

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/228/1999

Starred Decision No: 95/00

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Any comments by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

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

so as to arrive by 2nd March 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

95/00

1. My decision is that the decision of the social security appeal tribunal ("the 1998 tribunal") held on 16 September 1998 is not erroneous in point of law. Accordingly, I do not allow the claimant's appeal.

2. The claimant had been in receipt, successively, of sickness, invalidity and incapacity benefit from 1988, following an industrial accident he suffered in June that year. The principal problems from which he suffers are a lumbar back lesion with degenerative disc disease of the lumbar spine, a torn hamstring muscle, and a perforated right ear drum. He was required to complete an incapacity for work questionnaire which he did on 10 May 1995. He was examined by a medical officer on 5 July 1995. After considering the evidence an adjudication officer disallowed the claimant's incapacity benefit from and including 4 August 1995 on the grounds that he had not satisfied the all work test, inasmuch as he had only achieved 3 points on the physical descriptors, namely in respect of bending and kneeling. The claimant appealed. A tribunal held on 17 November 1995 disallowed his appeal, confirming the decision of the adjudication officer. The claimant appealed to the Commissioner. The Commissioner allowed the claimant's appeal and remitted the case for rehearing by a differently constituted tribunal on the grounds that the 1995 tribunal had not fully considered the claimant's allegations that he was sometimes completely out of action for four or five days at a time because of his back and that this could occur between one and three times a month. By the time the Commissioner gave his decision on 6 August 1998 the claimant had in fact applied for and had been awarded incapacity benefit again from 27 February 1996, although this award was disallowed with effect from 15 November 1996, a decision which was upheld by a tribunal held on 30 September 1997. Accordingly when the case came before the 1998 tribunal it only had to consider the period ("the closed period") from the date of the original disallowance, namely 4 August 1995, down to the day before the subsequent award, namely 26 February 1996. The 1998 tribunal allowed the claimant's appeal in part inasmuch as it found that the claimant satisfied the all work test from 1 January 1996 to 14 January 1996 on the grounds that he was wholly unable to walk during that time and accordingly scored 15 points in respect of that activity. However the tribunal, by a majority, held that for the rest of the closed period the claimant only scored 6 points, 3 in respect of rising from sitting and 3 since he sometimes could not bend or kneel as if to pick up a piece of paper from the floor. The dissenting minority held that, since the claimant could only pick up a piece of paper from the floor by squatting he satisfied the descriptor "cannot bend or kneel as if to pick up a piece of paper from the floor" on the grounds that squatting did not constitute bending or kneeling and he should accordingly be awarded 15 points.

3. The claimant appeals with the leave of the Commissioner. The appeal is not supported by the adjudication officer concerned. The claimant asked for an oral hearing, to which request I acceded. At the hearing the claimant appeared in person and Mr Sriskandarajah of the Office of the Solicitor to

the Department of Social Security appeared on behalf of the Secretary of State (who had succeeded to the functions of the adjudication officer). I am grateful to both for their submissions.

4. Two issues arose in the appeal. First, whether squatting constituted bending or kneeling for the purposes of the relevant activity. The descriptors concerned are:-

"cannot bend or kneel as if to pick up a piece of paper from the floor and straighten up again" (15 points)

and

"sometimes cannot bend or kneel as if to pick up a piece of paper from the floor and straighten up again" (3 points)

It was common ground between all members of the tribunal that the claimant could only achieve the task mentioned in these descriptors by squatting. It was further common ground that he sometimes was disabled from doing the task by reason of his back pain. The issue between the majority and the dissenting minority was whether "squatting" constituted "bending or kneeling". The claimant submitted that squatting was neither (i) bending, that is to say, bending at the waist nor (ii) kneeling, that is to say placing one or both knees to the floor. On behalf of the Secretary of State it was submitted, by reference to various dictionary definitions, that "bend" could refer not only to vertebral movement but also to bending of the knees.

5. In my judgment "bending or kneeling" does encompass squatting. I reached this conclusion not so much on the dictionary definitions recited to me on behalf of the Secretary of State, but rather in the context of the descriptors taken as a whole. The descriptors refer to bending or kneeling "as if to pick up a piece of paper from the floor". In my judgment these words colour the words "bend or kneel" and require one to consider how people normally pick up a piece of paper from the floor. This is normally done by a combination of bending at the waist and bending at the knee, with an inclination of the head in order the better to be able to see: the number of people who actually kneel, in the sense of placing one or both knees to the floor, in order to pick up a piece of paper, are relatively few, as are the number of people who bend only at the waist without flexing at the knee at all. The descriptors thus must encompass bending the knees. On this analysis a person who only bends the knees, or squats, can "bend or kneel as if to pick up a piece of paper from the floor" and therefore does not satisfy the descriptors. As mentioned above the majority of the tribunal, however, found that the claimant was sometimes disabled from picking up a piece of paper from the floor even by squatting and for this reason correctly awarded the claimant 3 points.

6. The second issue is as follows: during the hearing I indicated that I was concerned whether the tribunal had properly considered the variability of the claimant's

condition and whether, given the claimant's original allegations that he was sometimes laid up in bed for four or five days at a time, it had had sufficient regard to incapacity which might have lasted for four days or more. On reconsidering the tribunal's decision I am, however, satisfied that it adequately considered these matters, even though it had not had the advantage of having the Tribunal decision CIB/14534/96 (which dealt with variable conditions) before it. It only had to consider the closed period - just under 7 months. Within the closed period it identified 14 days in January 1996 when the claimant was found to be wholly incapable. The majority concluded that (page 210), taking an overall view for most of the time the claimant was during the rest of the closed period able to perform the various descriptors making up the all work test and accordingly did not qualify. It had previously examined in some detail for what periods the claimant had been laid up for any length of time and, having identified these (only one of which - that in January 1996 - fell within the closed period) found that there were no other periods when the claimant had been confined to bed.

6. For the above reasons, the claimant's appeal fails.

(Signed) A Lloyd-Davies
Commissioner

(Date) 7 March 2000