Weighing of Evidence — Guidance —

Decision: CDLA/8462/95 Discrimination

1. My decision is as follows. It is given under section 23(7)(b) of the Social Security Administration Act 1992.

1.1 The decision of the Coventry Social Security Appeal Tribunal held on 2nd October 1997 is erroneous in point of law: see paragraphs 10 to 14 and 17.

1.2 Accordingly, I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal from the adjudication officer's decision, I refer the case to a differently constituted tribunal for determination.

1.3 I direct the tribunal that rehears this case to conduct a complete rehearing. In particular, the tribunal must:

Determine the period over which it has jurisdiction.

The tribunal's jurisdiction begins on the effective date of the adjudication officer's decision under appeal: 22nd January 1997.

In order to determine the date on which the tribunal's jurisdiction ends, the tribunal must establish whether the claimant's capacity for work has subsequently been determined. If the claimant's capacity for work has been determined after that date, the tribunal's jurisdiction runs to the beginning of the period covered by that subsequent determination. Otherwise, the tribunal's jurisdiction runs down to the date of the rehearing. The adjudication officer must inform the tribunal, either by way of an additional submission or through the presenting officer at the rehearing, whether any subsequent determination has been made and, if so, its effective date.

Determine the claimant's entitlement to Incapacity Benefit.

The tribunal must consider the claimant's incapacity for the whole of the period within its jurisdiction: see the decisions of the Tribunal of Commissioners in CIB/14430/1996, CIS/12015/1996 and CS/12054/1996.

Apply the correct burden of proof

The adjudication officer must show grounds to review and to revise the decision awarding benefit to the claimant in accordance with the decision of the Tribunal of Commissioners in CSIS/137/1994, especially in accordance with the Appendix to that Decision. If the adjudication officer discharges this burden, the burden is on the claimant in order to establish incapacity from a later date.

History of the case

2. This is an appeal to a Commissioner against the decision of the tribunal brought by the claimant with the leave of a Commissioner. The adjudication officer supports the appeal.

3. The claimant was in receipt of Incapacity Benefit when required to submit to an assessment by means of a self-assessment questionnaire followed by a medical examination and report.

4. In the self-assessment questionnaire, the claimant asserted difficulties with the activities of rising from sitting, walking, negotiating stairs, bending and kneeling, and lifting and carrying. The examining doctor gave the opinion that the claimant was disabled in terms of the all work test under the activities of walking and negotiating stairs.

5. An adjudication officer reviewed the decision making the award and terminated the claimant's entitlement from and including 22nd January 1997. The adjudication officer, on the basis of the opinion of the examining doctor, awarded 3 points on the all work test.

6. The claimant appealed to a tribunal against the decision of the adjudication officer. The letter of appeal referred for the first time to inflammation of the right hip. In a supporting letter, her GP referred to osteoarthritis of the lumbar spine. The claimant attended and gave evidence at the hearing of the appeal, accompanied by her daughter and a representative from her local Law Centre.

7. The tribunal confirmed the adjudication officer's decision. Although the tribunal awarded an additional 3 points under each of the activities of sitting and rising from sitting, the claimant did not score the minimum of 15 points necessary to satisfy the all work test.

The tribunal's reasons

8. Having dealt with the history and structure of Incapacity Benefit, the own occupation test, and the structure and point scoring of the all work test, the tribunal dealt with the issues arising for decision in this paragraph.

> "In the tribunal's judgment first being satisfied that there was also present cervical spondylitis as certified by the claimant's general practitioner the claimant would sometimes have problems with getting up from a chair and in sitting for any considerable length of time. The tribunal was not satisfied that the extent of the claimant's problems were as set out in argument by the claimant's representative. Where the claimant's account of her problems differed substantially from the view of the examining medical officer the tribunal preferred the evidence of an examining medical practitioner as it was both disinterested and informed while the claimant's evidence (and to an extent the evidence of a claimant's own GP) is not. See CDLA/8462/1995."

9. The tribunal's reasons might have been better if more space had been devoted to the matters of fact that were in dispute and less to a recitation of matters that were not contested.

10. The tribunal's reasons are incomplete, unclear and self-contradictory. Furthermore, the tribunal appears to have abdicated its responsibility to weigh the evidence. So, the tribunal's decision is erroneous in law.

11. The tribunal's reasoning is incomplete, because it made no reference to the inflammation of the claimant's right hip or to the diagnosis of osteoarthritis of the lumbar spine. The tribunal did not deal with this evidence. Did it decide that the claimant and the GP were referring to the same condition in different terms? It expressly accepted the evidence from the GP on cervical spondylosis. Did it reject the GP's diagnosis of osteoarthritis? Did it accept the GP's diagnosis, but decide that there was no relevant disability relating to the lumbar spine?

12. The tribunal's reasoning is unclear, because it rejected the claimant's evidence in so far as it "differed substantially" from the view of the examining doctor. What amounts to a substantial difference? What evidence from the claimant was rejected and what of her evidence was accepted?

13. The tribunal's reasoning is self-contradictory. The examining doctor had diagnosed "neck pains", but identified no disability resulting from them. The tribunal accepted the GP's diagnosis that "cervical spondylitis" was "also present" and identified disability with sitting and rising from sitting. Surely, these are the same diagnoses in different words - the examining doctor emphasised the symptoms and the GP emphasised their cause. The tribunal treated them as different. They are not. The tribunal did not explain why it reached a different conclusion on the resulting disability from the same condition as that identified by the examining doctor.

14. The tribunal abdicated its responsibility to weigh the evidence, because it treated the matters as covered by the decision of the Commissioner in CDLA/8462/1995. That decision, and others to the same effect by the same Commissioner, are often cited by adjudication officers in their submissions to tribunals. Some tribunals rely on them as their reason for preferring the evidence of examining doctors to that of claimants and their medical advisers. These adjudication officers and tribunals have misunderstood the decision.

15. In CDLA/8462/1995, paragraph 5, the Commissioner was concerned with a submission from an adjudication officer that the tribunal's reasons were inadequate on the ground that they failed to explain why the evidence of the Examining Medical Practitioner was preferred to that of the claimant. The Commissioner rejected the submission. He held that a tribunal did not have to explain something that was "self-evident and obvious", but that an explanation would be needed if the reasons for a tribunal's preference were not so clear.

16. With this decision, I respectfully agree. It must, though, not be misunderstood. The Commissioner was only dealing with what amounted to adequate reasons for a tribunal's decision on the weight of the evidence. The Commissioner did not decide that tribunals should, or must, prefer the evidence of an examining doctor to that of a claimant or a GP. The weighing of evidence is for the tribunal. A Commissioner only has power to decide if there has been an error of law. The weighing of the evidence is essentially a matter of fact, with only very limited legal constraints. There will be a breach of the principles of natural justice, and so an error of law, if each of the tribunal's findings of fact is not based on some material logically tending to show the existence of that fact: see the opinion of the Privy Council delivered by Lord Diplock in Mahon v. Air New Zealand [1984] 3 All England Law Reports 201 at page 210. The weight to be attached to any piece of evidence must be determined by applying common sense: see the comments of Lord Blackburn in the House of Lords in Lord

Advocate v. Lord Blantyre (1879) 4 Appeal Cases 770 at page 792. There will be an error of law if the tribunal takes an approach to a piece of evidence which is not rational and in accord with common sense. So, if the evidence on a particular point is unchallenged and there are no facts or circumstances to displace or cast doubt on it, the tribunal's decision would be erroneous in law if it fails to accept it: see the judgment of Lord Chief Justice Goddard in R. v. Matheson [1958] 2 All England Law Reports 87 at page 90. Likewise, if a finding of fact is so out of tune with the evidence that the tribunal must have misunderstood that evidence: see the reasoning of the Privy Council in Hossack v. General Dental Council, reported in The Times on 22nd April 1997, reversing a finding of fact by the Dental Council's professional conduct committee on this ground. CDLA/8462/1995 did not come within these narrow limits. So, the Commissioner could not, and did not purport to, tell tribunals how to weigh evidence in a particular case. This is why he expressed his decision in terms of adequacy of reasons and why it is for that proposition only that the decision properly stands as an authority.

17. The tribunal appears to have treated CDLA/8462/1995 as authority for weighing the evidence as it did. This is shown by the fact that the tribunal cited the decision. If the tribunal had understood that the decision was only an authority on the adequacy of reasons, it would not have cited it. It is also shown by the penultimate sentence from the passage quoted in paragraph 8. The references to an Examining Medical Practitioner and to a claimant's GP suggest that the tribunal was taking a general approach rather than undertaking an analysis of the particular evidence in the individual case.

18. I respectfully add this qualification to CDLA/8462/1995. Law is one thing, good practice is another. It is good practice for tribunals always to explain why some evidence was preferred to other evidence. What is self-evident or obvious to a tribunal or a Commissioner is not necessarily so to a claimant. The task is not onerous; it takes only a few words to explain the comparative strengths and weaknesses of evidence.

Summary

19. The tribunal's decision is erroneous in law and must be set aside. It is not appropriate for me to give the decision that the tribunal should have given on its findings of fact and it is not expedient for me to make further findings of facts. There must, therefore, be a complete rehearing of this case before a differently constituted tribunal. The tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions. As my jurisdiction is limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the tribunal on the law to apply.

Signed: **Edward Jacobs**
Commissioner

Date: **15th December 1998**