whatever was meant by the terms "pathology" and "pathological", however, it seems clear that the tribunal discounted the possibility of physical disablement in the absence of any physical explanation of the symptoms which the claimant alleged.
8. Although ME, or chronic fatigue syndrome (which now appears to be the preferred term), remains a controversial area, there is general acceptance of the report on the condition prepared in 1996 by a Joint Working Party of the Royal Colleges of Physicians, Psychiatrists and General Practitioners. Appendix 3 of the Report sets out case definitions of chronic fatigue syndrome, including the United Kingdom definition, which excludes from the definition of the condition chronic fatigue with known physical causes. The Question and Answer sheet produced by the ME Association describes the

condition as "characterised by extreme fatigue, muscle pain and a severe 'flu-like malaise", and states that a "clinical diagnosis is made by looking at the pattern of symptoms which is common to all sufferers and by testing for and excluding other causes of fatigue". The diagnosis of ME is therefore on the basis of the existence of a cluster of symptoms, which is unexplained by any other cause. Although it was therefore open to the visiting medical officer and to the tribunal to exclude a diagnosis of ME on the basis that the claimant did not exhibit the symptoms which characterise the condition, or that those symptoms had some other cause, that finding was not open to them on the basis that there was no clinical pathology which explained the claimant's symptoms. Indeed, if the visiting medical officer had found such a pathology, the claimant could not have been suffering from chronic fatigue syndrome.

9. The 1996 Joint Working Group report recognised that chronic fatigue syndrome could not be classified as either physical or psychological, but consisted of a mixture of both. On the basis of that report, the Commissioner in *CDLA/2822/1999* concluded that a tribunal is entitled to treat a claimant's chronic fatigue syndrome (by whatever name it is called) as involving a physical element that is capable of supporting an award of higher rate mobility component. (para. 11) If the tribunal found that the claimant was suffering from chronic fatigue syndrome, it was therefore open to them to find that the claimant was suffering from physical disablement and to make an award of higher rate mobility component if the other conditions of entitlement were satisfied.
10. The Commissioner in *CDLA/2822/1999* added that, in order to qualify for the mobility component, there must be nothing to suggest that the claimant's mobility is wholly or largely limited by the mental component of the syndrome, if it is possible to disentangle the mental from the physical component. I would make two observations on that qualification.
11. First, it is to be noted that, just as a diagnosis of chronic fatigue syndrome excludes symptoms with a known physical cause, so also does it exclude symptoms resulting from particular psychiatric disorders. Appendix 3 of the 1996 Joint Report lists the psychiatric disorders which, according to one definition, exclude chronic fatigue syndrome as: melancholic depression, substance abuse, bipolar disorders, psychosis and eating disorders. A proper diagnosis of chronic fatigue syndrome will therefore have excluded such psychiatric causes of a claimant's symptoms, and, if a tribunal is to make a finding that mobility is wholly or largely limited by the mental component of chronic fatigue syndrome, it must therefore be on the basis that the limitation does not result from a condition which is excluded by the diagnosis of that condition.
12. Secondly, I would echo and endorse the views of those Commissioners who have held that, in determining whether a disability is physical, regard must be had to the effect of a condition, rather than its cause. In *CDLA/1020/1997* the Commissioner rejected a contention that, as a matter of principle, ME is not a physical disability. Having held that the issue is one of fact in every case, the Commissioner continued:

"That such disablement must be the result of a genuine medical condition is beyond doubt: and of course as stated by the Commissioner in Case *CSDLA 176/94* on which the adjudication officer relies, a tribunal must be satisfied on that issue and record findings and reasons and reasons to justify their conclusion on it. But for my part I find more helpful the guidance given by the Commissioner more recently in case *CSDLA 265/97*...In particular as he observes...the central issue in such cases is not so much

whether the condition relied on is itself "physical in nature", but whether it *produces physical consequences* so far as the claimant's muscle movements are concerned, and whether those in turn cause pain or other difficulty."

13. I have therefore come to the conclusion that the tribunal erred in finding that the claimant was not suffering from any physical disablement on the basis of a lack of any physical explanation for his symptoms. I therefore allow the appeal and set aside the tribunal's decision, since I cannot make the necessary findings of fact myself, I refer the case for rehearing by a fresh tribunal.
14. The new tribunal should decide, on the basis of the whole of the evidence, whether they accept that the claimant is suffering from chronic fatigue syndrome. If so satisfied, they should then decide, in relation to mobility component, whether the claimant is physically disabled, having regard to what I have said in paragraphs 8 to 12. If they determine those issues in the claimant's favour, they will then have to consider the extent of the impairment of the claimant's ability to walk and the nature and extent of any attention and supervision reasonably required by the claimant in the light of their findings on the severity of his disability as it affects him most of the time. Those matters are, of course, very much in issue.
15. The claimant has now informed me that he has been successful in an appeal against a later refusal of disability living allowance, and has been awarded benefit from 10 March 2000. Any award of benefit by the new tribunal will therefore be for a closed period.

(Signed)

E A L Bano
Commissioner

11 October 2001
