

Descriptor 11 (e) all work based: having on a busy street
- If due to descriptors can only understand 7
with difficulty (report need to report) then
descriptor should apply - reasonable -

MSB
(901)

THE SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *1 /99

(Commissioner's File No: CIB/590/98)

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

Miss J Bravo
Office of the Social Security and Child Support Commissioners
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3 BN.

so as to arrive by 12 March 1999

* 1/99.

1. The decision of the Social Security Appeal Tribunal dated 7 November 1997 is erroneous in law. I set that decision aside and, as empowered by section 23(7)(a)(i) of the Social Security Administration Act 1992, I give the decision which I consider the tribunal should have given which is:-

In the period 6 February 1997 to 9 March 1997 (both dates included) the claimant scored 18 on the All Work Test specified in regulations 6(1)(b) and 24 of the Social Security (Incapacity for Work) (General) Regulations 1995 as read with the schedule to those regulations and is therefore entitled to Incapacity Benefit for that period as being incapable of work.

2. The claimant appeals, with leave of the chairman, against the tribunal's dismissal of his appeal against an adjudication officer's decision of 6 February 1997 to the effect that the claimant scored only 3 points on the All Work Test and, therefore, was not entitled to Incapacity Benefit from that date.

3. The claimant suffers from chronic obstructive airways disease and deafness. He was accepted as being incapable of work on 3 August 1989 and, after a spell on Statutory Sick Pay, was in receipt of Sickness Benefit followed by Invalidity Benefit from and including 26 August 1989. On 13 April 1995, because he had been incapable of work for the previous 196 days, he became subject to satisfaction of the All Work Test as a condition for entitlement to Incapacity Benefit. On 6 February 1997 an adjudication officer, having considered a report by an examining medical officer of the Benefits Agency Medical Services and information provided by the claimant on an Incapacity for Work questionnaire, decided that the claimant scored 3 points in respect of descriptor 2(d) (can walk up and down a flight of 12 stairs without holding on) of the schedule to the regulations and was therefore not incapable of work and not entitled to Incapacity Benefit. The claimant appealed that decision to the tribunal.

4. The tribunal decided that the claimant scored 7 points in respect of the descriptor 1(d) (cannot walk more than 200 metres without stopping or severe discomfort), 3 points in respect of descriptor 2(d) and 3 points in respect of descriptor 6(c) (sometimes cannot either, bend or kneel, or bend and kneel as if to pick up a piece of paper from the floor and straighten up again). Applying paragraph 26(1)(e) of the regulations the tribunal discounted the 3 points in respect of descriptor 2(d) and arrived at a total of 10 points. In doing this it decided that descriptor 11(e), which carries 8 points, in respect of reduced hearing, did not apply in the claimant's case and that for the purposes of the All Work Test he had no problem with hearing. Accordingly, having a total score of only 10 points, he was not entitled to benefit. The claimant takes issue with the tribunal on the question of descriptor 11(e).

5. The statement of the reasons for the tribunal's decision includes the following paragraphs relating to the matter of the claimant's hearing (the numbering is mine):-

"14. It was acknowledged on behalf of the appellant that in order to succeed with his claim he would need to satisfy descriptor 11e in respect of his hearing loss namely that he could not hear well enough to understand someone talking in a normal voice on a busy street. This caused the tribunal some difficulties. There was no up to date medical evidence and the appellant's GP had made no reference to hearing loss in completing the MED4. The appellant acknowledged that he had attended upon his GP but that no treatment had been recommended and no hearing aid was thought to be desirable.

15. Clearly the appellant has some hearing loss. He explained to the tribunal how in a crowded place he would have some difficulties in hearing. He maintains that in a busy high street, if he was seeking to carry on a conversation, he would have to keep on asking persons to repeat their question. He maintains that his condition is exacerbated by tinnitus.

16. The tribunal have found that the appellant does have some hearing loss. This was determined in 1990 and it is said that any hearing loss since that time can only be upon the basis of natural ageing. Whilst the appellant might, dependent upon circumstances, have some difficulty in understanding persons talking in a normal voice on a busy street, it has been the task of the tribunal to determine whether at its simplest, having regard to the overall picture, the appellant can or cannot hear well enough to understand someone talking in a normal voice on a busy street. The tribunal find that the appellant can hear well enough to understand some [one] talking in a normal voice on a busy street and therefore he is not entitled to the descriptor that he seeks to claim. As previously indicated the decision is based upon all the evidence available to the tribunal and is a finding of fact based thereon."

6. The statement of the claimant's grounds for appealing the tribunal's decision includes the following:-

"In the findings of fact the tribunal gives a detailed analysis and evaluation of [the claimant's] hearing problems and confirms that it was acknowledged by the appellant's representative that in order to succeed with the appeal the descriptor 11e would have to be satisfied, namely that he could not hear well enough to understand someone talking in a normal voice in a busy street.

However, it is felt that the tribunal erred in law even though a great deal of attention was given to the hearing loss of [the claimant's].

It is felt that the tribunal's conclusion was inconsistent with certain findings of fact.

The tribunal found [There is then quoted the third and fourth sentences of paragraph 16 of the statement of reasons].

There seems to be a tautological conflict in this statement at one saying he has some problems at hearing a person in a busy street and then coming to a conclusion of fact that he is able to understand someone talking in a busy street in a normal voice.

Accordingly it is believed that the Tribunal's conclusion regarding hearing is an error of law having regard to its previous reasoning."

7. The adjudication officer now concerned does not support the appeal. In his written submission of 3 July 1998 he rejects the claimant's grounds of appeal and argues that the tribunal has clearly considered all the evidence and that it is clear that it has accepted that the claimant does have a problem with his hearing and that on the evidence the hearing problem is not severe enough to satisfy the descriptor 11(e) of the schedule.

8. I heard the claimant's appeal on 20 October 1998. The claimant was not present but he was represented by Mr B. Griffiths of the Benefit Advice and Tribunal Unit of Doncaster Metropolitan Borough Council's Directorate of Social Services. The adjudication officer was represented by Mr S. Sriskandarajah of the Office of the Solicitor to the Secretary of State for Social Security. I am obliged to both Mr Griffiths and Mr Sriskandarajah for their submissions.

9. Mr Griffiths expanded on the argument in the statement of the grounds of appeal that the tribunal's acceptance of the fact that the claimant had a problem with hearing in a busy street is inconsistent with its finding that descriptor 11(e) does not apply. In essence his argument was that the tribunal seemed to accept the claimant's evidence that if he is conversing with another person in a busy street he has to keep asking that person to repeat what he or she is saying. It was, therefore, illogical to say that the claimant is unable to understand someone talking in a normal voice on a busy street. Moreover, the tribunal's reasoning seems to indicate that it considered that because the claimant can manage to understand what is being said in the circumstances specified in descriptor 11(e) the descriptor does not apply to him even although he has considerable difficulty in understanding. In that approach to the matter the tribunal was applying a more difficult test than is specified in the regulations. All of the descriptors in the schedule to the Incapacity for Work (General) Regulations had to be considered in the light of what is reasonable. It is not reasonable to say that a claimant can understand someone talking in a normal voice in a busy street if he can gain that understanding only by making frequent requests for repetition of what has been said.

10. Mr Sriskandarajah adhered to the adjudication officer's submission that the tribunal's conclusions on the descriptor 11(e) question were adequately reasoned and based on adequate

findings in fact. However, he did suggest that the case may need to be remitted for rehearing because the tribunal had accepted an erroneous submission from the adjudication officer as to the period to be covered by its decision. The adjudication officer's decision under appeal was that the claimant is not entitled to benefit from 6 February 1997. However, the claimant made a further claim for benefit on 10 March 1997. The cause of incapacity was stated by the claimant's General Practitioner to be depression and an adjudication officer accepted that the claimant was to be treated as incapable of work from 10 March 1997 pending assessment for the All Work Test. The assessment was carried out on 17 September 1997 and an adjudication officer, having decided that the claimant scored 6 points for physical descriptors and 3 points for mental descriptors, disallowed Incapacity Benefit from and including 24 September 1997. The adjudication officer requested that the tribunal should limit its decision to the period from 6 February 1997 (the beginning of the period covered by the adjudication officer's decision under appeal) to 9 March 1997 (the day before the commencement of the period covered by the interim award made pending assessment for the All Work Test).

11. Mr Sriskandarajah argued that the adjudication officer was mistaken in requesting the tribunal to limited the period of its decision in that way. There should have been no interim award of benefit as a claimant is not entitled to have more than once the benefit of the provision in regulation 28 of the general regulations that the All Work Test shall be treated as satisfied until he has been assessed. The period of the tribunal's consideration should have been the period beginning with the disallowance under appeal down to the date of the tribunal's own decision. The tribunal's failure to deal with the whole period within its jurisdiction was an error in law.

12. I agree with Mr Griffiths' submission. In the 8th paragraph of the statement of the reasons for the tribunal's decision it is said that the tribunal has taken the view that any task that can only be carried out in circumstances of substantial pain or difficulty cannot properly be regarded as within the capabilities of the claimant. In my parargraph 4 above I have quoted the 15th paragraph of the tribunal's reasoning. I think that the fifteenth paragraph indicates that the tribunal accepted that it was only with difficulty that the claimant could understand someone talking in a normal voice on a busy street. Therefore, by the tribunal's own stated standard of assessment, which in my view is correct, the descriptor 11(e) applies. In other words, when Mr Griffiths' criterion of reasonability is taken into account the descriptor applies because on the evidence accepted by the tribunal the claimant cannot be said to understand someone talking in a normal voice in a busy street. In my view, therefore, the tribunal should have awarded the claimant 8 points in respect of his reduced ability to hear and that added to the other aggregable points which it has awarded brings the claimant's score to 18. The tribunal's decision should, therefore, have been that the claimant satisfied the All Work Test. As there is no need for further findings in

fact I have substituted my own decision for that of the tribunal.

13. As regards the period which should be covered by my decision, I agree with Mr Sriskandarajah that by virtue of paragraph (2) of regulation 28 of the General Regulations, but subject to certain exceptions specified in that paragraph, the assumed satisfaction of the All Work Test pending assessment provided for in paragraph (1) of that regulation does not apply where the claimant has within the 6 months preceding his claim been found to be capable of work. I am not sure whether or not the exceptions apply in this claimant's case in relation to the claim which he made on 10 March 1997 but even if the adjudication officer concerned with that claim was wrong to apply regulation 28(1) to the claimant it made no difference to the period which should have been covered by the tribunal's decision. The period covered by the decision under appeal to the tribunal and, therefore, the period covered by the tribunal's decision commenced on 6 February 1997 and was at the date of the decision of the adjudication officer then concerned an open ended period. In normal circumstances the period would have remained open ended and the tribunal would have had to consider all relevant circumstances extant at anytime from the 6 February 1997 until the date of its hearing. However, the making of a new claim on 10 March 1997 put a term to the period of the claim disallowed on 6 February 1996 by the adjudication officer. The new tribunal had no jurisdiction in respect of any period after 9 March 1997 unless the adjudication officer's award in respect of the period beginning on 10 March 1997 or the subsequent disallowance had been appealed to the tribunal which, of course, neither had been.

14. For the foregoing reasons the claimant's appeal to me succeeds and my decision is in paragraph 1 above.

(Signed) R J C Anugus
Commissioner

(Date) 11 November 1998

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14. For the foregoing reasons the claimant's appeal to me succeeds and my decision is in paragraph 1 above.



(Signed) R J C Anugus
Commissioner

(Date) 11th November, 1998.