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Obesity is a bodily disattement

THE SOCIAL SECURITY COMMISSIONERS

Commissioners' Case: CIB/1387/2000

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR DEPUTY COMMISSIONER McLACHLAN

Claimant:
Tribunal: *Stratford*
Tribunal's Case No: *S 42/249/1999/00521*
National Insurance No:
Date of hearing: *27.8.99*

Commissioner's Case No: CIB/1387/2000

Decision

1. The decision of the Stratford Social Security Appeal Tribunal of 27.8.99 is set aside. I remit the case for re-hearing to a completely new tribunal since further facts have to be found and it is not expedient that I do so myself.

Background

2. The Adjudication Officer awarded Incapacity Benefit to the claimant from and including 13.8.96. Another Adjudication Officer reviewed that decision on the basis that there had been a change of circumstances in that the claimant had been found capable of work from and including 24.2.99. The second Adjudication Officer determined that the claimant was not entitled to Incapacity Benefit. The basis of that determination was that at an examination by a Benefits Agency Medical Services doctor the claimant had not satisfied the All Work Test scoring only four points in relation to it. The Adjudication Officer had agreed with that assessment. On 8.3.98 the claimant appealed to the tribunal.

The All Work Test

3. The All Work Test scores points for claimants if they are unable to accomplish various activities to the extent specified in individual descriptors set out in the Schedule to the Social Security (Incapacity for Work)(General) Regulations 1995. Full details of those activities, the descriptors and of the point scoring system are set out in the case papers and I shall not repeat them here. Suffice it to say that a claimant must score a certain number of points to satisfy the test. I might add that with effect from April 2000 the All Work Test has been renamed the Personal Capability Assessment. In view of the time with which I am concerned in this appeal I shall continue to use the former name.

The appeal to the Tribunal

4. After a postponement for medical evidence to be obtained (which never materialised) the appeal was heard by the Stratford tribunal on 27.8.99. The claimant attended and gave evidence. It was not then, and nor has it been subsequently, suggested that the claimant was exempt from or deemed to satisfy the All Work Test pursuant to either rr.10 or 27 of the 1995 regulations. The tribunal accepted that the tribunal scored four points in relation to the mental health descriptors as indeed the Adjudication Officer had done. Those descriptors were 15C (Inability to concentrate to read a magazine article or follow a radio or television programme), 17F (Anxiety that work would worsen his illness), 18D (Irritation at things that would not previously have bothered him) and 18E (Preferring to be alone for at least six hours a day). The tribunal went further and also accepted that the claimant scored a further

nine points in relation to the physical descriptors. They found that descriptor 13E (occasional loss of bowel control) applied. That score was not enough to satisfy the All Work Test and thus the appeal was lost. After an unsuccessful application for setting aside, the claimant sought leave to appeal. This was refused by a District Chairman but was ultimately given by a Commissioner.

The appeal to the Commissioner

5. The claimant's representative presents a careful submission which seems to say that the tribunal went wrong in three different ways: they have erred in the way they dealt with the claimant's evidence; they wrongly regarded obesity as not being a physical disease; and finally they failed properly to deal with the intermittent nature of the claimant's problems. The Secretary of State does not agree and supports the tribunal's decision.

The claimant's evidence.

6. I find nothing amiss with the tribunal's statement of material facts and reasons in this respect. It is plain that they considered carefully the claimant's oral evidence and compared with earlier comments they had made. The representative seems to be seeking to reargue the case on the basis of the existing evidence. The tribunal would be in error of law had they made a decision to which no reasonable tribunal could have come. They were duty bound to take a view on the evidence that was before them. They did so and gave their reasons.

The intermittent nature of the claimant's problems

7. The tribunal had this issue in mind as I can see from the reference they made to CIB 14534/96, which is now reported as R(IB) 2/99. Most people who are unwell have some days that are better than others but that is not to say that they (or anyone else) would describe their incapacity as intermittent. It may be simply that on some days they feel a little better than they do on others. Looking at all of the evidence in this file the claimant himself does not seem to be describing a particularly intermittent condition so as to give rise to a duty on the part of the tribunal to make findings of fact on the point. Having written that, I do acknowledge that asthma by its very nature may be intermittent. I do note that whilst the claimant's general practitioner described his asthma as being moderate to severe, the doctor who examined him recorded a peak flow rate of 520 which was near normal. In the event in view of the contents of the next paragraph I do not need finally to resolve this issue and I do not do so.

The claimant's obesity

8. Prior to 3.4.00 r.24 Social Security (Incapacity for Work)(General) Regulations 1995 read:-

“The All Work Test is a test of the extent of a person's incapacity,

by reasons of some specific disease or bodily or mental disablement, to perform the activities prescribed in the Schedule.”

The addition of r.25(3) from 6.1.97 made it plain that the descriptors listed in part I of the Schedule must arise from a specific bodily disease or disablement and that the descriptors listed in part II of the Schedule must arise from a specific mental disease or disablement.

9. The words disease or disablement are to my mind ordinary words and are to be interpreted as such rather than in any technical sense. The word “obese”, the use of which sometimes offends, may be used medically to describe someone whose weight in relation to his or her height exceeds a certain figure. That does not necessarily mean that in ordinary conversation that person would necessarily be so described. It is the latter interpretation which should be favoured. I hesitate to describe obesity as a disease although it may very well be the result of one. I have no hesitation, however, in saying that obesity is a disablement.

10. Whether that disablement has any effect in terms of physical limitation so far as the All Work Test is another matter. That will depend on the evidence of the degree of disablement and how far the person is limited as a result of it. It is argued on behalf of the Secretary of State:-

“Being overweight may cause difficulties but it can hardly be regarded as a state of deprivation or incapacitation. If a person were to be regarded as disabled if their physical abilities fell below the “norm” there would be few people who would not fall within the definition.”

To the extent that many of us are overweight (at least in the opinion of our medical advisers) I entirely agree with the first sentence. If, however, someone were grossly overweight they could properly be regarded as being in a state of incapacitation. It is all a matter of degree. The Secretary of State appears to use the word “disabled” as it is used when referring to those for whom special provision in society should be made. There is, however, a broader sense to the word in that if one is not able to undertake some activity one may be said to be disabled from doing so. In neither rr.24 nor 25(3) is the word qualified by, for instance, “severe” or “substantially”. I therefore find no reason why the claimant’s obesity should not be taken into account in assessing his abilities to perform the various activities specified in Part I of the Schedule.

11. The tribunal’s full statement includes the following:-

“(The claimant’s) specific bodily and mental disablements were asthma, haemorrhoids and stress. His oral evidence in relation to rising cast doubt on his problems being associated with his bodily disablement.”

The evidence that the claimant had given about rising was clearly that he had to put his hand on the back of the chair to get up. The tribunal was wrong in failing to take into account the claimant’s obesity in connection with that activity and therefore its decision has to be set aside.

Descriptors 5C and 6C – the “sometimes” descriptors

12. Although this issue is not directly referred to in the submission by the claimant's representative it does seem to me to be potentially in point. The claimant suffers from asthma described by his general practitioner as being moderate to severe. It seems quite possible that sometimes, which does not mean all of the time or even a majority of the time, that he might have a difficulty with rising from a chair or with bending or kneeling to retrieve something from the floor on account of his asthma. This is something which the tribunal should have addressed and I cannot be certain from the statement that they did so.

Directions

13. The new tribunal should take in to account the claimant's obesity in performing the activities listed in Part I of the Schedule. They should also consider descriptors 5C and 6C before going on to consider the other activities including the remaining descriptors of activities 5 and 6. It will be understood that I do not by this decision suggest that the claimant will succeed at the end of the day. Indeed, the new tribunal is not bound to come to the same conclusions as the last in relation to the descriptors where points were scored. There is one final matter: it is not clear from the papers whether the claimant had been previously examined in relation to the All Work Test. Had he been, then the tribunal should have considered whether there were grounds for review following the decision of the Commissioner in CIB 3899/97. It may well be that this issue does not arise since the point has not been taken by the claimant's representative. In any event, the Secretary of State, now that he has taken over the functions of the Adjudication Officer, should prepare a further submission for the new tribunal dealing with the matter.

24.5.2000

Stuart McLachlan
Deputy Commissioner

24 MAY 2001