

See para 7 - very helpful on bend of knee JS
- Appeal to Governor cannot be made but can be made via - via

HL/CW/TC/7

Commissioner's File: CIB/898/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [REDACTED]

Social Security Appeal Tribunal: Derby

Case No: 4/14/96/02341

1. For the reasons given below this appeal by the claimant succeeds. In accordance with the provisions of section 23(7)(a) of the Social Security Administration Act 1992 I set aside the decision of the social security appeal tribunal given on 6 September 1996. I substitute my own decision. This is to the effect that, subject to any right of review after that date, the claimant continues to be incapable of work and entitled to incapacity benefit from and including 17 January 1996.

2. This case concerns the claimant's capacity to work, which depends on the application of the All Work Test. The test is defined in regulation 25 of the Social Security (Incapacity for Work) (General) Regulations 1995. The rules for satisfying the test are set out in regulation 25 and 26. The test itself is set out in the schedule to those regulations. In the present case, the claimant's capacity for work depends on whether he has scored at least 15 points for physical descriptors on the test. Mental health issues do not seem to be involved, and there appears to be no evidence that the claimant might be exempt from the test or come within one of the exceptions. Further details of the relevant law and the relationship between the All Work Test and entitlement to incapacity benefit have been set out in the adjudication officer's original submission to the tribunal, of which all parties have copies. I do not propose to repeat what has been said in that document except insofar as is necessary to explain my decision.

3. The claimant was born on 22 April 1951. He had a heart attack in about 1990 and suffered from angina but this does not seem to have caused problems during the relevant period. He also suffered from a frozen left shoulder during the year preceding the effective date of the adjudication officer's decision. However, so far as concerns the present appeal he was certified as incapable of work with effect from 19 May 1993 because of an unstable right knee. This diagnosis was confirmed by his GP in form Med 4 signed on 31 July 1995, and a diagnosis of painful left knee was also made. On 8 August 1995 the claimant returned to the Department of Social Security or Benefits Agency form IB50, an incapacity for work questionnaire. Had his comments on this form been taken at face value, he would have scored far more than the 15 point threshold for physical descriptors. On 5 January 1996 the claimant was examined by Dr Wright on behalf of the Benefits Agency Medical Service. In box 19 of his report of form IB85, Dr Wright states that there is pain and swelling of both knees, worse after walking "any significant distance". He said that knees occasionally give way on the stairs or on getting up from chair. No locking was described. This comes under the heading "medical evidence used to support your choice of descriptor". However in box 22, under the heading "clinical examination" Dr Wright states that there was no visible swelling of the knees and that a full range of movement was palpable although there was mild crepitus on both sides (grating). It might be that there is a problem with the design of the form. It might be that there is some confusion over what is understood by the concept "medical evidence to support your choice of descriptor". It might be that Dr Wright recorded in box 19 what he had been told by the claimant and recorded in box 22 what his own findings were. For whatever reason, the contents of box 19 and box 22 are inconsistent. In my experience it is not infrequent that this happens and if tribunals are to make findings of fact in such circumstances, they must be careful to identify what evidence is accepted and what evidence is rejected, and why. Dr Wright accepted that the claimant would not be able to stand for more than 10 minutes before needing to move around (descriptor 4(e) carrying 7 points) and that he would not be able to walk up and down a flight of 12 stairs without holding on (descriptor 2(d) carrying 3 points). Dr Wright was not of the opinion that any of the other descriptors carrying points applied to the claimant. The adjudication officer considered the matter, agreed the 2 descriptors identified by Dr Wright, and was also of the opinion that the claimant sometimes could not rise from sitting to standing without holding on to something (5(c) carrying 3 points). In the opinion of the adjudication officer the claimant had scored 13 points. This was below the 15 point threshold and the adjudication officer decided that as from 17 January 1996 the claimant was no longer incapable of work and therefore no longer entitled to incapacity benefit.

4. On 24 January 1996 the claimant appealed to the social security appeal tribunal against the decision of the adjudication officer. The tribunal met to consider the matter on 9 April 1996 but adjourned the hearing to give the claimant an opportunity to attend with a representative. A differently constituted tribunal met on 6 September 1996. The claimant attended and gave oral evidence and his representative made submissions. However, the tribunal confirmed the decision made by the adjudication officer. In relation to the 3 descriptors and the 13 points identified by the adjudication officer and the tribunal it is not disputed that these descriptors have been correctly identified and the points correctly allocated, whatever other descriptors might apply. Accordingly, I make no further comment on those matters except to adopt as my own the findings of the tribunal that these descriptors and points apply.

5. The claimant applied for leave to the Social Security Commissioner against the decision of the tribunal. The claimant's representative suggested that the tribunal's decision was in error of law insofar as it related to the activities of bending and kneeling, sitting, lifting and carrying. On 14 November 1996 the chairman of the tribunal refused leave to appeal. The claimant now appeals by leave of Mr Commissioner Heald granted on 14 May 1997. The adjudication officer now concerned with the matter does not support the grounds put forward on behalf of the claimant but does argue that there was an error of law made by the tribunal, although not one that would have affected the outcome of the appeal, and suggests that I should set aside the decision of the tribunal and substitute my own to the same effect. There was evidence before the tribunal in relation to the claimant's ability to walk on level ground. The tribunal made no specific finding in relation to the claimant's ability to do this but did state that "even if the appellant was able to walk 400 metres this would not assist him...". The reason why this finding would not assist the claimant is because an inability to walk more than 400 metres without stopping or severe discomfort is descriptor 1(e) carrying 3 points. Regulation 26(2) provides that in determining a person's score where descriptors in relation to walking on level ground (activity 1) and walking up and down stairs (activity 2) both apply, only the descriptor with the highest score in respect of either activity may be counted. Since the tribunal found that descriptor 2(d) applied, it would not assist the claimant to find that 2(a) (which also carried 3 points) applied. The adjudication officer has submitted that it was incumbent upon the tribunal to award any points that were due with regard to activity 1, irrespective of its findings on activity 2. I reject this. This would be a time wasting exercise taking no further the question of whether the claimant was or was not incapable of work. So long as the tribunal was satisfied that no more than 3 points could be allocated in respect of any of

the descriptors in activities 1. or 2, then it was not necessary to act as the adjudication officer has suggested.

6. However, the reason why I have allowed the appeal and substituted my own decision relates to the question of bending and kneeling. Descriptor 6(c) carries 3 points and applies if the claimant "sometimes cannot bend or kneel as if to pick up a piece of paper from the floor and straighten up again". In his comments on form IB50 the claimant had indicated that this was the case. This would also be consistent with the diagnosis made by the GP on the medical certificate and with the evidence in box 19 of Dr Wright's report on form IB85. On the other hand, in box 22 Dr Wright had found no visible swelling and a full range of movements, although there was mild crepitus. The tribunal did not allocate any points in respect of bending and kneeling and made the following statement:-

"The tribunal considered the activity of bending and kneeling and had regard to the comments of the Examining Medical Officer who stated appellant was able to load a front loading washing machine and Hoover. The tribunal noted [the claimant's] explanation that he did not need to bend to load the washing machine or to plug in the Hoover. However, having regard to the Examining Medical Officer observation that he observed appellant putting on his shoes after picking them up and Dr Cox's explanation that a person with bad knees relies upon bending from the waist the tribunal concludes that appellant is not entitled to any points for this activity."

7. Dr Cox was the tribunal's medical assessor and although his advice on general matters might be helpful to the tribunal, it must be remembered that the medical assessor does not examine the particular claimant and should not express an opinion on whether any of the descriptors applies to any particular claimant. In my opinion descriptor 6(c) applies if it is sometimes the case that a claimant cannot bend as if to pick up a piece of paper from the floor and straighten up again or if it is sometimes the case that a claimant cannot kneel as if to pick up a piece of paper from the floor and straighten up again. It applies if the claimant can always bend but sometimes cannot kneel. It applies if the claimant can always kneel but sometimes cannot bend. It is clear from the extract that I have quoted above that the tribunal applied the wrong test. The fact that the claimant could rely on bending from the waist (if this was the case) does not mean that it was not the case that sometimes the claimant could not kneel as if to pick up a piece of paper from the floor and straighten up again. In this respect the tribunal's decision was made in error of law, because it asked itself the wrong question, and for that reason I have set aside its decision. It is now over 2½ years since the examination by Dr Wright, and I doubt whether any further useful evidence would be

forthcoming if I were to refer this matter back to a fresh tribunal for a new hearing. Accordingly, I deem it expedient to substitute my own decision. In view of the evidence and descriptors which were accepted by the tribunal, dealing with limitations on the ability of the claimant to stand, rise from a chair without holding on, and walk up and down stairs, and in view of the balance of the evidence, I am of the opinion that descriptor 6(c) does apply, that 3 further points should be awarded, that the total score is at least 16 points, and that the decision should be as I have indicated in paragraph 1 above. Having made these findings, it is not necessary for me to address the other grounds of appeal. For the above reasons, this appeal by the claimant succeeds.

(Signed) H Levenson
Commissioner

(Date) 4 August 1998