

7

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/483/2001

Starred Decision No: 77/01

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

*Mr Damien Abbott,
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 10th August 2001

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal, brought by the claimant with my leave, from a decision of the Romford social security appeal tribunal, dated 19 April 2000, whereby they held that the claimant was not entitled to incapacity benefit because he scored only 12 points under the all work test, rather than the 15 points required by regulation 25(1)(a) of the Social Security (Incapacity for Work) (General) Regulations 1995.

2. The claimant appealed originally on grounds that raised only points of fact. However, two further grounds were added after the chairman had refused leave to appeal. It was on those grounds that I granted leave. It is also on those grounds that the Secretary of State supports the appeal.

3. In considering the "activity" of lifting and carrying (paragraph 8 of Schedule 1 to the 1995 Regulations), the tribunal said –

"We questioned [the claimant] as to his ability to lift 2.5 kilos from table top height and hand it to another person, he confirmed that he was able to do that and we therefore find that within the terms of the descriptor no points are justified."

Descriptor 8(d) is:

"(d) Cannot pick up and carry a 2.5 kilogramme bag of potatoes with either hand."

It is common ground, and I agree, that the tribunal applied the wrong test, because "carry" connotes a degree of movement from one place to another. Merely handing something to someone is not carrying it. The claimant's case is that he could lift a 2.5 kilogramme bag but that he could not carry it and it is therefore plain that his case must be considered by another tribunal.

4. In considering the "activity" of sitting (paragraph 3 of Schedule 1 to the 1995 Regulations), the tribunal said:

"We find no basis for the claim in the submission that he cannot sit longer than 30 minutes due to discomfort in the lower limbs and sleepiness. This is not consistent with the clinical findings, with his own description of his activities or with our own observations at the hearing."

Descriptors 3(c) and (d) are:

"(c) Cannot sit comfortably for more than 30 minutes without having to move from the chair because the degree of discomfort makes it impossible to continue sitting."

“(d) Cannot sit comfortably for more than 1 hour without having to move from the chair because the degree of discomfort makes it impossible to continue sitting.”

The claimant accepts that the tribunal were entitled to find that he did not satisfy descriptor 3(c) but it is common ground that, having so found, they ought to have gone on and considered whether he satisfied descriptor 3(d). Again, I agree. A contention by a claimant that he satisfies descriptor 3(c) necessarily includes a contention that he satisfies descriptor 3(d) and, in those circumstances, if the claimant's main contention is rejected by a tribunal, it is incumbent on them to consider the narrower, implied contention. That was particularly so in the present case where an additional 3 points scored under descriptor 3(d) would have been enough to entitle the claimant to benefit.

5. Accordingly, I allow the claimant's appeal and refer the case to a differently constituted tribunal for determination.

M. ROWLAND
Commissioner
7 June 2001