

*Also 15 103 Rule - Quantity Under Act At Law As
Cannot Do Decision For More Than A Maximum Period
Also 2000 16 Limit to Case Below & Rem Case
at Commission*

Commissioner's File: CIB/243/1998

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

**APPEAL FROM A SOCIAL SECURITY APPEAL TRIBUNAL
ON A QUESTION OF LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Appeal Tribunal: Coventry Social Security Appeal Tribunal

Case No: 4/13/97/27720

1. This is a supported appeal with the leave of the chairman from a decision of the Coventry Social Security Appeal Tribunal given on 28 August 1997 determining that the claimant was not entitled to incapacity benefit. For the reasons given in paragraphs 9 to 13 below, the appeal is allowed. The decision of the tribunal is set aside and the case is remitted to be heard by a differently constituted tribunal in accordance with the guidance given in those paragraphs.

2. The claimant suffers from asthma, at least in the winter months, but has no other physical or mental problems. He became incapable of work on 5 January 1993. Thereafter he received first sickness benefit and then invalidity benefit. Following the change from invalidity benefit to incapacity benefit, the claimant was required to complete an all works questionnaire, which he submitted on 14 October 1996 together with a medical certificate. He was examined by an examining medical officer on 5 November 1996 and on the following day the adjudication officer determined that the claimant was not incapable of work from and including 6 November 1996.

3. In the questionnaire, the claimant had indicated no problem with any of the descriptors, but had added that he had asthma and used inhalers. He also wrote that his asthma affected him mainly during the winter as in very cold weather it affected his breathing and he was unable to walk very far. The medical note submitted simply diagnosed chronic asthma and recommended that he should refrain from work for 3 months. The examining medical officer recorded that the claimant had had asthma for 4 years and that it affected him mainly in winter. He describes him as breathless intermittently during the winter months with a tendency to chest infections, but states that during the summer he was quite well. The examining medical officer goes on to record that the claimant uses inhalers and antibiotics in winter, but gets very breathless and tends to stay in. His wife would take the children to school in winter - a 2 miles

walk. He would take them in summer. He had never seen a consultant about his asthma.

4. In his letter of appeal dated 26 November 1996, the claimant stated that he was subject to severe and unpredictable asthma attacks, and that when they occurred he could not leave the house and was gasping for air. He had to leave his job at Jaguar because of his health. He was especially prone to attacks first thing in the morning and in the winter, or when he was in a room with somebody smoking or when he went from a cold to a hot environment or vice versa. He was fit on the day of his medical but two days before he was laid up all day and unable to go out.

5. In his evidence to the tribunal, the claimant stated that he did not walk more than 200 yards even on a good day, that he drove the car short distances, that he hung on to the stairrail when climbing stairs, and that his average peakflow was 130-140 when not using steroids. He also stated that he could not stand for more than 10-15 minutes, that for the previous two years he had spent winter afternoons in bed 2-3 days a week and that he had no problem bending or kneeling but may wheeze and cough afterwards.

6. The tribunal found that the claimant was not to be treated as incapable of work, that the all work test applied and that none of the exemptions applied. The claimant in his claim form had indicated no problem with any of the descriptors and this was confirmed by the examining medical officer. Subsequently on the same day the chairman provided a statement of material facts and reasons in accordance with Regulation 23, (3A) of the Social Security (Adjudication) Regulations 1995 as amended. The tribunal rejected a submission by the claimant's representative that "Section 27(c)" applied. This appears to be a reference to Regulation 27(c) of the Social Security (Incapacity for Work)(General) Regulations 1995 in their original form since he goes on to say that the tribunal accepted the medical assessor's view that asthma was a controllable disease and while the claimant had periodic (3 in 1997) bouts of severe asthma these are controlled by use of steroids. The chairman went on to state that the claimant's evidence to the tribunal was substantially different from what he stated in his claim form and was therefore not accepted by the tribunal. In particular his claim as to his average peakflow was rejected on the ground that this would show a continuous severe debilitated state not borne out by the medical evidence.

7. The claimant in his notice of appeal complains of the use of the additional statement procedure by the chairman, and submits that the original decision could not be corrected or supplemented by it. I reject this ground of appeal, which appears to have overlooked the effect of the amended Regulation 23.

8. The other grounds of appeal put forward on his behalf are that (1) the tribunal did not make findings of fact on the claimant's incapacity for work in respect of each day from the date of the adjudication officer's original decision to the date of the hearing; (2) the tribunal failed to deal with points raised by the claimant's representative relating to the effect of work on the claimant and the effect of Regulation 15 of the Social Security (Incapacity for Work)(General) Regulations 1995; and (3) the whole of the reasons findings and notes produced by the tribunal were wholly inadequate. Each



of these grounds is supported by the adjudication officer, who has given reasons for supporting them, and has consented to a decision without reasons if I accept his submission in its entirety. As I do not entirely accept his submissions, I am giving reasons for my decision.

9. The claimant's problem, asthma, is one where the symptoms are variable. The proper approach to a case involving variable symptoms has been set out in Commissioner's Decision CIB/911/1997, at paragraphs 11-15. That was a case where the disabilities were dizziness and vertigo, but similar considerations must apply to asthmatic attacks. In addition, in my view, a claimant cannot perform one of the descriptors if he will not do it because he has a real fear of the consequences if he does do it. It is not enough to earn points, however, if the activity can only be done with difficulty or if occasionally it cannot be done at all.

10. In the present case, it was plain that the claimant suffered from asthma attacks, but not all the time. The tribunal gave, in my view, adequate reasons for concluding that he could normally perform any descriptor activity as and when called on to do so. The tribunal was entitled to reject his evidence on these matters, and did so. What it failed to do was to consider the application of the descriptors 5(c) and 6(c) which apply where a disability is experienced sometimes. It ought to have considered their application despite the fact that the claimant stated in his claim form that they did not apply, since it was perfectly possible that while having an asthma attack they would apply. They only carry 6 points between them, however, and if this was the only point of criticism, it would not have assisted the claimant.

11. The tribunal also failed to consider whether there were any particular days or periods when the claimant was incapable of work up to the date of the hearing. It has made no findings as to this at all, and does not seem to have sought to have established this apart from ascertaining that up to that time in 1997 there had been three days when the claimant had had a severe asthma attack and that he had not been hospitalised. No findings are made as to their effect on his ability to perform the tasks in the descriptors or as to the frequency of lesser attacks or their effects on him. It may be that the tribunal thought that because the asthma could be controlled by an inhaler, he was still capable of work on those days, but it does not say so. It may also be that the days on which the claimant would have been found incapable of work, if any, would have been too few to entitle him to any incapacity benefit in respect of those days, but again there is no finding on this.

12. The tribunal also failed to take account of the claimant's statement in his original application form where he says that in very cold weather asthma affects his breathing and he is unable to walk very far. Statements to a similar effect were made by him to the examining medical officer. His evidence at the hearing is not substantially different from this statement as regards his ability to walk in winter, and ought not to have been rejected by the tribunal on the basis of inconsistency. Also, the tribunal does not seem to have considered whether he was unwilling in winter to perform any of the descriptors because of a real fear that if he did so he would suffer an asthma attack, or indeed to have made any inquiry on these matters.

13. As the representative of the claimant has pointed out, Regulation 15 of the Social Security (Incapacity for Work) (General) Regulations 1995 provides that a person who at the commencement of the day is, or thereafter becomes, incapable of work by reason of some specific disease or bodily or mental disablement shall be treated as incapable of work throughout the day. This means that if the claimant suffers an asthma attack which does not last the whole day, he is still to be treated as incapable of work during that day, provided, of course, that the effect of the attack is that he would score 15 or more points using the descriptors for more than a minimal period.

14. I reject the submission that the tribunal did not properly consider the effect of Regulation 27 of the Social Security (Incapacity for Work)(General) Regulations 1995. It is plain that in the statement of material facts the tribunal is dealing only with Regulation 27(c) in its unamended form. That provided that "A person who does not satisfy the all works test shall be treated as incapable of work if *in the opinion of a doctor approved by the Secretary of State ... (c) he suffers from a severe uncontrolled or uncontrollable disease*". As the adjudication officer has pointed out, the regulation has been held to be ultra vires in so far as it enacts that the doctor's opinion will result in a person being treated as capable or incapable of work, with the result that the regulation is to be read as if the italicised words above are omitted. However, the tribunal is still entitled to accept the medical officer's view on this matter, and this is precisely what the tribunal did. I do not consider that it is necessary for every tribunal decision on this matter to spell out that it had regard to the decision of the High Court on this matter provided it sufficiently appears that it has decided the point itself.

15. On the further point made by the adjudication officer that the tribunal ought also to have expressly dealt with the effect of the amended regulation in respect of the period since 6 January 1997, there was never any suggestion that any of the provisions of that amended regulation could apply, and it is plain on an examination of the amended regulation that it could not apply. I see no reason why the tribunal should have referred to it in its reasons any more than it needed to refer to any other matter that was plainly not in issue.

16. I therefore set aside the decision of the tribunal and remit the case to be heard by a differently constituted tribunal. This will involve a complete re-hearing of the case, and not just a re-hearing of the specific issues where I have held that the tribunal erred. It will be for the new tribunal to address and reach a decision on all the issues before it on the evidence then available.

(signed)

Michael Mark
Deputy Commissioner

(dated)

29 October 1998

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