

*Anti-Frustrating Consistency - to Insufficient
 Remarks. Once matter in Dec 95
 Actual Insurance - "Anxiety Consistency"
 Decision from Pain Insufficient*

WRB
 1/17

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:

Social Security Appeal Tribunal: Sutton B.

Case No: 7/01/95/13165

1. This is an appeal by the claimant against a decision of the Sutton B social security appeal tribunal held on 16 November 1995. The tribunal found by a majority that the claimant was not entitled to incapacity benefit. The claimant suffered from very variable symptoms and with the benefit of more recent decisions it is clear that the tribunal have applied the wrong test and the decision is therefore wrong in law. The appeal is allowed and the case remitted for rehearing to a differently constituted tribunal for determination.

2. The claimant suffered from endometriosis, an intermittent affliction occurring in a monthly cycle. It caused pain for 10 to 12 days, acutely for 3 to 4 days. Her doctor advised her to refrain from work from 18 April 1985 and she was awarded incapacity benefit while an assessment of her eligibility was carried out. As she had previously been unemployed the test for incapacity was the All Work Test. The claimant completed a questionnaire about her disabilities and the examining medical officer carried out the All Work Test. Under the test, a claimant's ability to perform, prescribed activities with various degrees of competence referred to as the descriptors results in the award of points. Fifteen points are required to qualify for incapacity benefit. The claimant was found not to score any points and was therefore not entitled to benefit. She therefore appealed. The All Work Test was carried out on a good day and it was accepted by all three tribunal members that during the acute phase of her condition she would be entitled to substantially more than 15 points, but for some of any month the points were nil. The tribunal were unclear as to how to address this. The minority

member considered that her incapacity lasted a sufficient proportion of the month for her to qualify as incapable of work. Of the majority, both considering she did not qualify, one thought the condition must be satisfied for the whole period, the other, only for a substantial majority of the period. The tribunal's confusion is understandable. Since this decision several Commissioners decisions have been given which indicate the test to be imposed in such a case.

3. Prior to the advent of incapacity benefit employability was an important quality in assessing a claimant's entitlement to sickness benefit or invalidity benefit. Where a person suffered from an affliction which prevented him from working for short periods of unpredictable but frequent intervals it was accepted that this inability to be reliable could render a claimant unemployable even though the majority of the time he was not incapable of work, CS/90/86. No such considerations apply to incapacity benefit although examining medical officers are advised to assess the competence in relation to the descriptors generally and not as a snapshot at the time of examination. The claimant's ground of appeal to me that CS/90/86 has not been followed is simplistic because the legislation has changed.

4. In C1/95/IB the Chief Commissioner for Northern Ireland considered the position of a person whose condition was variable. He noted that most descriptors related to the ability to accomplish a particular act and he inferred that "cannot" perform an act meant cannot with reasonable regularity. An ability to do the act most of the time would not score any points. This view was supported by the replacement of "cannot" by "sometimes cannot" for a very few descriptors implying a different and easier test for those activities. In CIB/13508/96 Mr Commissioner Howell found that where a claimant can accomplish the task most of the time, or would normally be able to perform the stated activity when called upon to do so then the descriptor is not satisfied. The claimant cannot be said to be unable to accomplish the set task. However he further points out that incapacity benefit is a daily benefit, a claimant is entitled to benefit for any day of incapacity (as established by the All Work Test) falling during a period of incapacity, and claimants are able to link periods separated by less than 8 weeks. He says:-

"All relevant individual days of incapacity need therefore to be identified, so far as practicable over the period and down to the tribunal's own decision so as to give the claimant and the adjudication officer as much guidance as possible on the proper entitlement under the new Regulations. This last part of the exercise may well involve the tribunal in making some rough and ready assessments on the best evidence they have available, and the answer will still be unsatisfactory for the claimants

as they will dip in and out of entitlements according to the length and severity of the attacks of their condition and the number of days involved."

Thus incapacity benefit, subject to waiting and linking provisions is payable in respect of the individual days when the claimant is found to satisfy the All Work Test, and other benefits may be payable in relation to the rest of the time even where the loss of earning power is continuous.

5. The approaches in CI/95/IB and CIB/13508/96 are not incompatible. Where an intermittent condition is sufficiently prevalent that a task cannot be said to be performed with reasonable regularity, this should be taken into account when the descriptors are scored. If the affliction occurs infrequently so that the claimant is not generally prevented from performing the task with reasonable regularity benefit will only be payable for any days of actual incapacity. I therefore concur with the adjudication officer now concerned that by applying the approach they did, the majority of the tribunal erred in law in not deciding that for some days the claimant qualified under the All Work Test and in not identifying those days. This might have required the application of a fairly broad brush approach but should not have been too difficult given the fairly regular cycle of symptoms.

6. The claimant's second ground of appeal is that the tribunal wrongly interpreted "altered consciousness". She maintained that the pain affected her ability to concentrate and her perception. The tribunal held that the descriptor was intended to deal with "fits, seizures, blackouts and any disturbance of consciousness occurring while awake that prevents continuing activity". The activity, paragraph 14 of the Schedule to the Social Security (Incapacity for Work) (General) Regulations 1995, is "Remaining conscious without having epileptic or similar seizures during waking moments". I do not consider that this wording can be stretched to cover the distraction arising from severe pain.

(Signed) F V Hereward
Deputy Commissioner

(Date) 30 June 1998