

Appeal from Tribunal - Merit of Appeal (7) *26/98
Commissioner - Asst. Commissioner
Case Considered Commission Decision Capacity
ELN/CH/ZA/3 *to Review Appeal - Not on a Safety Basis*

Commissioner's File: CIB/15231/1996

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

1. My decision is that the decision of the Social Security Appeal Tribunal given at Hartlepool on 13 May 1996 is erroneous in law and I set it aside. I remit the case for rehearing and redetermination in accordance with the considerations referred to below to an entirely differently constituted tribunal pursuant to section 23(7)(b) of the Social Security Administration Act 1992.
2. This is an appeal by the claimant against the unanimous decision of 13 May 1996 brought with leave of the chairman of the tribunal.
3. The terms of the decision which prompted the appeal to the tribunal are set out in the adjudication officer's submission to the tribunal. Essentially they are to the effect that the claimant failed to achieve a score of points sufficient to pass the All Work Test and that there were no exempting or exceptional circumstances. It followed that the claimant was not incapable of work and could not be treated as incapable of work from 31 August 1995. The claimant's award of incapacity benefit consequently fell for review and termination from that date.
4. The tribunal dismissed the claimant's appeal specifically deciding that the adjudication officer's decision was confirmed and that the claimant was not entitled to incapacity benefit from and including 31 August 1995.
5. The claimant's grounds of appeal are contained in an appendix to her notice of appeal dated 1 July 1996. Those grounds of appeal can be summarised as follows:-

- (i) The tribunal failed to give adequate reasons for rejecting the evidence of the claimant's GP in so far as it alleged that the claimant's problems with vertigo had effects as disabling as loss of consciousness;
- (ii) The tribunal failed to address the proper meaning of the words "involuntary episode of lost or altered consciousness" contained in paragraph 14 of the Schedule to the Social Security (Incapacity for Work) (General) Regulations 1995 ("the regulations") and to explain why the claimant's symptoms did not fit the proper meaning; and
- (iii) The tribunal failed to consider how the claimant's vertigo effected her ability to perform other functions contained in the All Work Test descriptors.

6. The adjudication officer concerned with the appeal to the Commissioner supports the claimant's appeal though on grounds which do not exactly coincide with those put forward by the claimant.

7. I find it expedient firstly to address the second of the claimant's grounds of appeal. The adjudication officer submits that the tribunal did not err in law in their consideration of the effects of the claimant's vertigo and that they gave full and complete reasons as to why they concluded that her attacks did not amount to periods of lost or altered consciousness. I agree that the tribunal gave extensive reasons; the essence of those reasons being that they had taken the advice of their medical assessor who had:-

"Expressed the unequivocal medical opinion that however nasty and severe the episodes of vertigo might be in a particular case, they did not result ordinarily in the loss or alteration of consciousness."

According to the chairman's notes of evidence, the tribunal had asked their assessor what he thought altered consciousness was. He gave the opinion that it was:-

"A state between consciousness and unconsciousness."

The tribunal did not, however, ask of the medical assessor the one vital question upon which the whole edifice of their reasons was built ie what meaning did he give to the word "consciousness" for the purposes of his opinion that it was not ordinarily lost or altered in a case of vertigo? Only if they had asked that question could the claimant be sure that in the circumstances the tribunal had addressed themselves to the correct meaning of the word and were right to rely upon the assessor's opinion in the way they did. As it is, there

is no indication whatsoever in the tribunal record that the tribunal asked themselves what that word meant. The claimant sets out in her grounds of appeal dictionary definitions of the words used in the regulations and of the terms used in evidence to describe her symptoms, in an attempt to establish a correlation between those words and those symptoms. What is rather strange is that no arguments of this kind appear to have been put before the tribunal at the hearing, either in writing or orally; that state of affairs being even stranger when the record indicates that the tribunal appear to have been told by the presenting officer that a case was pending before a Commissioner on "this very issue" and that they had rejected a suggestion that they might well adjourn to await that Commissioner's decision. If only because of those circumstances, I find it to have been incumbent upon the tribunal to explore the meaning of the words in the regulations and to express an opinion upon them for the benefit of the claimant; in not doing so the tribunal failed to show to the claimant that they had addressed the correct legal considerations applicable to her case and they erred in law thereby. That is sufficient reason to set aside the tribunal's decision.

8. The only Starred decision drawn to my attention concerning the definition of the relevant words is that given in CSIB/14/96, where the Commissioner concluded:-

"It is not possible to lay down guidelines as to what, in law is meant by 'altered consciousness'. It is ... essentially a practical matter for a tribunal to determine in the light of medical guidance from their assessor and by the application of common-sense. ... Above all, I am persuaded that the concept of 'altered consciousness', which may have some medical significance, is impossible of legal definition and is a concept of difficulty for application by lay tribunals. For these reasons I do not think that it is appropriate that I should give any further guidance to the new tribunal in this case."

I can accept that it is entirely appropriate to leave to tribunals, aided by their assessors, the decision as to whether on the facts on any particular case the words in the regulations are or are not satisfied. With all due respect to the Commissioner, however, I cannot accept that it is a satisfactory state of affairs that there is to be left to every individual tribunal the power to decide what legal meaning is to be given to the words, which as I read it, is his import of his decision.

9. Two decisions of the Chief Commissioner for Northern Ireland have, however, been drawn to my attention in which guidance is given upon the definition of 'episodes of altered consciousness' within the regulations. Usefully, both the

decisions involved claimants also suffering from the symptoms of vertigo, variously described in their cases as 'dizzy spells', 'nausea', 'confusion' and 'unsureness of surroundings'. In C13/96 (IB) the Chief Commissioner said:-

"In my opinion 'consciousness' in this context means 'awareness' and a person has an involuntary episode of altered consciousness when he has reached a stage of mental confusion such that he is no longer properly aware of his surroundings or his condition. My knowledge of medicine is limited; but as I understand it, such episodes are most likely to be experienced by persons who suffer from certain forms of epilepsy or diabetes; but that is not to say that there could not be other causes. Indeed, I would accept that a particularly severe attack of vertigo might have such an effect. ... every case must be considered on its own merits."

Applying this guidance to the case before him the Chief Commissioner declined to interfere with the tribunal's conclusion on the facts that the claimant had not suffered episodes of altered consciousness. The Commissioner was satisfied that the tribunal had applied the correct test to facts and had reached a conclusion upon those facts which they were entitled to reach. Consistently the Commissioner applied his own guidance in C8/96 (IB) again declining to interfere with the tribunal's conclusion this time that the claimant had suffered episodes of altered consciousness. The decisions of the Commissioners for Northern Ireland are not, of course, strictly speaking binding on me, though they are of persuasive authority. I note however, that in each case the Commissioner he had had the benefit of oral argument and of a written opinion on the matter from the departmental senior medical officer. In those circumstances I regard the Commissioner's guidance as decidedly "informed" and see no reason against directing the new tribunal to have regard to it when they hear the current matter again.

10. The new tribunal will accordingly find facts, as the previous tribunal did not, showing the exact character, nature and frequency of the claimant's attacks and will decide whether on those facts the claimant satisfies in some way the provisions of paragraph 14 as interpreted above. They will also give an explanation as to why those provisions are or are not satisfied on the facts found. They will not, as the previous tribunal in essence did, simply assume that all symptoms of vertigo, whatever their character and severity, are incapable of satisfying the regulations concerning consciousness (at least as drafted at the time when the adjudication officer made his decision and the tribunal heard the case).

11. And that brings me conveniently to the claimant's third ground of appeal. She complains that the tribunal failed to

take into account the effects of the episodes of vertigo on her ability to perform other functions contained in the regulations. It is asserted in particular that the tribunal were asked to consider how the claimant's ability to rise from sitting and her vision were affected. I cannot see any reference to such matters either in the tribunal record or in the representative's written submission to the tribunal; indeed rather inconsistently the following passage appears in that record:-

"In preliminary discussion with (the claimant's representative) the Tribunal confirmed that ... the ... award of 3 points for bending and lifting (sic) and 10 for hearing would not be disturbed. No other physical descriptors were claimed save only that (the representative) invited the Tribunal to re-open the issue of loss or alteration of consciousness."

- have no reason to doubt that the matters said to have been raised before the tribunal were so raised, though no doubt it will be appreciated that I am some what reluctant to find the tribunal at fault in the way alleged bearing in the mind the contents of this passage. It seems to me, however, that whether or not some concession was made at the hearing (which the passage would seem to suggest was the case) a tribunal properly exercising their inquisitorial jurisdiction ought nevertheless to have given serious consideration in the light of the evidence before them to the question of whether for example, the claimant at least sometimes had difficulty rising from a chair without holding on.

12. The evidence in the claimant's case suggests that there is a variation or fluctuation in her symptoms. I note that at the direction of a Nominated Officer a copy of Commissioner's decisions CIB/13161/96 and CIB/13508/96 have been placed with the papers as being of possible relevance to the circumstances of the claimant's case. As there has emerged some divergence of opinion amongst the Commissioners as to how the regulations apply in those circumstances, it may be helpful if I give some guidance to the new tribunal on how to approach the matter.

13. Those responsible for developing the All Work Test acknowledged that entitlement to benefit should not be determined solely by examination findings on a particular day. They accepted that the effect of medical conditions may have a variable course and that the pattern of variability may be different according to the diagnosis. For example, someone with multiple sclerosis may have spells of disability interspersed with spells of relatively good health whereas someone with rheumatoid arthritis may have a fairly constant level of disability but find that their symptoms are most severe first thing in the morning (see The Medical Assessment for Incapacity Benefit, Benefits Agency 1994). Hence the inclusion in the standard report forms for BAMS examiners of a

place for comments about variability and fluctuation of the claimant's disabilities and capacities. The Incapacity Benefit Handbook for Medical Service Doctors, advises (at page 93) that assessment should not be based on a "snapshot" of the client but should fully reflect disability over a period of time. In CI/95 (IB) the Chief Commissioner for Northern Ireland said:-

"The real issue is whether, taking an overall view of the individual's capacity to perform the activity in question, he should reasonably be considered to be incapable of performing it. The fact that he might occasionally manage to accomplish it would be of no consequence if, for most of the time, and in most circumstances he could not do so ... Accordingly, as I see it, there must be an overall requirement of 'reasonableness' in the approach of the tribunal to the question of what a person is or is not capable of doing, and this may include consideration of his ability to perform the various specified activities most of the time."

To me, as to some of the commentators (see Bonner: Non-means Tested Benefits: The Legislation 1997 at page 952) this passage (approved elsewhere, for example, in CSIB/17/96) goes some way towards recognising the declared intentions of the policy makers to which I have referred. (whether or not it was intended by the Commissioner to have that effect - see C5/96(1B)).

14. In CIB/13161/96 and CIB/13508/96, however, the Commissioner concluded that unlike the position under the old rules in force prior to 13 April 1995, it is not permissible to take an overall view of a claimant's capacity extending over a continuous period of time. In the Commissioner's view, the All Work Test is geared to "days of incapacity for work" (see section 30C(1) of the Social Security Contributions and Benefits Act 1992). It follows, therefore, the Commissioner concludes, that the All Work Test must be satisfied on a daily basis if the claimant is to qualify for benefit on those days. The new rules, it is said, largely ignore the problems of people who have "good and bad days"; they can qualify on their bad days but not on their good ones and they will consequently be in the position of having to "dip in and out" of entitlement.

15. With respect, I cannot accept that it inevitably follows from the gearing of entitlement to days of incapacity for work that no "overall view" is permissible. Entitlement to benefit prior to the introduction of the All Work Test was similarly geared to days of incapacity for work (see section 57(1)(a) of the Social Security Contributions and Benefits Act 1992) and yet it was generally accepted that an overall view could be taken. In CS/090/86, for example, the Commissioner concluded

that a person whose back was bad only on certain days could be found to be incapable of work:-

"Notwithstanding that there must ... be significant periods when he could do work that he could be reasonably be expected to do."

Similarly in R(S) 9/79 it was considered that a claimant could be incapable of work on qualifying days of incapacity for work in a week notwithstanding he was fit for work on some of those days. In my view it is permissible to take the same approach towards the All Work Test. The claimant does not fail the Test simply because he can perform the descriptors on a particular day nor does he pass it simply because he cannot perform the descriptors on that day. The Test is to be applied on a daily basis but compliance with it is not dependant upon circumstances prevailing on a particular day. The assessment of compliance on a particular day should be based on the claimant's functional ability over such period as the tribunal consider appropriate to enable them to get a true and fair picture of the claimant's capacity. The matter should be left to the judgment of the tribunal having sensible regard to the circumstances; much will depend on the nature of the claimant's disability. That is an approach which has commended itself to those dealing with the day conditions of disability living allowance (see R(A) 2/74) just as much as it has for those dealing with invalidity or other previous incapacity benefits to whose decision I have referred. Both the approaches may involve some rough justice; the one I commend has, I believe, the additional benefit of being less administrative burdensome and unwieldy.

16. I make no direction to the new tribunal as to which approach should be adopted; that is a matter entirely for them taking all the authorities into account and they may possibly be aided in their task by having regard to CIB/911/97 and SIB/459/97 where the Commissioners attempt to reconcile the different approaches.

17. It is now a matter of somewhat academic importance whether the tribunal erred in failing to show that they had properly considered the letter from the claimant's GP. I have some sympathy with the views expressed by the adjudication officer in this respect at paragraphs 14-16 of his written submission to the Commissioner. The new tribunal will no doubt ensure that they treat that piece of evidence appropriately and show that they have done so.

18. No challenge was made to the adjudication process adopted in the claimant's case either before the tribunal or before the Commissioner. I nevertheless direct the new tribunal to have regard to paragraphs 23-27 of the adjudication officer's written submission to the Commissioner and in particular to

the guidance given on review decisions in general in CSIS/137/94 and the appendix thereto.

19. Finally I remind the tribunal of their duty to take the matter from the date of the adjudication officer's decision "down to the date of the hearing" taking into account any alterations in the claimant's circumstances and other relevant events occurring in that period that may affect her entitlements, so as to bring finality to her case. In this respect the tribunal will no doubt bear in mind the alterations made to paragraph 14 in the Schedule to the regulations made by paragraph 2(11)(a)(iii) of the Social Security (Incapacity for Work and Miscellaneous Amendments) Regulations 1996 with effect from 6 January 1997. If while these proceedings have been afoot the claimant has seen fit to make another claim for benefit and that claim has been determined by an adjudication officer, the tribunal's jurisdiction in the present matter will of course be limited up to and including the day before the period covered by that determination (CSIB/203/97).

20. The appeal is allowed.

(Signed) E L Newsome
Deputy Commissioner

(Date) 19 March 1998