

WAS 156

Breaky rule
don't put
to put tribunal
comments to her at all

Commissioner's Case No: CIB/16365/1996

Reverse to HM OCA not a mental
disorder

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Maidstone social security appeal tribunal of 11 July 1996 is erroneous in law. I set it aside and remit the case to a freshly constituted social security appeal tribunal sitting with a medical assessor, different from the assessor who sat on the said date, for redetermination.

2. The claimant claimed incapacity benefit on 5 December 1995. She was not awarded that benefit because she did not satisfy the contribution conditions. However she was awarded national insurance credits based upon her incapacity for work from the said date. As she had not been engaged in an occupation for 16 hours per week or more for more than 8 weeks in the 21 week period prior to the said date, the all work test of incapacity for work applied to her. (Section 171C(1) read along with section 171B(1) of the Social Security Contributions and Benefits Act 1992.) The claimant was sent an all work test questionnaire which she returned to the local office along with a MED4 certificate from her GP. That gave the main diagnosis of her condition as "compulsive behaviour" and under the heading "other diagnoses" the GP recorded "anxiety state". (Document 9). On 23 April 1996 the claimant was examined by a BAMS medical examiner. On receipt of the report of that examination, an adjudication officer held that the claimant did not satisfy the all work test from 30 April 1996 as he only awarded her 7 points under the mental descriptors of that test and zero points under the physical descriptors.

3. The claimant appealed against that decision to the tribunal. The tribunal also took the view that the all work test was not satisfied. However at their own hand they substituted their own decision for that of the adjudication officer and awarded the claimant zero points under the mental descriptors of the all work test and 3 points under the physical descriptors of that test. Thus the decision by the tribunal that the claimant did not satisfy the said test was taken on an entirely different basis from that used by the adjudication officer. The claimant now appeals with leave of a Commissioner. Her appeal is supported by the adjudication officer now concerned.

4. The findings of fact made by the tribunal were as follows:-

1. [The claimant], who is a 44 year old housewife, claimed incapacity benefit from 5th December 1995. As she did not satisfy the contribution conditions for incapacity benefit, incapacity credits were awarded to [the claimant] from 5th December 1995. It is noted that she has claimed and been paid income support for the whole period.
2. The Tribunal found as a matter of fact that the "all work" test applied as a test of incapacity.
3. [The claimant] suffers from a form of compulsive behaviour which, so she describes, manifests itself in a tendency to continually wash her hands, and check cooker knobs, doors and locks. It is accepted by the Tribunal that this is an extremely distressing condition which interferes with her way of life.
4. It appears that the condition is exacerbated by stress. Her general practitioner has prescribed tablets but she does not take these. On occasions, she finds it extremely difficult to manage the housework. She is unable to answer the phone if she considers her hands are dirty and usually falls asleep when

- watching TV. Despite what is said in her GP's report into possible psychiatric illness, [the claimant] confirmed that she has never suffered from agoraphobia.
5. Her condition makes her feel angry and she becomes bad tempered. It makes her cry. On occasions, she simply cannot cope. She will sleep on the settee. On occasions she will not have breakfast and sleeps in her day clothes. She hovers downstairs but not upstairs and she spends too much time washing her hands.
 6. The symptoms that [the claimant] describes do not necessarily amount to physical disability. They are behavioural problems and not psychiatric problems. The medical assessor, Dr Moborak, indicated the type of treatment that [the claimant] could expect if the matter were further investigated confirming this point.
 7. There is no medical evidence to suggest that [the claimant] has any physical disability other than that mentioned in her questionnaire. The mental disabilities that she mentions appear to be part of her obsessive behaviour and the Tribunal took the view that these were not strict mental disabilities such as to fall within the descriptors to be applied. There was no psychiatric evidence produced before the Tribunal."

The tribunal stated their reasons thus:-

1. Section 30A Social Security (Contributions and Benefits) Act 1992 indicates an entitlement to incapacity benefit depends upon a person being "incapable of work".
2. The burden of proving that he or she is incapable of work falls upon the Claimant unless an award has already been made in which case the burden falls upon the Adjudication Officer to show that the Claimant has ceased to qualify for benefit. Please see the Commissioner's Decision in R(S)3/9. In this case, an award has not already been made and, therefore, the burden falls upon the Claimant (Appellant).
3. The two tests applicable in law are the "own occupation" test and the "all work" test whose statutory definitions are contained in Section 171B and Section 171C(1) and (3) of the Social Security (Contributions and Benefits) Act 1992 respectively.
4. The "own occupation" test will not apply if the Claimant was incapable of work for 196 days in the spell of incapacity preceding 13th April when the Regulations became effective.
5. If the "own occupation" test does not apply then the correct test is the "all work" test under Section 171C of the Social Security (Contributions and Benefits) Act 1992 and the Social Security (Incapacity for Work) (General) Regulations 1995, Regulation 28.
6. Where the "all work" test applies, a person can be treated as incapable of work if they are in receipt of prescribed benefits or have prescribed conditions as set

out in the Social Security (Incapacity for Work) (General) Regulations 1995, Regulation 10.

7. None of these apply to the facts of this case.
8. The "all work" test is defined by an assessment on the extent of a person's incapacity, because of some specific disease or mental disablement, to perform prescribed activities pursuant to Social Security (Contributions and Benefits) Act 1992, Section 171C(2)(a).
9. Regulation 25 of the Social Security (Incapacity for Work) (General) Regulations 1995 and Schedule 1 of those Regulations lay down prescribed activities and descriptors for physical and mental disabilities. In order to qualify, an Appellant has to score 15 points for physical activities, 10 for mental activities and 15 for both with a minimum of 6 for mental disabilities.
10. This is a difficult case in that the Claimant was clearly suffering from a particularly disturbing and irrational condition. However, the Tribunal had to apply the physical and mental descriptors in accordance with Schedule 1 of the Social security (Incapacity for Work) (General) Regulations 1995.
11. The only descriptor which seemed to apply was a problem with continence which was repeated in evidence and also included within her questionnaire. This is to be found as No. 13(f) for which there is an awarded score of 3 points. No other descriptors of either physical or mental nature could be found by the Tribunal.
12. Accordingly, the appeal was dismissed and [the claimant] is not entitled to incapacity credits as from 5th December, 1995."

5. The gist of the claimant's complaint in her present appeal relates to the decision of the tribunal to remove the 7 points for mental descriptors awarded by the adjudication officer and to substitute an award of zero points for those descriptors rather than increasing the pointage therefor, as she wished them to do. The tribunal could have explained the basis of their decision much better than they did. Reading the facts found and the reasons stated as a whole, however, what the tribunal were trying to state was that the claimant's obsessive behaviour problems could not, in their view, be brought within the phrase "some specific disease or bodily or mental disablement" in regulation 24 of the Incapacity for Work (General) Regulations 1995. Once such a decision had been made it followed that no points for mental descriptors could be awarded. This is a result of the terms of the said regulation 24 read along with part II of schedule 1 to the said regulations. As a matter of law, it is correct that before points can be awarded for any descriptor appearing in the said schedule the terms of regulation 24 must be satisfied. The incapacity to perform any function prescribed in the descriptors in the schedule must be "by reasons of some specific disease or bodily or mental disablement.". This point is stressed by Commissioner Goodman in paragraph 7 of CIB/14202/96. I note in passing that that case is in some respects the converse of the present one, see paragraph 6 of that decision compared with paragraphs 6 and 8 below. Thus if an adjudicating authority considers that the said regulation 24 is not satisfied an

award of zero points for the descriptors under the all work test is appropriate, all other things being equal. Such a decision is not *per se* erroneous in law, rather the reverse. I would add that further complications arise as from 6 January 1997 by reason of the addition of regulation 25(3) to the text of regulation 24 of the said regulations as from that date.

6. In the present case, however, I do consider that in reaching the decision which they did the tribunal erred in law. The MED4 signed by the claimant's GP (document 9) gave as stated above the diagnoses applicable to the claimant as "compulsive behaviour" and "anxiety state". The claimant herself gave a full account of her condition in her all work test questionnaire (see especially documents 12 and 28). At documents 31 and 32 the claimant's GP certified that the claimant was suffering from a psychiatric illness which he described as "an anxiety state with obsessive behaviour". He further certified that she was suffering from a personality disorder in the form of "compulsive behaviour". He added the comment that the claimant had agoraphobia. He explained that the claimant was not being treated by a consultant psychiatrist because she did not wish to see anybody. The BAMS medical examiner on page 35 gives the relevant diagnosis as "obsessive behaviour. O.C.D." (document 35). I consider that I can safely assume that the latter abbreviation refers to obsessive compulsive disorder. It is within judicial knowledge that that is a recognised psychiatric disorder. On the basis of that diagnosis, the BAMS medical examiner went on to assess the claimant having regard to the mental descriptors of the all work test (documents 52 to 59). On the basis of all of this evidence, the adjudication officer appears to have accepted without any question that regulation 24 of the Incapacity for Work (General) Regulations 1995 was satisfied and, in turn, having regard, in particular, to the information contained on documents 52 to 59 he awarded the claimant 7 points for mental descriptors. Prior to the tribunal hearing there never appears to have been any question but that the claimant satisfied the said regulation 24, presumably on the basis that she was suffering from "a specific mental disablement". This was certainly in no way disputed by the adjudication officer. Rather the reverse. His decision can only be explained by his acceptance of the applicability of the said regulation 24 to the claimant, given all of the medical evidence referred to. At the tribunal hearing, the claimant was present but was not represented. Her daughter was present as a witness. No presenting officer was present. The hand-written note of evidence (document 69) indicates that she gave evidence of her compulsive behaviour especially demonstrated in constant hand-washing. Various physical descriptors were then discussed. Document 70 shows that the claimant then stated that "I have never suffered agoraphobia". She then went on to give oral evidence relevant to various mental descriptors. At the conclusion of the hand-written note of evidence (document 70) the medical assessor is recorded as stating *inter alia* that "none of the physical descriptors applies. Question of mental health. Anxiety and depression. It is more a behavioural problem not a psychiatric problem." This advice, thus recorded, appears to have been given at the conclusion of the oral evidence. It is not recorded whether it was given in response to specific questions from the tribunal or in response to a general request for comments on the case (the most probable scenario) or at the assessor's own initiative. However, the key point is that this was the first time that the question of the claimant not satisfying the said regulation 24, to put the matter in technical terms, had arisen. As stressed, it had not arisen in the adjudication officer's consideration of the case nor had it arisen earlier (so far as the note of evidence indicates) in the course of the tribunal hearing. The claimant would have heard the medical assessor make the comments orally as summarised by the chairman in his hand-written note of evidence. However there is no record of the chairman putting these issues to the claimant or of him

explaining their significance to her. Far less is there any record of any consideration being given by the tribunal to an adjournment. Certainly no adjournment was granted and the tribunal went on to decide the case. Although they do not quite say so in terms, it is clear from the whole text of their facts found and reasons stated that they were largely basing their decision as respects the point in question on the assessor's advice. To act as the tribunal did, was in my view, a clear error of law amounting to a breach of the rules of natural justice. I accept that a tribunal hearing is by way of a complete re-hearing of the case and that it is legally possible for a tribunal to reach a decision on quite a different basis from that reached by an adjudication officer. (R(SB)1/82 paragraphs 10 to 12 and R(FIS)1/82 paragraph 20.) I further accept that a tribunal exercise an inquisitorial role and are not restricted merely to dealing with the contentions put forward by the parties. Rather they are entitled to investigate the case for themselves and reach their own determination as to where the truth lies so far as possible. (R(IS)5/93 and the authorities cited therein.) It is also the case that a tribunal is entitled, though not required, to decide a matter first arising in the course of the appeal before them. (Section 36(1) of the Social Security Administration Act 1992.) However in undertaking all its functions and exercising all its powers, including those just referred to, a tribunal is bound by the rules of natural justice. In particular it must afford to all parties before it a fair hearing. That duty demands that if a material fresh point arises in the course of a hearing it must be clearly put to a claimant by the tribunal so that he can have an opportunity to comment upon it. See paragraph 18 of R(I)29/61, a decision of a Tribunal of Commissioners. This same point is also forcibly made by Lord Denning M.R. in R v Deputy Industrial Injuries Commissioner ex parte Howarth, reported as an appendix to R(I)14/68 where his Lordship put matters like this:-

"It seems to me that if a new point of such a kind is to be taken, it should be drawn to the man's attention so that he can deal with it. It is elementary that a decision should not be given against a man unless the case against him - by which I mean the substance of the case - has been brought to his attention so that he has had a fair opportunity of dealing with it. I know that the procedure before the tribunal should be, and is, informal: but, however informal, I think that if a new point is to be taken against a man, he ought to have an opportunity of dealing with it."

I consider that the new point arising in this case was of very considerable importance to the claimant. She should thus have been given, as a minimum, an opportunity to comment upon it after having had it explained to her clearly along with its significance for her case. This is so especially as she was unrepresented at the hearing. Indeed I hold that, in this case, the only appropriate course for the tribunal was not only to give the claimant an opportunity to comment on the medical assessor's opinion, which they apparently failed to do, but also to adjourn the case to enable the claimant to obtain advice and if appropriate further medical evidence. The propriety of thus proceeding, on the ground of fairness, is further underlined by the absence of a presenting officer as well as of a representative for the claimant. In holding that natural justice demanded an adjournment, I follow R(I)2/91, especially paragraph 9, as well as the authorities cited above. Indeed the present case is in my judgment a *fortiori* of the case just referred to in that here the claimant had no warning whatever given to her in the tribunal papers that the question of her not satisfying the conditions of the said regulation 24 was at issue. She was thus effectively the victim of an ambush by the tribunal and on this ground alone her appeal necessarily succeeds because of the demands of procedural fairness.

7. I accept the submissions of the adjudication officer now concerned that the facts found and reasons stated by the tribunal are inadequate for the purposes of regulation 23(2)(b) of the Adjudication Regulations 1995 (in force at the date of the tribunal's decision). The tribunal thus further erred in law. Without over elaboration, it should firstly be stated that nowhere is the true basis of the tribunal's decision as extrapolated by me in paragraph 5 above made apparent. Such an important matter should not be left to inference and general statements. Further the tribunal have not clearly explained why they took the view that the claimant was not suffering from "a specific mental disablement". It seems that they did so because they were following the assessor's advice but they do not explicitly state that this is the case. I consider, given the weight of medical evidence rehearsed by me in paragraph 6 above, that it was incumbent on the tribunal in this case to state definitely that they were following the assessor's view and also why they were following that view. A social security appeal tribunal is not bound by an assessor's opinion. Indeed they should only accept it if they are satisfied that, having regard to all the evidence in a case, it is correct. See R(I)14/51, paragraph 7(1). Thus in a case like this, where there was so much medical evidence to a contrary effect to the assessor's opinion it is necessary for a tribunal to explain albeit briefly why they prefer the assessor's advice to that contrary evidence. That was not done. The sentence at the end of finding of fact number 6 is not sufficient for this purpose and would not have been sufficient even if it had been placed, more appropriately, within the reasons stated. Finally, it is not correct to state as the tribunal do in finding of fact number 7 that there was "no psychiatric evidence produced before the tribunal". It is correct that there was no evidence from a consultant psychiatrist but there was considerable evidence of a psychiatric nature, as described by me in paragraph 6 above, before the tribunal, coming from the GP and the BAMS medical examiner.

8. In addition I also hold that the tribunal's decision was perverse on the merits of the question arising under regulation 24 of the Incapacity for Work (General) Regulations 1995. The weight of the evidence as rehearsed by me in paragraph 6 above has to be placed on one side of the scale. On the other there lies the medical assessor's advice, as recorded in the hand-written note of evidence, which as indicated in my quotations from that hand-written note in the said paragraph is by no means free from ambiguity and also gives no clear reason for the views expressed therein. Given all of that, I take the view that no reasonable tribunal, properly instructed as to the law, could have reached the conclusion which this tribunal did. I take that view not only having regard to the matters just referred to but also having regard to the meaning to be attached to the relevant words in the said regulation 24. In paragraph 7 of CIB/14202/96 Commissioner Goodman refers to disabilities which are not "mere matters of mood" but which relate to "a recognisable mental disablement". This he goes on to describe as being "in the nature of an illness and not shared by healthy members of the population". Further down in the same paragraph he refers to states which result from "a definite mental disability". The phrase "some specific disease or bodily or mental disablement" appearing in the said regulation 24 and also in s171C(2)(a) of the Social Security Contributions and Benefits Act 1992 previously appeared in section 57(1)(a)(ii) of the said Act (now repealed) in force prior to 13 April 1995 and indeed in the statutory predecessors of that provision. The authorities on the meaning of these phrases as they stood under the former law in regard to incapacity for work are helpfully summarised in Bonner, Non Means Tested Benefits: The Legislation, 1997 Edition at pages 245-246. I consider that these authorities are still relevant to the interpretation of the phrase under discussion and that it should also be held in the

absence of any contrary indication that the phrase and the words it contains bear the same meaning as in the former legislation. These authorities indicate that "specific" means "of a kind identified by medical science". They further indicate that "disease" means "a departure from health capable of identification by signs and symptoms, an abnormality of some sort". Finally, they also indicate that "disablement" constitutes "a state of deprivation or incapacitation of ability measured against the abilities of a normal person". Ultimately the question whether any claimant is covered by these terms as thus defined will be a matter of the application of these definitions to the evidence, especially the medical evidence. I am satisfied, given the totality of the information before the tribunal that they should have reached the conclusion, in the light of the authorities referred to including Commissioner Goodman's decision relating specifically to incapacity benefit, that regulation 24 did apply to the claimant because she was suffering from "a specific mental disablement". Indeed in my view no reasonable tribunal could have reached any other conclusion. The tribunal applied the wrong test and asked the wrong question by differentiating "behavioural" and "psychiatric" problems in their approach to the issue.

9. I direct the new tribunal to proceed as follows:-

- (a) Unless some fresh medical evidence is produced to the contrary, they are entitled to accept on the available medical evidence that the claimant is covered by the regulation 24 of the Incapacity for Work General Regulations 1995, on the basis of suffering from "a specific mental disablement" i.e. obsessive compulsive disorder, along with anxiety state.
- (b) The task of the tribunal will be to assess on the basis of all the evidence oral and written before it which if any of the relevant descriptors, physical and mental, apply to the claimant. Having selected the appropriate descriptors, they should thereafter award the specified score for each and then aggregate the total score for the purpose of deciding whether or not the claimant satisfies the all work test under regulation 25 of the said regulations.
- (c) Having regard to the decision of the Tribunal of Commissioners in CS/12054/96, CIB/14430/96 and CIS/12015/96 and the common appendix thereto they should carry out the above assessment not only as at the date of the adjudication officer's decision but also down to the date of the re-hearing before them. In carrying out that task they should have regard in particular to any deterioration in the claimant's condition since the adjudication officer's decision. She raised this matter so long ago as 7 May 1996 on document 64. Given that there may be some degree of interaction in this case between physical and mental disabilities, the tribunal in carrying matters down to the date of the hearing before them should pay careful note to the possible application to the case of regulation 25(3) of the said regulations as from 6 January 1997. In the event that the claimant has made a fresh claim of incapacity for work which has been adjudicated upon, the tribunal should not deal with matters down to the date of the re-hearing before them but should restrict themselves to dealing with matters down to the date immediately before such subsequent adjudication took place. The said common appendix should be made available to the new tribunal in the tribunal papers.

Commissioner's Case No: CIB/16365/1996

10. The claimant's appeal is successful. My decision is in paragraph 1 and my directions to the new tribunal are in paragraph 9.

(signed)
A J GAMBLE
Deputy Commissioner
Date: 11 December 1997