

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Burnley appeal tribunal, held on 9 January 2003 under reference U/40/123/2002/00928, is not erroneous in point of law.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the Secretary of State with the leave of a district chairman of tribunals. Case management directions were given by Miss Commissioner Fellner.

3. In view of the issues raised by the appeal and in Miss Fellner's absence on sick leave, I directed an oral hearing of the appeal. It was held before me in London on 22 January 2004. The Secretary of State was represented by Mr Vaughan Lewis of the Office of the Solicitor to the Department for Work and Pensions. I am grateful to him for his succinct and constructive submissions on the case. The claimant did not attend and was not represented at the hearing, but his representative did make written submissions in advance of the hearing. I am grateful to him for those submissions.

The tribunal's decision

4. The issue for the tribunal was whether the claimant was incapable of work on and from 2 August 2002. The tribunal decided that he was. The Secretary of State had scored the claimant's disabilities at 7 points under the personal capability assessment for walking and negotiating stairs. The tribunal added a further 12 in respect of the activity of remaining conscious. It found that the claimant had cough syncope. That finding was supported by medical evidence. The claimant's evidence was that this condition caused him to lose consciousness. The Secretary of State's medical adviser stated that this was possible. The medically qualified panel member on the tribunal confirmed this. On that basis, the tribunal found that the claimant had had an involuntary episode of lost consciousness at least twice in the previous 6 months. That disability carried a score of 12 points. Together with the 7 points awarded by the Secretary of State and confirmed by the tribunal, that was sufficient for the claimant to satisfy the personal capability assessment. The Secretary of State appealed against that decision on the ground that the tribunal had misdirected itself in law on the activity of remaining conscious.

The scope of Howker

5. *Howker v Secretary of State for Work and Pensions* is reported as *R(IB) 3/03*. It is a decision of the Court of Appeal that concerned the amendments made, with effect from 6 January 1997, by the Social Security (Incapacity for Work and Miscellaneous Amendments) Regulations 1996 to the Social Security (Incapacity for Work) (General) Regulations 1995. The Court decided that the amendment made to regulation 27(b) of the 1995 Regulations was made without compliance with the statutory machinery and so was of no force or effect. The basis of the Court's decision was that the Department of Social Security (now the Department for Work and Pensions) had misled the Social Security Advisory Committee by describing the potential effect of the proposed amendment as 'neutral' whereas in fact its potential effect was 'adverse' to claimants.

6. The actual decision in *Howker* is limited to regulation 27(b). That is clear from the judgments and the terms of the Court's Order. However, Mr Lewis conceded, and I accept, that the reasoning on which the Court's decision was based could apply to other amendments.

7. The amendment with which this case is concerned relates to the activity of remaining conscious. This activity is governed by paragraph 14 of the Schedule to the 1995 Regulations. As originally enacted, it was defined as:

'Remaining conscious other than for normal periods of sleep.'

By virtue of regulation 2(11)(a)(iii) of the 1996 Regulations, the definition was changed to:

'Remaining conscious without having epileptic or similar seizures during waking moments.'

8. The Department described the potential effect of this amendment to the Social Security Advisory Committee as 'neutral'. Mr Lewis submitted that the issue for me was whether that was an accurate description of the effect of the amendment. If it was not and its effect was potentially adverse to claimants, it was covered by the reasoning in *Howker*. I accept that Mr Lewis correctly identified both the issue I have to decide and its significance.

9. I am sure that the effect of the amendment was potentially adverse to claimants. The amended version was limited to epileptic and similar seizures. There is an issue about whether similarity is determined by reference to the origin or the effect of the seizures. And, if the latter, there is an issue as to how the effects are defined. But whatever the scope of the amended definition it must be narrower than the original version, which covered any loss of or alteration to consciousness when awake. I am not sure that Mr Lewis formally conceded this point, but he certainly acknowledged its validity in the course of our discussion.

10. So, I am satisfied that the Social Security Advisory Committee was misled by the description of the potential effect on claimants of the proposed amendment. The reasoning of the Court of Appeal in *Howker* therefore applies to it.

11. I suspect that the effect of the proposed amendment was not intended to be adverse in terms of the policy underlying the provision as originally enacted. In other words, the proposed wording reflected what the activity was always intended to cover. But that is not the test. The test is whether the change in the terms of the legislation was adverse. Whatever the activity may originally have been intended by the policy-makers to cover, it was not so drafted by the Department's lawyers.

12. My decision is that the amendment to the definition in paragraph 14 of the Schedule to the 1995 Regulations was made without proper compliance with the statutory machinery of referral to the Social Security Advisory Committee. It was, as a result, of no force or effect. The claimant's capacity for work has to be determined under the terms of paragraph 14 as originally enacted.

Other amendments

13. The other amendments made to the 1995 Regulations by the 1996 Regulations are not in issue in this case. Tribunals dealing with cases involving those amendments will have to

decide whether they are covered by the reasoning in *Howker*, which I have applied in this decision. Mr Lewis told me that all those amendments were described to the Social Security Advisory Committee as 'neutral' in their potential effect on claimants. The issue for tribunals will be whether that was an accurate description.

14. It would, no doubt, be helpful to claimants and tribunals if the Secretary of State were to take a realistic view on the other amendments in the guidance issued to decision-makers and in the submissions made to appeal tribunals and Commissioners. But that is not a matter for me.

Did the tribunal go wrong in law?

15. The claimant's capacity for work had to be determined by reference to the paragraph 14 as originally enacted. The tribunal's approach to that provision was in accordance with the original version. It did not deal with the *Howker* issue, which was not raised before it, or with the issue of the interpretation of the amended version. So, it may have stumbled on the correct approach rather than reached it by analysis of the issues. Nevertheless, it did correctly direct itself on the law. Did it go wrong in law in applying the law?

16. The tribunal's decision was based on findings of fact.

- In so far as those findings related to the claimant's medical condition, they were based on medical evidence. The tribunal was entitled to make them.
- In so far as they related to the possible disabling effects of that condition, they were based on the medical advice of the Secretary of State's medical adviser and the tribunal's medically qualified panel member. The tribunal was entitled to rely on that advice.
- In so far as they related to the actual disabilities experienced by the claimant, they were based on the tribunal's assessment of the credibility and reliability of the claimant's evidence. Those were matters that are properly within the judgment of the tribunal.

In all those respects, the tribunal's decision was soundly based in evidence. I can find no way in which it went wrong in law in making those findings. On those findings, the claimant properly scored 12 points under paragraph 14.

Summary

17. The tribunal made findings of fact that were soundly based given the evidence before it and the medical advice available to it. On those findings, its decision was correct in law. It did not deal with the issue of the effect of the amendments to the 1995 Regulations. But its outcome decision was correct.

18. I dismiss the appeal.

Signed on original

**Edward Jacobs
Commissioner
23 January 2004**

