Bullch. 172

File no: CIB 1265 2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I dismiss the appeal. For the reasons below, the decision of the tribunal is not wrong in law.

2 The appellant and claimant is appealing with permission of the chairman against the decision of the Southampton appeal tribunal on 12 October 2001 under reference U 03 203 2001 00964. The tribunal confirmed a decision of the Secretary of State that the claimant was not incapable of work from and including 1 May 2001.

3 I held an oral hearing of this appeal at Cardiff Civil Justice Centre on 5 August 2002. The claimant attended and was represented by Mr T Jacobson. The Secretary of State was represented by Mr Huw James of the Office of the Solicitor to the Department for Work and Pensions.

Background to this appeal

4 The claimant used to work as a printing services manager. In 2000 he developed an anaphylactic reaction to unidentified substances at work. He was advised by his general practitioner not to work and referred for specialist treatment. He was also medically retired from his job. When he filled in the usual incapacity benefit questionnaire, he identified no physical limits on his abilities as measured by the standard personal capacity assessment tests. But both he and his general practitioner described his problems as intermittent extreme skin reaction resulting in spontaneous splitting and bleeding over his entire head and body. The examining medical practitioner reported that he had severe anaphylactic reaction to a side variety of chemicals occurring in everyday life, and that the consultant had advised the claimant that he should not work. But, measured by the personal capacity assessment, he was not incapable of work. A decision maker therefore stopped the incapacity benefit.

5 The claimant appealed. His general practitioner wrote a supportive letter stating:

> "I believe any working environment in which paper and chemicals are present causes him to have a severe anaphylactic reaction which totally debilitates him physically. His eyes swell so much that he is unable to see."

The general practitioner also quoted advice from the consultant dermatologist that the reaction could be triggered by non-specific irritants such as swimming, exercise in a gym, dusty environments and long haired dogs. The general practitioner stated that he had known the claimant for 23 years and that the general practitioner and the consultant were better judges of whether the claimant could work than " a doctor who asked him inappropriate questions in a 30 minute interview". There is also a letter from Dr Hugh Jones, MD FRCP, consultant dermatologist at the Royal Hampshire County Hospital confirming this. It also confirmed that they had yet to identify the specific triggers of the claimant's problems. In a further letter in September 2001 the consultant stated that the claimant's skin was now being upset by a wide range of allergies and irritants such that he is not able to undertake any occupation.

The tribunal decision

6 The tribunal reviewed the claimant's case most carefully. It accepted the claimant's (and his doctors') evidence of his problems. It also accepted that his case was that he could be affected in any working environment, not just his former work in the printing industry. It considered both regulations 10 and 27 (the exceptions to and exemptions from the test). And it considered relevant Commissioners decisions about intermittent conditions. It also considered the decisions about conducting the tests for the personal capacity assessment on the basis of everyday functions in ordinary life, and not specifically in a working environment. Its conclusion was that the question of the risk was a central factor in the claimant's case. On the evidence the claimant would not be at risk in every possible work environment, and that there are many work environments which are no more or a risk than he encounters in his home environment. The appeal was dismissed.

Grounds of appeal

7 On behalf of the claimant, Mr Jacobson argued strongly that the tribunal had given the wrong weight to the medical evidence, and to the way in which the claimant filled in the form. He pointed out that if the claimant had filled in the form on a day on which he was suffering from his symptoms (if he were able to) then he would have recorded severe limitations on his abilities. For example, he would have been unable to see. His client's problem had started in 1980 and had slowly but steadily got worse. It stopped his client working in 2000. At that time it took only 5 to 15 minutes from a stimulus for the shock to take full effect, leaving the claimant totally debilitated on some occasions. Mr Jacobson submitted that the error of the claimant himself in filling in the form was the same error as that of the tribunal - taking a snapshot view. Commissioners had emphasised that this was the wrong approach.

8 The claimant stated, in reply to questions, that he was not receiving benefit. He was not aware that he might be entitled to disablement benefit. I drew his attention to the possibility of a claim for prescribed disease D5 (non-infective dermatitis of external origin) based on some of the medical evidence in the papers. The claimant told me he had been refused incapacity benefit, but could not risk claiming jobseeker's allowance because his doctors had advised him that he could not risk being exposed to the wrong environment.

9 Mr James indicated his sympathy to the claimant's case, but could not support the appeal as a matter of law. The tribunal had looked at all the evidence. It had applied the tests correctly. The question was not whether the claimant could work, but how he was to be measured against those tests. The tribunal has also looked at the "snapshot" question and taken it into account in its decision.

My decision

10 This case is about whether the claimant can claim incapacity benefit and not, as Mr James rightly stated, about whether the claimant can work. Entitlement to incapacity benefit is defined not by whether a claimant can actually work, but whether he meets the tests in the personal capacity assessment or the exceptions to, or exemptions from, that test. In an ideal world that test and those exceptions and

exemptions would cover all cases fairly. But in the real world complicated deeming provisions such as these do not deal with every case. Or, to put it as the tribunal put it, they must be interpreted to cover "every possible working environment" and not the realistic limited choices that normally occur.

11 The tribunal conducted a most careful review of this case. Its decision cannot be faulted on any grounds of adequacy. There is evidence to show that the claimant "sometimes" could not bend or kneel, but that does not change the decision. As that descriptor illustrates, the test as a whole is objective. The facts of this case make that plain. The test is to bend or kneel "as if to pick up a piece of paper". If the test were "to pick up a piece of paper" then there is evidence that the claimant cannot pick up paper without severe risk, so he would fail it. But the actual test is "as if". Despite the strong arguments of Mr Jacobson, I cannot hold that the tribunal erred in considering the personal capacity assessment.

12 Regulation 10 provides for "certain persons with a severe condition to be treated as incapable of work". I have looked very carefully at that regulation, because that is where I would expect to find the answer to the claimant's most unusual but also undeniable problems. The appropriate part of that regulation is regulation 10(2)(e). That lists the following problems as providing exemption if severe: learning disability, neurological or muscle wasting diseases, inflammatory polyarthritis, cardio-respiratory function, dense paralysis, impairment of function of brain or nervous system, severe and progressive immune deficiency states, severe mental illness. None could be regarded as covering the claimant's problem. I also considered the exceptional circumstances in regulation 27. But this is now a narrow rule dealing with severe life threatening diseases. I considered whether the evidence that the claimant could be rendered blind by his problem might justify re-examination of that basis, but again concluded that the tribunal had reached a proper conclusion on the evidence.

13 My conclusion is that the decision of the tribunal is not wrong in law. The tribunal cannot rewrite the test laid down in the regulations to deal with this unusual case. I note that this case has already occupied the time of a Member of Parliament. I therefore add the comment that there is the clearest evidence in this case that the claimant cannot and should not be asked to work in any normal work setting. Neither he nor the experts who attend him know what causes his anaphylactic shock. It is severe and when it occurs is severely debilitating. As the experts do not know what risks the claimant is to avoid, it is difficult to think what jobs an employment officer at a Jobcentre could properly ask the claimant to do or seek. Indeed, the evidence suggest that the employment officer could not properly ask the claimant to look in newspapers for a job or write letters or fill in forms about them. But the effect of my decision is that the claimant must apply for jobseeker's allowance if he wants benefit. I have to record that this suggests that the rules are inadequate, but that is for Parliament and Ministers, not me. The claimant's case suggests that there would seem to be a strong case for an additional category of cases in regulation 10(2)(e) to cover severe cases of anaphylactic shock, particularly where the cause is uncertain.

David Williams
Commissioner
04 September 2002

[Signed on the original on the date shown]