

- Tribunal must weigh medical evidence
 - Should not assume DSS doctor is 'disinterested'
 but other doctor is not. WRB 152

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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIB/1149/1998

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER JACOBS

<i>Claimant:</i>	<i>Kevin Bell</i>
<i>Tribunal:</i>	<i>South Shields</i>
<i>Tribunal's Case No:</i>	<i>S/44/233/1997/00039</i>

Decision:

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 South Shields Social Security Appeal Tribunal held on 14th January 1998 is erroneous in point of law: see paragraphs 9 to 15.
- 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:

Consider the report of Dr Hassan of 24th October 1997

A copy of this report, which is in the tribunal's file, must be added to the papers for the rehearing.

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: 5th August 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.

The appeal to the Commissioner

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 does not support the appeal.

The adjudication officer's decision

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 sitting, rising from sitting, standing, walking, negotiating stairs, bending and kneeling, and lifting and carrying. The examining doctor gave the opinion that the claimant was not disabled in terms of the all work test.

5. An adjudication officer reviewed the decision making the award and terminated the claimant's entitlement from and including 5th August 1997. The adjudication officer, on the basis of the opinion of the examining doctor, awarded no points on the all work test.

The appeal to the tribunal

6. The claimant appealed to a tribunal against the decision of the adjudication officer. The claimant attended and gave evidence at the hearing of the appeal, accompanied by a representative from his Neighbourhood Advice Centre. A report was produced in support of the appeal from a Consultant Rheumatologist.

7. The tribunal confirmed the adjudication officer's decision.

The tribunal's reasoning

8. The full statement of the tribunal's decision records that the tribunal preferred the evidence of the examining doctor to that of the Consultant. It records that the tribunal "considered and applied" the decision of Commissioner Rice in CDLA/692/1994. It also recorded reasons for its preference "in accordance with" that decision. The reasons were in summary:

8.1 the examining doctor was wholly disinterested and had the medical expertise to assess the claimant under the all work test;

8.2 it was not clear if the Consultant had understood the descriptors under the all work test;

8.3 one sentence in the Consultant's report showed that he had considered the application of the descriptors in the context of a working environment.

The errors of law

9. The tribunal's decision is erroneous in law, because (a) its reasons are inadequate to explain the approach that the tribunal took to the evidence and (b) its reasons show that it misunderstood the significance of Commissioner Rice's decision and as a result approached the evidence incorrectly.

Commissioner Rice's comments

10. The comments of Commissioner Rice in CDLA/692/1994 are similar to those that he made in a number of other decisions. In CIB/407/1998, I analysed his similar comments in CDLA/8462/1995 and showed that the Commissioner's remarks were concerned only with the adequacy of reasons for a tribunal's decision on the weight of the evidence. They did not amount to an authority that more weight was to be given to evidence from an examining doctor than from any other source. The same analysis applies to his comments in CDLA/692/1994.

11. It may be that Commissioner Rice's comments on the value of the evidence of the examining doctor when compared to evidence from the claimant or the claimant's GP are an accurate prediction of how conflicting evidence is likely to be weighed. However, any suggestion that his comments are an authority which may or must be applied shows that the tribunal misunderstood their significance and approached the evidence improperly in law. As I put it in CIB/407/1998, paragraph 14:

"The tribunal abdicated its responsibility to weigh the evidence".

12. Commissioner Williams also considered CDLA/8462/1995 in CIB/3620/1998. He emphasised that nothing said by Commissioner Rice displaced the tribunal's duty to consider the evidence as a whole and to attribute appropriate weight to each piece of evidence in the context of the case. If the Commissioner was purporting to do this, his comments were inconsistent with a line of authority to the contrary dating back at least as far as R(S) 1/53, paragraph 6. With Commissioner Williams' decision, I respectfully agree.

The implied lack of disinterest in the Consultant's report

13. The full statement of the tribunal's decision refers to the examining doctor's disinterest, implying that the Consultant may not be entirely disinterested. I respectfully agree with Commissioner Williams in CIB/3620/1998, paragraph 10:

"I fail to see any reason whatsoever for assuming the evidence of a member of the BAMS staff is objective, but that the evidence of a specialist medical staff member employed by the NHS is not."

Did the Consultant understand the terms of the all work test?

14. It is relevant to consider whether a report from a doctor who has not been trained on the all work test was based on a proper understanding of the terms of that test. An indication in the report that the doctor misunderstood the test will reduce the weight that it carries as

evidence. However, it is not appropriate to prefer other evidence on the ground that the doctor may not have understood the terms of the all work test or that the report does not positively show that he did understand the test. How could a report show that a Consultant had properly understood the test? It will be apparent from the terms of the report whether the Consultant has seen the wording of the descriptors. Consultants are intelligent and it may be assumed that they are able to read, understand and apply the terms of the all work test, unless a descriptor has been interpreted by Commissioners in a way that would not appear from its wording.

The working environment

15. The rejection of the Consultant's report on the basis of a possible implied reference to a working environment in single sentence in the conclusion of the report is inappropriately selective. Elsewhere in the report there are many statements made specifically in terms of particular descriptors. It is not clear to me that the sentence does contain an implied reference to a working environment. If it does, that one reference in a conclusion by itself does not show that all early statements are undermined by it.

16. So far as the relevance of the working environment is concerned, I considered this question in CIB/165/1997. My conclusion was (paragraph 17):

"My conclusion is that the structure and wording of the legislation is clear. The activities of the all work test have to be applied as they stand and not in any particular context. There is no basis for spelling out from the legislation a requirement that the activities be applied in the context of work. Any attempt to define such a context is fraught with difficulty and liable to produce irrational results. This conclusion is in accordance with a line of authority in Commissioners' decisions and, although one Commissioner has expressed the need to consider the issue carefully, I know of no Commissioner who has expressed a contrary view."

I direct the tribunal at the rehearing to take this approach.

Summary

17. 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: 4th June 1999